REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 19 OF 2019

ANNALISA MUIGAI...1ST APPELLANT

STEPHEN KUNG'U NJOROGE...2ND APPELLANT

VERSUS

BEATRICE WAITHERA GITIRI &

JOSEPH KINUTHIA MURIU (*suing as the Legal Representative of the Estate of*

***JOHN MAINA KINUTHIA (DECEASED))*............. ....RESPONDENTS**

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru

(Hon. B.M. Mararo) Delivered on 05/12/2018 in Nakuru Civil Case No. 1116 of 2015)

JUDGMENT

1. This Appeal arises from a judgment and decree entered in *Nakuru Civil Case No. 1116 of 2015*. In that suit, the Respondents sued the Appellants as Legal Representatives to the estate of the late John Maina Kinuthia (Deceased). The Deceased passed on as a result of a road traffic accident which occurred on the Nakuru-Naivasha Highway on 21/06/2015. The Deceased was riding a motor cycle Registration number KMCP 447E and sustained fatal injuries following the accident. The 2nd Appellant was driving Motor Vehicle Registration No. KBP 411U, a Mercedes Benz, owned by the 1st Appellant.

2. The Respondents sued the Appellants alleging negligence on the part of the 2nd Appellant and sought to have the 1st Appellant vicariously liable. The filed Plaint prayed for damages under the Fatal Accidents Act and the Law Reform Act; special damages of Kshs. 74,680/- plus costs of the suit and interests.

3. The Appellants declined liability and filed a Statement of Defence seeking dismissal of the suit. The suit went to full hearing. The Respondents called three witnesses while the 2nd Appellant testified on behalf of the Appellants. The Learned Trial Magistrate returned a verdict finding full liability against the Appellants for the accident. He awarded general damages for Kshs. 30,000/- for pain and suffering; Kshs. 100,000/- for loss of expectation of life and Kshs. 1,920,000/-for loss of dependency. He found that the special damages had not been proved.

4. The Appellants are dissatisfied with the judgment of the Learned Trial Magistrate. The Memorandum of Appeal raises eight grounds of appeal as follows:

> *a) The Trial Magistrate erred in law and in fact and misdirected himself in delivering a judgment in favour of the Plaintiffs when the Plaintiffs had failed to prove their case to the required standard.*
>
> *b) The Trial Magistrate erred in law and in fact in failing to consider at all or adequately the evidence tendered by the Defence witness and/or in unfairly disparaging the Defence testimony and thereby arriving at the wrong conclusion.*
>
> *c) The Trial Magistrate erred in law and in fact in engaging in evidence analysis which was selective and speculative.*
>
> *d) The Trial Magistrate erred in law and in fact in finding that the Defendants were 100% liable when the evidence adduced pointed*

to the Deceased's negligence.

e) The Trial Magistrate erred in law and in fact in finding that dependency was proved and further his assessment of damages for loss of dependency.

f) The Trial Magistrate erred in law and in fact in failing to appreciate the applicable principles in the assessment of damages under the Fatal Accidents Act and the Law Reform Act.

g) The Trial Magistrate erred in law and in fact in awarding damages that were manifestly excessive in the circumstances.

h) *The Trial Magistrate's decision was unjust, against the weight of evidence, was based on wrong principles of law and occasioned miscarriage of justice*.

5. The parties agreed to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight.

6. I have read and considered the respective arguments in the parties' written submissions.

7. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally

*(**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

8. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

10. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi***

v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

11. The evidence that emerged from the Trial Court was as follows. Mugendi Moyangi is a casual labourer who lives in Shabab, Nakuru. He testified as PW4. He recalled that on 21/06/2015 he was walking towards Nairobi on the pedestrian lane on the Nakuru-Nairobi Highway. It was around 10:00am. He adopted his statement which explained that he saw a motorist slightly ahead of him riding towards Nakuru town. He was riding motor cycle Registration No. KMPC 447E. He then saw the Subject Motor Vehicle speeding as it headed in the same direction. The Subject Motor Vehicle hit the motor cyclist from behind, catapulting the rider off the motor cycle. Moyangi was among the first at the scene. His opinion was that the driver of the Subject Motor Vehicle was reckless.

