REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 112 OF 2017

1. DANIEL NDERITU.....APPELLANTS

VERSUS

1. RACHEAL NJERI KIMANI

2. JOHN MWANGI MUTHONI (Suing as the legal representatives of the

Estate of ISAAC KIMANI MWANGI) ..... RESPONDENTS

(Being an appeal from a judgement delivered by C. Oluoch - (PM) in Kiambu Chief Magistrate's Court Civil Case No. 168 of 2012)

J U D G M E N T

1. This appeal emanates from the judgment delivered in **Kiambu Chief Magistrate's Court Civil Case No 168 of 2012 by Oluoch PM on 2nd April 2014**.The suit had been filed by **Racheal Njeri Kimani** and **John Mwangi Muthoni** (the Respondents herein) in their capacity as the legal representatives of the estate of their deceased son **Isaac Kimani Mwangi.** In the plaint filed on 27th July 2012, it was averred that **Daniel Nderitu** (then Defendant) now the Appellant, was the registered owner of the motor vehicle **KBN 312 K** which was allegedly driven in such a negligent manner on 8.6.11 that it knocked down the deceased who was standing on a pavement along **Limuru/Kiambu road** and that he sustained fatal injuries as a result.

2. The Respondents had sought damages under the Law Reform Act and under the Fatal Accidents Act. By a defence filed on 8th August 2012, the Appellant denied the occurrence of the accident, negligence and liability. In the alternative, the Appellant pleaded negligence against the deceased. Following the trial in which only two witnesses, **John Mwangi Muthoni** and a minor, **DW** testified as **PW1** and **2** respectively, judgment was delivered in terms that the Appellant was found 100% liable and damages in the sum total of KShs.1,517,400/= awarded to the Respondents in damages.

3. The Appellant aggrieved with the outcome filed the memorandum of appeal on 8th April 2016. Grounds 1 – 3, 8 challenge the finding in respect of liability on grounds *inter alia*, that the trial court erred in fact and in law by not apportioning liability between the parties . Grounds 4, 5, 6 attack the award of damages as excessive and inconsistent with the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013. In ground 7, the Appellant complains that the trial magistrate erred in law and fact by not considering the Appellant's submissions and case law.

4. The court directed that the appeal be canvassed by way of written submissions. Concerning liability, the Appellant takes issue with the evidence led by **PW2** and the pleadings at paragraph 5 of the plaint, to assert that, no fault was established against the vehicle driver and that at most, liability ought to have been apportioned in light of doubts created as to the manner of occurrence of the accident. The case of **Hussein Omar Farah v Lento Agencies [2006] eKLR** was relied on for the latter proposition. Secondly, the Appellant asserts that the Respondents did not prove the Appellant's ownership of the accident vehicle in the material period, as records tendered were in relation to September 2011, whereas the accident occurred in June 2011. The Appellant relied on the decision of **Aburili J** in **Alfred Kioko Muteti v Timothy Miheso and Anor. [2015] eKLR** and asserted that the Respondents' case ought to have been dismissed.

5. Regarding the award of damages in respect of lost dependency, and pointing to the tender age – 7 years - of the deceased, the Appellant faults the trial court's use of a multiplier approach in light of imponderables concerning the potential of the deceased. Urging a global award of damages in the circumstances, the Appellant called to his aid the decision of **Sitati J** in **Chen Wembo and 2 Others v IKK and Another (suing as legal representatives of the estate of C.R.K.) [2017] e KLR.**

6. In the Appellants view, the case was not suited to a multiplier approach in view of the age of the deceased. In this regard the Appellant urged an award of KShs.200,000/= and reiterated the authority cited in the lower court, namely, **T.O.A v George Onyango Ogan and**

another [2009] eKLR which the Appellant complains was not considered in the judgment of the trial court. Regarding the 4th ground the Appellant, relying on the definition of a dependent under Section 2 of the Insurance (Motor vehicle Third Party Risks) amendment Act 2013 (hereafter the Amendment Act) submitted that dependency was not proved as the deceased's income was not established.

7. In support of grounds 5, 6 and 7 the Appellant reiterated earlier submissions in respect of the award for lost dependency and asserted that this award and the award of KShs.50,000/= for pain and suffering were manifestly excessive. In respect of the latter, they proposed a sum of KShs.20,000/= the deceased having succumbed to injuries after 3 days.

