REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 67 OF 2011

LEONARD KAUNYANGI ..... APPELLANT

-VS-

DAVID MATI ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of S. Andressien (Principal Magistrate) in Meru CMCC NO. 460 OF 2007, in which the Learned Trial Magistrate awarded the appellant general damages of Kshs 390,000/= less 70% contribution as a result of a road traffic accident that occurred on 12th August 2006, in which the deceased was fatally injured. Aggrieved by that award, the Appellant has now appealed to this court.

2. In his Memorandum of Appeal dated 8th June 2011,the appellant raised the following grounds:-

a) ***The Trial Magistrate erred in law and fact in holding the deceased 70% liable contrary to the evidence on record.***

b) The Trial Magistrate failed to appreciate the pleadings and evidence tendered to find that defence testimony was less reliable and hence defence wholly or substantially liable.

c) The Learned Magistrate erred in law and in fact in making a finding on quantum which was erroneous both in fact and in law.

d) The entire judgment on liability and quantum is unfair, inequitable and unreasonably and/or inordinately low in the circumstances.

3. On 29th November 2017, directions were made that the appeal be determined by way of written submissions. However, by the time of writing this judgment, none of the parties had filled his submissions.

4. This being a first appeal, the court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. See ***Selle v Associated Motor Boat Co.*** **[1968] EA 123** and ***Kiruga v Kiruga & Another*** **[1988] KLR 348**.

5. The appellant's case was that the deceased was the plaintiff's (PW1) son and that he died on 12th August 2006, having been involved in an accident with a vehicle belonging to the Respondent. It was his evidence that he was not at the scene of the accident and that the deceased was a standard 8 pupil at Kipiru primary school; that he used to assist him in farming and that he expected the deceased to help him after he cleared his education.

6. PW2 Joshua Nturibi testified that on 12th August 2006, he was coming from his *manyatta* in Isiolo and as he waited for transport he waved down a lorry which stopped and he boarded it. It was his evidence that the lorry had sand and some passengers and that on the way, they found a young man who had a bicycle and a *karai*. The young man boarded the lorry and as the same was moving downhill at a high speed, he suddenly saw something slide out and people shouted and the lorry stopped. They all moved out and found the young man fallen and already dead. They then reported the accident at Katharene AP camp.

7. PW3 Joseph Ngera, a traffic police officer attached to Maua traffic base, testified and produced a file in respect of an accident that occurred along Muriri Isiolo road involving a lorry registration number KAV 309M and a passenger by the name Moses Muchui Kaunyangi who was fatally injured. The accident was reported at Tigania police station and the driver was subsequently charged with the offence of causing death by dangerous driving.

8. DW1 George Manjau testified that on 12th August 2006, he was driving on Murithi Kandenge road and that he had carried some passengers and sand. He then heard people behind him telling him to stop as the person he had picked at Kandethi had fallen off. He stopped and went back to where he had fallen and found him already dead. He later took the vehicle to the chief's camp.

9. PW2 was the only eye witness to the accident. He testified that as the lorry was moving downhill at high speed, he suddenly saw something slide out, people shouted and the lorry stopped. He however, did not describe how the deceased fell. PW2 and DW1 were both in agreement that the deceased fell off from the moving lorry which was full of sand. The evidence of DW1 was really of no probative value as he did not witness the accident and he only stopped when people shouted at him to stop.

10. PW2 in cross examination remained firm that the deceased got tossed off from the lorry and that he was not reaching for his bicycle. The defence did not call any evidence to rebut this evidence. There was no dispute that the deceased fell off from a moving lorry and that the lorry was also carrying sand. The deceased voluntarily agreed to be carried at the back of the lorry which was carrying sand. According to PW2, the deceased boarded the lorry after negotiating with the conductor and agreeing on the price. It is my considered view that the deceased voluntarily consented to the risk associated with such a move and therefore this is a proper case to invoke the doctrine of *volenti non fit injuria.* The general principles applicable to that defence were stated by the Judicial Committee in ***Letang vs Ottawa Electric Railway Company*** **(1926) A.C 275** the following terms quoted from the judgment of Wills J. in ***Osborne vs The London and North Western Railway Company*** **(1888) 21 Q.B.D** ***220***

> ***"If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is app1icable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it".***
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> ***Volenti non fit injuria* means that *the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. This was the holding of Scott L.J. in Bowater v Rowley Regis Corp. (1944) KB 476***

11. On the other hand, the driver of the ill fated lorry voluntary consented to carry passengers in the back of the lorry which was full of sand. He had a duty to drive the said lorry carefully. The deceased was a young man of 17 years only in class 8 at the time. Considering his age and the driver of the ill fated lorry, I apportion liability in the ratio of 70:30 in favour of the appellant. There is evidence that the driver was speeding with a lorry full of sand on a murram road. The driver bears more liability.

12. Turning now to damages, the general rule is that an Appellate Court should be slow to interfere with the discretion of the trial court in the award of damages unless the trial court is shown to have acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – v- A.M.M. Lubia & another (1982-88) 1 KAR 777***.

13. In the instant case there is no dispute that the deceased was a standard 8 pupil at Kipiru primary school and was aged 17 years. It was PW1's evidence that the deceased used to assist him in farming and herding cattle and that he expected that the deceased would help him after clearing his education. The trial court adopted a multiplicand of Kshs 3000/=saying it would have been a while before he could get employment. In the case of ***Kenya Breweries Ltd -vs- Saro (1981) e KLR 408,*** the court held that the age of a child must be considered in assessment of damages stating thus:

> ***"We would respectfully agree with Mr. Pandya that 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 the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law."***

The court awarded Kshs.300, 000/= for the minor who was 6 years old as a conventional sum.

14. In the instant case the deceased was aged 17 years and was said to be in primary school. No evidence was however tendered to show his performance in school. It is not known what he would have become in the future. The best approach in the circumstances would have been to award a global award. In the case of **Charles Ouma Otieno & another -Vs- Benard Odhiambo Ogecha (*Suing As Brother And Legal Representative And Administrator of The Estate Of The Late Oscar Onyango Ogecha* (Deceased) [2014] eKLR Sitati J stated thus:**

> ***"I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.***
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> ***The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of H. Young &***

***Company EA Ltd. & another -vs- James Gichana Orangi – Kisii HCCA NO.207 of 2009*. In the said case, the learned trial magistrate awarded damages totaling Kshs.323,300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs.323, 300/= and in lieu thereof made a lump sum award of Kshs.300, 000/= subject to 25% contribution."**

Similarly, Ringera J in ***Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another*** quoted by Koome J., in ***Albert Odawa v Gichimu Gichenji*** **NKU HCCA No. 15 of 2003[2007] eKLR** he expressed the following view:-

"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 dependancy, and the expected length of the dependancy 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".

In the end result I find a sum of Kshs 500,000/= to be adequate compensation and I accordingly award the same less 30% contribution.

15. Accordingly judgment is entered for the appellant in the sum of Kshs 500,000/=. The appellant will also have costs of this appeal.

DATED and DELIVERED at Meru this 21st day of March, 2018.

A. MABEYA

JUDGE