12. That view was shared by Corporal Denis Ouko who investigated the accident and prepared a Police Report minuted as Accident Register No. IAR(F)76/2015. This Report was produced as Exhibit 5 for the Plaintiffs by PC Samson Okello, a Police Officer at Nakuru Police Station who testified as PW3. The Corporal's findings were as follows in pertinent part:

> *There was free flow of traffic; and vehicles were minimal considering the time of the day.*
>
> *The road is a dual carriage way.*
>
> *The driver of the M/Vehicle aforementioned [KBP 411U] misjudged distance and improperly overtook the motorbike thereby causing the accident and subsequent death of the victim……*
>
> *Basing my facts from the aforementioned evidence adduced, I hereby find it expedient (sic) that the driver of the aforesaid motor vehicle be charged with causing death by dangerous driving c/section 49(1)of the Traffic Act…..*

13. On his part, the 2nd Appellant conceded that he was, indeed, driving the Subject Motor Vehicle on 21/06/2015 on the Nairobi-Nakuru Highway. He testified that as he got to the Free Area, he was on the right hand side of the dual carriage way. After some speed bumps, he said he was accelerating when a motor cycle came from the left lane towards the right lane. He said that he tried to hoot to warn the cyclist and tried to swerve but he ended up hitting him with the right side of the vehicle. He said that he has not been charged with any offence arising from the accident.

14. In cross-examination, the 2nd Appellant said that he was in the "inner lane" and that the motor cyclist was "close to him but still on the left…." He said that he was not speeding but was going at 40-50 KM/H at the time and that he swerved to the right side of the road.

15. On my part, I am persuaded that the Plaintiffs' version was more plausible and was established as the true version of what happened on a balance of probabilities. This was because, first, it was narrated by a disinterested observer who saw the accident happening – that is PW4. He was straightforward and to the point in his statement and testimony and he remained unshaken during cross-examination. Second, essentially the same version was found to have been the truth by another disinterested person, the Investigating Officer, Corporal Okello. He filed a Report produced as an exhibit in the case which concluded that the 2nd Appellant was speeding and that he misjudged the distance between himself and the Deceased. Corporal Okello recommended that the 2nd Appellant be charged with causing death through reckless driving. While it is not clear if the charges were ever brought, it is telling that the Police Officer charged with the task of investigating the accident made this recommendation.

16. Third, while the Appellant's Counsel loudly complains that it was unwarranted for the Learned Trial Magistrate to disparage the testimony of the 2nd Appellant, after due analysis of that evidence, I am unable to say that the Learned Trial Magistrate erred in disbelieving the account given by the 2nd Appellant. The testimony of the 2nd Appellant did contain two major inconsistencies which seen in the context of his self-interest and the disinterested versions given by the Plaintiffs' witnesses heavily tilted in favour of a finding in favour of the Plaintiffs' version of the story. One, the 2nd Appellant claimed that he was driving on the right hand lane towards Nakuru during his examination in chief and during cross-examination, he confirmed that he was in the "inner lane". If so, it would mean that the Deceased was on a left lane. If the Deceased on a lane left of the 2nd Appellant who was, in turn, in the inner lane (meaning the last lane on the right towards Nakuru), the 2nd Appellant's version that the Deceased was changing lanes towards the further right lacks internal logic. The version becomes even less plausible considering that the Subject Motor Vehicle hit the Deceased from the right side of the Motor Vehicle (a fact confirmed by the 2nd Appellant in his testimony). Finally, the version by the 2nd Appellant is further impugned by his claim that he swerved right to try to avoid collision when the Deceased came onto his lane. If so, considering that he hit the Deceased with the right side of the motor vehicle, he would have swerved left not right.

ASL Credit 2019 eKLR. Therefore, the award of Kshs. 30,000/-under this heading was eminently reasonable.

20. Turning to the loss of dependency, the Appellants complain that there was no evidence at all adduced on the amounts the Deceased used to earn and that therefore the Court should have used the minimum wage. The Appellants submitted that the the testimony given by the Plaintiffs' witnesses was not clear and contained inconsistencies; that they were not able to prove that the Deceased worked as a *boda boda* operator as well as a vegetable vendor as stated in the Plaint and repeated in the Learned Magistrate's judgment.

21. The Appellants point out that PW1 testified that the Deceased was a hawker of tomatoes while PW2 did not in her testimony state what the Deceased did for a living. They further submit that while the Learned magistrate relied on the authority (***Jacob Ayiga Maruja vs Simeon Obayo (2015)eKLR***) used by the Plaintiffs in their submissions on the issue of the multiplicand in absence of any evidence on record of the amount the deceased earned, current authorities are more in favour of using the minimum wage guideines when there is absence of proof of a Deceased person's earnings.

22. The Appellants' counsel cited ***Albert Odawa Vs Gichumu Gichenji Nakuru HCCA 15 of 2003(2007) eKLR*** where it was stated that the aim in an award of damages is:-

> *To approximate what loss the estate of the deceased has suffered following the wrongful death of the Deceased. It is of course not, possible to come up with a precise figure for the loss. The court merely tries to use all available evidence to come up with a figure which is fair and reasonable in the specific circumstances of the case. Where that is absolutely not possible, the court resorts to the minimum wage as a last resort.*

23. The Appellants, therefore, propose the use of Kshs. 5,000/- which is closer to the minimum wage payable to a General worker under column 4 of the relevant schedule of Legal Notice Number 117 of 1st May, 2015 which was Kshs.5,844/= in 2015.

