REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 10A OF 2017

JOHN MACHARIA MWANGI.....APPELLANT

-VERSUS-

JOSPHAT MURIUNGI MUGUONGO.....1ST RESPONDENT

PETER MUNENE MURIUNGI.....2ND RESPONDENT

(Suing as the legal representatives of the estate of

CHRISTINE NKIROTE MURIUNGI (DECEASED)

(Being appeal against judgment and decree in Chief Magistrates Court Civil Case Number 415B of 2013 (Hon. C. Mburu, Resident Magistrate) delivered on 9th February 2017.

JUDGMENT

The respondents sued the appellant in the magistrates' court for damages under the Law Reform Act, cap. 26 and the Fatal Accidents Act, cap. 32. They also sued for special damages, costs of the suit and interest thereon. They instituted their suit in their capacity as personal representatives of Christine Nkirote Muriungi (deceased) and also for the benefit of the deceased's estate.

According to their plaint filed in court on 12 November 2013, the suit arose out of a road traffic accident that is alleged to have occurred along Nyeri-Ihururu Road on 30 September 2012 at about 10:00 P.M.

The accident involved a motor vehicle registration number KBX 417X said to belong to the appellant and a motorcycle registration number KMCU 533 K (the motorcycle) on which the deceased is alleged to have been riding pillion.

It was the plaintiff's contention that at the time of the accident, the motor vehicle was being driven by the appellant himself and that he drove, managed, or otherwise controlled it so negligently that he caused it to hit the deceased as a result of which she sustained injuries to which she succumbed.

Apart from stating the particulars of the appellant's negligence, the respondents also pleaded the doctrine of res loquitur.

As a result of the deceased's death, her estate suffered loss and damage, so they claimed.

As far as their claim for loss of dependency under the Fatal Accidents Act is concerned, they claimed that the deceased supported her two children and also her brother and father. And under the Law Reform Act, they claimed damages for pain, suffering, lost years and loss of expectation of life.

In his statement of defence dated 10 October 2014, the appellant denied the respondents' claim in toto and put the respondents to strict to proof thereof. In particular, he denied that he was the owner or the driver of motor vehicle registration number KBH 417X; or that a road traffic accident involving the said vehicle occurred on the alleged date or that the appellant was negligent as alleged or at all.

He further contended that if at all the accident occurred, then it was solely caused or substantially contributed to by the rider of motor cycle registration number KMCU 533K or the deceased, herself.

He denied that neither the doctrine of res ipsa loquitur nor the Traffic Act and the Highway Code were applicable to the respondents' case.

He disputed the respondents' claim for any sort of damages, irrespective of whether they were special damages or general damages under and the Fatal Accidents Act or the Law Reform Act.

At the conclusion of the respondents' case, the learned magistrate found the appellant solely liable for the accident. As far as quantum for damages is concerned, she made an award of Kshs. 20,000/=for pain and suffering; Kshs. 100,000/= for loss of expectation of life; Kshs. 1,168,800/= for loss of dependency; and Kshs. 15,000/= as special damages. The respondents were also awarded costs of the suit and interest.

Being dissatisfied with this judgment the appellant appealed against it; he raised ten grounds of appeal in is memorandum of appeal dated 13 March 2017. These grounds, as I understand them, are as follows:

1. The learned magistrate erred in fact and in law in holding the appellant 100% liable for the accident in the absence of any evidence of negligence on the part of the appellant.

2. The learned magistrate misdirected herself on the law of evidence and ended up with a wrong decision on the question of liability.

3. The learned magistrate erred in law and in fact in failing to find that liability was not proved because there was no eyewitness who testified and there was no evidence of negligence on the part of the appellant.

4. The learned magistrate misdirected herself and arrived at a decision that was obviously against the weight of evidence.

5. The learned magistrate erred in law and in fact in awarding damages that were inordinately high or manifestly excessive and which were erroneous estimate of the damage or loss suffered by the respondent.

6. The learned magistrate erred in law and in fact in awarding damages both under the Law Reform Act and the Fatal Accidents Act as a result of which the respondents benefited twice in the same cause of action.