8. The Respondents in their submissions on liability reiterated evidence on the occurrence of the accident as adduced through **PW2** and evidence of the conviction of the Appellant in **Traffic case N0. 990 of 2011** for the offence of Causing death by dangerous driving contrary to section 46 of the Traffic Act. They further asserted that the Respondents' case was not controverted as the Appellant did not adduce any evidence.

9. They sought to distinguish the facts of this case from those in the case of **Hussein Omar Farah** cited by the Appellant and for their part, placed reliance on the case of **SN (suing as the Legal Administrator of the Estate of M.N.N) v Hussein J. Omar and 2 Others [2018] eKLR.** To the effect that a child of tender years cannot be guilty of contributory negligence. Further the Respondents refute the application of the Amendment Act to this case, asserting the law applicable to be the Fatal Accidents Act and the Law Reform Act and common law. And that in any event, in light of the decision in **Law Society of Kenya v AG and 3 Others [2016] e KLR** the Amendment Act did not apply in the assessment of damages which is an exercise of the court's discretion.

10. On the ownership of the accident vehicle, it was submitted that the instant case was distinguishable from the facts in **Alfred Kioko Muteti** as the Respondents herein, unlike in that case produced motor vehicle ownership records as well as the police abstract indicating details of ownership. That the evidence stood uncontroverted. To reinforce these submissions, the Respondents relied on two cases, namely **Kabir Mohamed Farouk v Postal Corporation of Kenya (2018) e KLR** and **Jotham Mugalo v Telkom (K) Ltd Kisumu HCCC 166 of 2001.**

11. Defending their entitlement to the award of damages for lost dependency, the Respondents cited the Court of Appeal decision in **Kenya Breweries Ltd v Saro [1991] e KLR** and the decision of the High Court **Daniel Mwangi Kimemi and 2 Others v J.G.M and Another (being the personal representative of the estate of N.K. [2016] e KLR,** the latter which involved a deceased child aged 9 years in respect of whom an award of KShs.1,000,000/= was made for lost dependency. The Respondents submitted that in the exercise of its discretion the trial court could have used the global or multiplier approach as both were accepted methods in the assessment of damages. The Respondents also defended the award in respect of loss of expectation of life, pain and suffering.

12. The court has considered the record of the trial, the respective pleadings as well as submissions on this appeal. The court proposes to deal with the grounds of appeal in a composite manner under two main issues, namely liability and quantum. However before doing so, it is pertinent to state the principles of applicable before launching into the analysis.

13. The duty of this court as a first appellate court is re-evaluate the evidence adduced at the trial and to draw its own conclusion, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Petess v Sunday Post Ltd (1958) EA 424; Sele and Anor. V Associated Motor Boat Co. Ltd and Others (1968) EA 123;** William Diamonds Ltd v Brown [1970] EA 11.

14. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"**

15. At paragraph 5 of the plaint, it was averred that the deceased "**was standing on the pavement along Limuru/Kiambu Road"** when hit by the vehicle **KBW 312 K** which was allegedly being driven in a negligent manner. The particulars of negligence were set out at paragraph 6 of the plaint. These averments were denied in the defence statement and in the alternative the Appellants averred that the deceased was negligent, as particularized at paragraph 6 of the defence and that he contributed to the accident. The sole eye witness to the accident was **DW (PW2)** a minor and sibling to the deceased.

16. The gist of **PW2's** evidence was that on the material date, he and his younger sibling, the deceased, were headed home. To get to their home they had to cross the **Limuru/Kiambu road**. That **PW2** successfully crossed the road ahead of the deceased, but the deceased was struck by the Appellant's vehicle just as he got off the road and was outside the edge of the road marked by a white line. During cross-examination he denied that the deceased was hit while standing on the pavement.

17. Also tendered in the evidence of the 2nd Respondent **(PW1)** were proceedings in the lower court trial in respect of traffic charges of Causing death by Dangerous Driving contrary to section 46 of the Traffic Act, brought against the Appellant. The Appellant was found guilty convicted and sentenced for the offence. **PW2** did not waver during cross-examination and the conviction was evidently not appealed. The Appellant did not adduce evidence at the trial and hence the Respondents' evidence on the manner in which the accident occurred stood uncontroverted.