24. The Appellants further contest that the multiplier of thirty years was reasonable in the circumstances. They argue that life expectancy in Kenya is 45 years and that, therefore the correct multiplier should have been twelve years.

25. On their part, the Respondent's lawyers point out that it is a well-established principle of law that an appellate court can only interfere with a trial court's discretion to assess damages where it is shown that the court has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be interfered. They cited ***Robert Musyoki Kitavi v Coastal Bottlers Ltd (1985) 1 KAR 891; Butt vs. Khan civil appeal no.40 of 1977 and Valley Bakery Ltd*** and ***Another Vs.Mathew Musyoki*** for this proposition.

26. The contest that there is a principle that unless a Plaintiff provides documentary proof of earnings the Court should use the minimum wage to calculate loss of dependency. In this regard, the Plaintiffs cited ***Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR*** where the Court of Appeal observed that:

> *We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things*.

27. There is no iron-clad rule that if there is no documentary evidence of earnings the Court must resort to the minimum wage where there is alternative evidence by which the Court can approximate the earnings of the Deceased. As the Court of Appeal pointed out in the ***Jacob Ayiga Maruja Case***, such a rule would be too rigid and would work much injustice. Indeed, it is important to recall that that the multiplier method is only a method not a dogma (see ***Albert Odawa V Gichimu Gichenji Nakuru HCCA 15/2003 [2007] eKLR*****).** As I stated in an earlier decision, the aim is to approximate what loss the estate of the Deceased has suffered following the wrongful death of the Deceased. It is, of course, not possible to come up with a precise figure for the loss. The Court merely tries to use all available evidence to come up with a figure which is fair and reasonable in the specific circumstances of the case. Where that is absolutely not possible, the Court resorts to the minimum wage as a last resort.

28. Approaching this case from this standpoint, there was evidence which remained uncontroverted that the Deceased used to earn approximately Kshs. 10,000/-. I found no contradiction on that point. The amount is also not unreasonable for a *boda boda* operator who also dabbled in grocery hawking. While the Appellants complain that there were inconsistencies on what exactly the Deceased used to do for a living, I found no such inconsistency: the father of the Deceased was categorical that he was a *boda boda* operator and that sometimes he sold tomatoes. The question whether he also sold groceries was not specifically put to PW2. There is no basis for holding that there was contradiction on that point. What is more is that the nature of the Deceased's occupation was not seriously put at issue in cross-examination.

29. In the circumstances, there was sufficient basis for the Learned Trial Magistrate to conclude that a figure of Kshs. 8,000/- was reasonable. The Learned Trial Magistrate did not commit any reviewable error to warrant interference with the exercise of his discretion in this regard.

30. What about the multiplier? The Appellants find the multiplier of 30 years given the age of the Respondent (he was 30 at the time of the accident) to be excessive. The Appellants say that the age expectancy in Kenya is 45 and that that is the upper limit that the Court should have used. I do not find this to be persuasive reasoning. Kenyan Courts have not used the purported life expectancy as the upper limit when calculating awards under the Fatal Accidents Act. On the contrary, many Courts use the retirement age of 60 years as the upper limit unless it is demonstrated that the Deceased suffered from particular disease which could have lowered his life expectancy or that he was engaged in a particularly risky occupation. Neither issues are factors here. It was therefore within the Learned Trial Magistrate's judicial discretion to come to the conclusion that 30 years was a reasonable multiplier to use. The fact that this Court could have used a different one is not sufficient reason to interfere with the Learned Trial Magistrate's exercise of discretion..

31. The amount for loss of expectation of life is not contested and will remain as awarded. In doing so, I am aware that the Learned Trial Magistrate awarded damages under both headings of "loss of expectation of life" and "loss of dependency". While there have been some suggestions in Kenya that it is improper to do so because it leads to a double award to the Plaintiffs since the persons benefitting from the estate of the Deceased are the same, the correct position is that enunciated in ***Kemfro v A.M. Lubia & Another [1982-1988] KAR 727*** thus:

> *The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act*.

32. Indeed, in this same case, in a separate concurring opinion, Chesoni Ag. JA (as he then was) held that "*to be taken into account and to*

be deducted are two different things [and that] the words used in Section 4(2) of the Fatal Accidents Act are 'taken into account'." In the circumstances of this case, I would hold that it is proper to award under both given the difficulties in establishing the exact earnings of the Deceased and the fact that a lower figure than his actual earnings appears to have been used.

33. In the end, therefore, the conclusion is that the appeal herein is without merit. It is hereby dismissed in its entirety with costs.

34. Orders accordingly.

Dated and delivered at Nairobi this 28th day of May, 2020.

....

JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Appellants, Kagucia & Co. Advocates and Counsel for the Respondents, E.M. Juma Ombui & Co. Advocates, consented in writing to the delivery of the ruling by both email and video-conference facility.