7. The learned magistrate erred in fact and in law in failing to appreciate that the beneficiaries could only benefit under one Act or, in the alternative, any award made under the Law Reform Act ought to have been taken into account when making an award under the Fatal Accidents Act.

8. The learned magistrate erred in fact and in law in awarding the respondents damages for loss of dependency and applying a dependency ratio of two thirds when there was no evidence tendered in proof of dependency.

9. The learned magistrate misdirected herself by applying wrong principles in assessment of damages and therefore arrived at a decision that was obviously wrong.

10. The learned magistrate misdirected herself and arrived at the wrong decision and which was against the weight of evidence on both quantum and liability.

Most of these grounds are obviously repetitive; by and large, they all revolve around the learned magistrate's finding on liability and her assessment of damages.

As usual, this being the first appeal, it is incumbent upon this honourable court to consider the evidence on record afresh and come to its conclusions but bearing in mind that the subordinate court had the advantage of seeing and hearing, the 1st respondent, who is the only witness that testified. (see **Selle v Associated Motor Boat Co. [1968] EA 123**; **Kiruga v Kiruga & Another [1988] KLR 348**. In this latter decision, the Court of Appeal held that: -

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.? An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."***

It was the 1st respondent's evidence that on 9 December 2012, he received a call from the deceased's employer, one Mama Mwangi, who informed him that the deceased had been involved in an accident and that she had died.

The deceased, according to his evidence, was his daughter who was born in 1991. She was employed as a house girl. At the time of her death, she had two children one of whom was aged 11 and in class 4 while the other one was in a nursery school.

Upon receiving the report of the accident and the death of his daughter, he proceeded to the mortuary where he viewed her body and confirmed that indeed she had died. In proof of this death he produced a copy of a death certificate showing that the deceased died of "*extra sangulation hemorrhage pelvic crush injuries blunt trauma consistent with RTA.*"

According to the abstract he was issued with, the appellant was indicated to be the owner of the vehicle, registration number KBH 417X and it was his evidence that it was this vehicle that was at fault.

He also testified that the deceased catered for two children and also supported him but upon her demise he not only lost her support but he

also assumed parental responsibility towards the deceased's children. All he produced in proof of the fact that the deceased left behind two children was a letter from his chief.

As far as her earnings are concerned, the 1st respondent testified that he did not know how much his daughter earned.

The appellant opted not to call any evidence.

He did not also appear to pursue the question whether an accident involving his vehicle occurred and therefore two questions that were of concern to the subordinate court and which are also relevant here are whether the appellant was liable for the accident and whether the learned magistrate was correct in her assessment of damages.

On liability it was the respondents' case that the appellant was to blame for the accident, a contention that the appellant vehemently disputed for the reason that the respondents were not eyewitnesses and none of them or any other witness, for that matter, testified as such.

It is true that the 1st respondent did not witness the accident and having been the only person who testified, it is also obvious that there was no evidence from any other person who may have probably witnessed the accident.

However, amongst the documents that the 1st respondent produced as exhibits in proof of his case was a police abstract dated 20 December 2012 issued by Nyeri traffic police base where the accident was reported. According to that abstract, the accident involved motor vehicle registration number KBH 417 X and a motorcycle registered as number KMCU 533 K. It also shows that the accident occurred on Nyeri-Ihururu Road on 9 December 2012, the same day it was reported at the police station. The appellant is identified in the abstract as the owner of the motor vehicle and he is also indicated as having insured it with Madison Insurance Company under policy number NYR/701/370423/2012/COMP. The deceased is also shown to have died in the accident. As at 20 December 2012 when the police abstract was apparently collected, the accident was still under investigation.

This evidence was not contested, and neither was any evidence called on behalf of the appellant to rebut it. It follows that the abstract was sufficient proof, at least on a balance of probability, of the facts the respondents sought to prove; of these I suppose the fundamental ones are that indeed an accident involving the appellant's motor vehicle and the deceased occurred as alleged in the respondents' pleadings and that the deceased perished in that accident.