18. As has been stated in many decisions of the superior courts, where an accident involves a child of tender age, no finding of contributory negligence can properly be made. See **Rahima Tayab and Others v Anna Mary Kinanu (1983) KLR 114, Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR.** The finding of the trial court that the deceased in this case could not be found liable for contributory negligence is therefore consistent with case law and nothing turns on that point. Similarly, on the question of the ownership of the accident vehicle by the Appellant, the Respondents tendered proof in the form of a copy of records **Exh. 6** and the police abstract **Exh. 8.** This evidence was not controverted. At any rate, the proceedings in the traffic trial indicate that the Appellant was driving the accident vehicle at

the material time. Liability in this case is not merely based on the Appellant's ownership of the accident vehicle, which to my mind was proved, but also on the fact that he was the person driving the vehicle on the material date.

19. Civil cases are decided on a balance of probabilities. The Respondents tendered proof of ownership through a copy of records and police abstract at the trial but the Appellant failed to rebut the evidence. The trial court correctly found that ownership had been established against the Appellant. See **Charles Nyabuto Mageto v Peter Njuguna Njathu [2013] eKLR**. Nothing turns on the question of the ownership of the vehicle by the Appellant.

20. Turning now to the question of quantum, the applicable principles are well known. The appellate court will only disturb an award of damages where such award is so inordinately high or low as to represent an entirely erroneous estimate. See **Bashir Ahmed But v Uwais Ahmed Khan.**

21. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by Appellant. I propose to deal separately with each head of damages in contention. The court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30.**

It was held in that case that:

> **"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."** see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)e KLR.**

22. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance"*.

23. Concerning the award in respect of pain and suffering, there was no dispute that the deceased succumbed to his injuries on 10th June 2011, about 3 days since the accident, during which period he was hospitalized. An award of KShs.50,000/= under this head is not excessive in my view. The conventional award where death is instant has remained KShs.10,000/= for a long time.

24. The Appellant has vigorously challenged the award made in respect of lost dependency on several fronts, the chief one being the use of a multiplier approach instead of a global award, the potential of the deceased and the trial magistrate's alleged error in not applying the Amendment Act to compute damages. Starting with the last issue, the law applicable is the Fatal Accidents Act and the Law Reform Act. The finding of unconstitutionality in respect of key provisions of the Amendment Act by the High Court **(Onguto J**, as he then was) for purporting to take away the discretion of the court in assessing damages has not been set aside. Until that happens the courts will continue to apply common law, the Law Reform Act, the Fatal Accidents Act and relevant case law in assessing damages in respect of persons such as the deceased in this case.

25. The controversy regarding whether the global or multiplier approach is most suited in cases involving minors is not new. Each approach is valid as long as the court applies the principles that guide such assessment. It is true as stated by **Sitati J** in **Charles Ouma Otieno and Anor. V Bernard Odhiambo Ogecha (suing as legal representative of the estate of Oscar Onyango Ogecha) [2014] eKLR** that the assessment of lost dependency in respect of minors is fraught with difficulty, as it is accompanied by many imponderables. Some of the considerations to be taken into account in such exercise have been enunciated by superior courts over time.

26. In **Kenya Breweries Ltd. v Saro** the Court of Appeal stated that in claims brought in respect of deceased minors, the age of the child is a relevant factor. The court stated:

> **"... in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in a case of a four year old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or low that an application of wrong principles must be interfered."**

27. The Court went on to consider awards made on this head between 1982 and 1990 before concluding that an award of KShs.100,000/= in 1990 cannot be taken to be so inordinately high that the application of a wrong principle must be inferred. The Court concluded by stating that:

> **"While we would express the view that damages on this head must be kept relatively low, we do not think that the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less had we been the trial judge but that is not a reason to warrant us interfering."**

28. The deceased in this case was aged 7 years at death. He was already enrolled in school. He was seemingly an average student as per the

school records tendered at the trial. That however cannot be used to project a gloomy picture of what his life would have turned out, whether a pilot in a high paying job as he allegedly aspired, or a mere hands man. Whatever the case, the award is payable to parents of a deceased child for the loss of the expectation of some form of support by their child in the future (**see Kenya Breweries case**).

29. In some cases involving very young children such as the deceased herein, the dilemma described by **Sitati J i**n **Charles Ouma** becomes more magnified. What is clear from many authorities of superior courts is that the awards are almost invariably lower for very young children. In the **Kenya Breweries case** the Court of Appeal exhorted that awards for lost dependency in respect of very young children ought to be kept relatively low.