In the absence of any evidence to the contrary, the leaned magistrate was entitled to hold as she did that the abstract was sufficient proof that the appellant owned the vehicle in question. It has so been in held in the Court of Appeal Cases in Kisumu **Civil Appeal No. 333 of 2003 Ibrahim Wandera versus P.N. Mashru Ltd; Kisumu Civil Appeal No. 309 of 2010 Joel Muga Opija versus East African Seafoods Ltd and in Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga &?Ano.**

On liability, the appellant initially attributed the negligence either to the deceased or the rider of the motorcycle on which the deceased was riding pillion. The record shows that he applied for third party proceedings against the motorcyclist but there is nothing to suggest that he took any further step in that direction. In any event, no evidence was called on his behalf to demonstrate how either the deceased or the motorcyclist could probably have been negligent and hence responsible for the accident.

Without any rebuttal, the learned magistrate was right to accept the respondents' evidence as the truth with respect to the question of who might have been responsible for the accident. At any rate, the respondent's pleaded the doctrine of res ipsa loquitur the essence of which is that they were not bound to call any evidence of how the accident occurred. I recently addressed this doctrine in **High Court Civil Appeal No. 30 of 2018, Gachanja Thagana versus Mwangi Wanjohi** where I noted that once a claimant invokes this doctrine, the burden is on the respondent to explain that he was not negligent for the accident in issue and regardless of whatever he may have done to avoid it, it did happen anyway.

In so holding, I followed the decision in **Barkway versus South Wales Transport Co. Ltd (1950) 1ALL ER;** in that case**,** a tyre of an omnibus burst, causing it to veer off the road and fall over an embankment as a result of which a passenger died. Several hypotheses were put forth but none of them was attributable to the tyre burst with any measure of certainty. It could not be explained in categorical terms how the defendant company, the omnibus owner, may have been negligent. The claimant pleaded res ipsa loquitur because, so it was her case, *'omnibuses which are properly serviced do not burst their tyres without cause nor do they leave the road along which they are being driven.'*

The case escalated to the House of Lords. In the leading judgment, Lord Porter cited Erle CJ in **Scott versus London Dock Co (3H&C 601)** where he said of this doctrine as follows:

> ***"... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care***"

The learned judge went further to explain that "*the doctrine is dependent on the absence of explanation and although it is the duty of the defendants if they decide to protect themselves to give an adequate explanation of the cause of the accident yet if the facts are sufficiently known the question ceases to be one where the facts speak for themselves and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not."*

On his part, Lord Normand spoke of the doctrine as follows:

> ***"The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence***

relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maximum res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. <u>The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset?unknown to the plaintiff and are or ought to be within the knowledge of the defendant</u>." (Emphasis added).

Based on these decisions, I hold that the learned magistrate was right in finding the appellant negligent and solely responsible for the accident.

On quantum, and in particular the question of assessment of damages, the general principle is that while such assessment is a function of the discretion of the trial court, the appellate court will be called upon to interfere with it if, in the exercise of its discretion, the lower court either took into account an irrelevant factor or left out a relevant factor or that the award it made was too high or too low as to amount to an erroneous estimate, or, that the assessment is based on no evidence, in any event. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms: -

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

The appellant's primary contention is that the learned magistrate made what would be described as a double award because she made an award under the Law Reform Act and under the Fatal Accidents Act yet the beneficiaries of both awards are the same people.

This question was addressed in **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88) 1KLR 727** where it was held, *inter alia*, that where the *net benefit will be inherited by the same dependants under the Law Reform Act, 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.*

This position was also referred to in **Asal versus Muge & Another (2001) KLR 202** where the same Court sitting at Kisumu cited its earlier decision in **Maina Kaniaru & Another versus Josephat Muriuki Wangondu, Civil Appeal No. 14 of 1989** (unreported) where it said: -

The rights conferred by section 2(5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of the deceased persons are stated to be "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act." This does not mean that damages can be recovered twice over but that if damages recovered under the Law Reform devolve on the dependants the same must be taken into account in reduction of the damages under the Fatal Accidents Act…"

I understand these decisions to say that, in fatal accidents, damages are recoverable under the distinct heads of the **Law Reform Act** (under **section 2(1)(5)** thereof) and the **Fatal Accidents Act** (under **section 4(1)** thereof). These provisions of the law starting with Section **2(1) (5)** of the **Law Reform Act** read as follows: -

2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

(2)…

(3)…

(4)…

(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be <u>in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act</u> or the carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of the deceased's persons shall apply in relation to causes under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).(underlining mine).

It is apparent that any cause of action for the benefit of the deceased's estate and thus any award that may ensue therefrom is not in substitution of or an alternative to the right that accrues to the deceased's dependants under the **Fatal Accidents Act.**

The **Fatal Accidents Act** itself makes it clear as to who should benefit from any action taken under it; **section 4(1)** thereof states: -

4.(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is

brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within three years after the death of the deceased person.

(2) In assessing damages, under the provisions of subsection (1), the court shall not take into account-

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after passing of this Act;

(b) any widow's or orphans pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.

That an action is maintainable under the **Fatal Accidents Act** for the benefit a deceased person's wife, husband, parent or child is beyond dispute; where such an action is viable, the trial court has the discretion, as is always, to determine the amount of damages payable; in exercising this discretion, the Act under **subsection (2)** provides a guide of what ought not to be considered in assessment of damages under this head. It does not, however, provide any general or specific guidelines of what should be considered; I suppose this omission is deliberate so as to leave it to the trial court with sufficient latitude within which it can exercise its discretion in assessing the damages considering the peculiarity of the cases that come before it.

It is upon this understanding that while an award under this head may be "reduced" as was suggested by the **Court of Appeal** in **Maina Kaniaru & Another versus Josephat Muriuki Wangondu (ibid)** because an award has been made under the **Law Reform Act** it cannot be done away with altogether. The fact that those who are likely to benefit from the deceased's estate are the same persons who will benefit from any claim under the **Fatal Accidents Act** is only factor to be considered in the extent of damages to be made; it is not a reason to reject a claim for an award under this head.

Having so found, there is no merit in the appellant's argument that that the learned magistrate made a double award.

My only concern with the learned magistrates award is with regard to her assessment of damages for loss of dependency under the Fatal Accidents Act. She adopted a multiplier approach, yet the respondent testified the he could not tell how much his daughter earned. Where a deceased's income is unascertainable, it has been held that this approach is in appropriate.

The manner of assessment of damages under the Fatal Accidents **Act** was succinctly put in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where Ringera J (as he then was) stated as follows:

"***The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

Although the deceased's father did not know how much his daughter earned, that could not be interpreted to mean that she never earned or couldn't make any earnings in future for the rest of her life. In **Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 of 2002 [2005] eKLR,** the Court of Appeal observed with respect to this question 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."

Thus, where a person is engaged in some income generating activity but his income or salary cannot be determined with any measure of certainty, it may be pegged on the government wage guidelines issued from time to time for purposes of assessment of damages for loss of dependency or, in the alternative, the court may award a global sum.

In **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was quoted with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR, Ringera, J.** as he then was stated as follows:

"***The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

The same principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., stated that: -

> *"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court's opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."*

I have always followed these decisions in such a case where the deceased's income couldn't be ascertained. I would therefore endorse a global award in the respondent's case. The deceased was aged 31; she was survived by her two school-going children. Besides supporting her own children, she supported her father. In these circumstances and doing the best I can, and considering that the respondents and the rest of the beneficiaries will benefit from the award made under the Law Reform Act, I would make an award of Kshs. 1000,000/= as a global award under the head of loss of dependency; in my humble view, this would be a reasonable compensation under this head. I would disturb the learned magistrate's award to that extent only; her award of Kshs. 1,168,800/= for loss of dependency is substituted with the award of Kshs. 1,000,000/= under this head.

Parties shall bear their respective costs of appeal. The respondents shall, however, have costs in the lower court as ordered by the learned magistrate.

Signed, dated and delivered on 28 May 2020

Ngaah Jairus

JUDGE