30. In this regard, I notice that the authorities now cited before this court by the Appellant were not placed before the trial court to consider. Similarly, the Respondents while reiterating submissions in the lower court also introduced new authorities on quantum. This is unacceptable in an appeal. I recently had occasion to comment on such practice in a different appeal in which I quoted the words of **Ochieng J in Silas Tiren and Another v Simon Ombati Omiambo [2014] e KLR.**

31. I am in full agreement with the sentiments of **Ochieng J** in his judgment in **Tiren's** case wherein he took exception to the introduction of new authorities on the appeal stating inter alia that:

> **"None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court … it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court… The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."**

32. On reviewing the Respondents' submissions in the lower court on lost dependency the authorities involved much older persons and are distinguishable. In **Allan Mundia Kahiga v Athi River Mining Co. Ltd [2009]** the young deceased girl was 19 years old. In **Joseph Maganga Kasha v KPLC Ltd [2012] e KLR** the Plaintiff only suffered injuries but did not succumb to them. He was 22 years old and was awarded damages, for lost earning capacity on a multiplier of 38 years. Similarly the Plaintiff in **Evans Odhiambo v Samson Wamue Ogema [2010] eKLR** did not die and he was awarded damages for lost earning capacity. The latter two authorities relied on by the Respondents had no relevance to the instant case.

33. It is not clear whether the court perused these decisions before adopting the multiplier approach and using the multiplier of 25 years. The trial court considered and based its assessment the case of **David Njunge v Chairman BOG Njiri High School [2001] eKLR** which involved a 17 year old student and the Appellant's authority, namely **Abdi Kadir v John Wakaba and Another [2009] eKLR** which involved a 12 year old boy. The Appellant's second authority was **T.O.A. v George Onyango Ogaru and Another [2009] e KLR** involving an 11-year-old child. In the latter case, the courts used a global approach to assessment, awarding KShs.2000,000/= (in 2009).

34. In both **Abdi Kadir's case**, the Respondents' only relevant authority **Allan Mundia**, the courts adopted a very conservative multiplicand that is KShs.3000/= and KShs2000/= per month respectively. Although these authorities are old, they align with the counsel in **Kenya Breweries Ltd** that these kinds of awards ought to be kept low in view of the numerous unknowns involved. In this case, the trial magistrate stated in her judgment that she adopted the multiplicand proposed by the Appellants (KShs.13,674) in the alternative of a global award , asserting based on the decisions cited by the Respondents, that a multiplier of 30 years is ordinarily used for deceased persons under the age bracket of 22 years.

35. This statement is a misdirection, in my view. Firstly, only one authority, of the three cited by the Respondents related to and was relevant to the assessment of lost dependency in a claim under the Fatal Accidents Act. Secondly, in that authority---- **Allan Mundia's** case – a modest multiplicand of KShs.2000/- per month was adopted in respect of the deceased 19 year old, and a multiplier of 36 years. There was no basis for the rather generous statement by the trial magistrate that a minimum of 30 years was some sort of standard multiplier for the age bracket of deceased persons under 22 years. There was no material to support such a statement in the authorities. Had the trial court read through the authorities presented before it, it would have discovered this deficit in the authorities.

36. All in all, it is my view that, due to the very tender age of the deceased and the authorities presented before the court, the multiplier approach did not suit this case. By basing her award on the minimum wage of KShs.13,674/= and using a multiplier erroneously deduced from the authorities of the Respondents, the trial court fell into error. The award of KShs1, 367,400/= on the face of it was excessive and arrived at through error. 37. The court must interfere with the award in the circumstances. As stated, this case was more suited to a global award. Thus, I set aside the award of KShs.1,367,400/= for lost dependency and substitute therefor a global figure of KShs.600,000/= (SIX HUNDRED THOUSAND). This award is in addition to the award in respect of loss of expectation of life and pain and suffering as awarded in the lower court.

38. In the circumstances, judgment is entered for of the Respondents in the total sum of KShs.750,000/= (SEVEN HUNDREND AND FIFTY THOUSAND). As the appeal has succeeded only partially, the Appellants is awarded half the costs of the appeal.

40. In closing, it is pertinent to observe that the trial magistrate having tried the Appellant in the traffic case that concluded in August 2012, ought not, in ideal circumstances and in the interest of justice, to have tried the civil cause arising therefrom, after a duration of just about one year. Although no objection was raised at the trial or on this appeal, nor is there any basis to infer any bias, it is eminently important, to avoid the perception of bias or prejudice, that a judicial officer ought not to handle the same or related cause more than once. Fortunately, in this case, the facts of the case were hardly contested and the findings of the trial magistrate thereon are sound and well-reasoned.

DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF JULY 2019

.....

C. MEOLI

JUDGE

In the presence of:

Appellant – No appearance

Respondents – No appearance