REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 456 OF 2016

MARTIN GITAU……..…….....……..…1ST APPELLANT

FRANCIS MUTETI MUSAU…….....….....…2ND APPELLANT

VERSUS

SHADRACK MULONZI & ALICE NZISA MULONZI (SUING AS THE LEGAL

REPRESENTATIVES OF THE ESTATE OFDANIELNZANGI MUIA....RESPONDENTS

(Appeal from the judgment of the Chief Magistrate's Court at Nairobi Milimani Law Courts by Hon. M/S Arika delivered on 7th June, 2016, in Nairobi Milimani CMCC No. 7023 of 2013)

JUDGEMENT

The Respondents were the Plaintiffs at the trial Court suing on their behalf and on behalf of the Estate of Daniel Nzangi Muia (the "**Deceased**"). In a plaint dated 3rd September, 2013, the Respondents Claimed that on or about 1st August, 2012 the deceased was travelling as a pillion passenger in motor cycle registration number KMCCI 904F along and/or at the junction of Loresho Ridge – Kaptagat Road, Nairobi when the 2nd defendant , as driver of M/V KZK 187, drove the same carelessly and negligently that as he was entering Kaptagat road from Loresho Ridge he hit the motor cycle in which the Deceased had been lawfully carried as a passenger at the junction of the two roads above, as a result of which the deceased suffered fatal injuries. The particulars of negligence are enumerated in the Plaint. The Respondents averred that the deceased left behind his mother, father and two children as the dependants.

The Plaintiffs sued for judgment against the Defendants for;-

a. General Damages

b. Costs, and

c. Interest

The Appellants filed a Statement of Defence dated 21st February, 2014 in which they denied the claim in totality and without prejudice, averred that any loss or damage that the Respondents may prove was caused, or substantially contributed to, by the negligence of the driver of motor cycle registration number KMCCI 904F and the negligence of the deceased. The particulars of negligence of the deceased as well as that of the cyclist of the motor cycle are also enumerated in the Defence.

In her judgment the trial Magistrate found that the Appellants were to blame for the accident at 100%.

The trial magistrate fixed the deceased's monthly income at Kshs. 10,850 which was the minimum wage at that time. She further noted that the deceased who died at the age of 39 years would have worked upto 65 years and she used a multiplier of 26 years and thus calculated loss of dependancy as 10,850*26*12*2/3 =Kshs. 2,256,800/=. Therefore, Judgment was entered in the following terms:

d. Pain and Suffering	Kshs. 30,000
e. Loss of expectation of life	Kshs. 100,000/=
f. Loss of Dependency	Kshs. 2,256,800/=/=
(Less loss of expectation of life)	(100,000/=)
TOTAL	**Kshs. 2,286,800**

Aggrieved by the trial magistrate's judgment, the Appellant filed this appeal both on liability and quantum of damages. The grounds of the appeal are;

g. THAT the Learned trial Magistrate erred in law and in fact when she awarded a multiplier of 26 years whereas the Respondents had prayed for a multiplier of 16 years.

h. THAT the Learned trial Magistrate erred in law and in fact in awarding the Respondent what was not submitted.

i. THAT the Learned trial Magistrate erred in Law and in fact in failing to consider the submissions on multiplier.

j. THAT the Learned trial Magistrate erred in Law and in fact by awarding a multiplier of 26 years which is too high because the deceasd could have died of other contingencies of life.

k. THAT the Learned trial Magistrate erred in law and in fact when he failed to apportion liability between the defendant and the motor cycle rider.

l. THAT the Learned Trial Magistrate erred by not considering the submissions made by the Appellants and the Respondent and authorities cited and the evidence placed before the court.

m. THAT the Learned Trial Magistrate misdirected herself on all points of law.

This being a first appeal, the role of this court will be to re-evaluate the evidence adduced at the lower court and come up with an independent finding. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** it was held that the principle is 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 to have acted on wrong principles.

From the grounds of Appeal, issues for determination are;

n. Whether the finding of liability against the Appellants at 100% by the trial Magistrate was founded on law and facts;

o. Whether the multiplier of 26 years was excessive ;

The Appeal was canvassed by way of written submissions which I have considered together with the authorities by the respective parties.

The Plaintiff called two witnesses. **Shadrack Mulonzi (PW1)** is the father to the deceased. He testified

that the deceased died at the age of 39 years and left behind two children aged 9 years and 4 years. He told the court that the deceased also took care of him and his wife (the Deceased's mother). It was his evidence that the deceased was engaged in the business of clearing and forwarding at Namanga and was earning income from the business. In cross examination, PW1 did not have any documents to support his claim that the deceased was working as such.

The second witness (**PW2**) **Benjamin Wainaina Wanjiku** was an eye witness and he testified that a lorry KZX 187 from Loresho ridge was entering Kaptagat road when it hit a pavement and hit a stationary motor cycle which was on the left side of the road. The deceased was a passenger on the motorcycle who was run over by the lorry on the tummy.

On the other hand, the Appellants' witness, **Francis Muteti Musau** (**DW1**) testified that he was driving motor vehicle KZX 187 from Loresho road and entered Kaptagat road. He was given way by another vehicle. DW1 testified that the subject motorcycle came from the direction of the Kaptagat road and had overtaken the vehicle which gave him way. He swerved and hit a pavement, lost control and hit the motorcycle which had also swerved to avoid him. In cross examination DW1 testified that he hit a pavement and lost control, went to the wrong side (right side of the road) where the motor cycle was on its proper lane. He removed the cyclist from under the lorry.

At the close of the hearing the parties filed written submissions. The Respondents submitted that the Appellants should be held 100% liable. On quantum the Respondents suggested a multiplicand of Kshs. 30,000 and a multiplier of 16 years as the deceased would have worked till the age 55. On the other hand the Appellants submitted that the rider of the motor cycle was 90% liable. They sought a multiplier of 10 year and dependency ratio of ½.

ON LIABILITY

This court is alive to the requirement that this being the first appellate court, it must re-evaluate and analyse all the evidence that was adduced in the lower court and arrive at its own independent findings keeping in mind that it did not get the chance to see the witnesses and observe their demeanor.

It is neither in dispute that the 2nd Appellant was driving the Motor Vehicle registration number KZX 187 nor is it in dispute that the said vehicle hit the Deceased who was a pavilion passenger on a motor cycle. The testimony of PW2 as well as that of DW1 is in agreement that the said accident occurred at the intersection of Loresho and Kaptagat road.

From the evidence adduced by PW2 who was an eye witness, the 2nd appellant driver hit a pavement, lost control and hit the motor cycle which was stationary. In his own testimony DW1 testified that he hit a pavement, lost control and hit the motorcycle which was on its lane on the right side. DW1 testified that he veered off to the right side of the road.

The evidence tendered herein leads to a conclusion that the deceased was hit while on the motorcycle which was, at the time of the accident, on the proper lane. It is the driver of the lorry who swerved to the right side and hit the motorcycle. No evidence was tendered by the Appellants to support the 2nd Appellant's claim that the deceased contributed to the accident. The Appellants did not enjoin the cyclist of the motor cycle whom they claimed was to blame for the accident therefore the court cannot find liability on a person who is not a party to the suit. On liability I find the 2nd Appellant 100% liable for the accident while the 1st Appellant is vicariously liable as the registered owner of the lorry. The learned magistrate was right in that regard.

ON QUANTUM OF DAMAGES

The general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where the trial judge in assessing damages either took into account an irrelevant factor or failed to take into account a

relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**).

The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated that;"*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 in that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low*."

The occupation of the deceased in this case was not proven but looking at the bank statements that were produced as exhibits, its clear that he was earning some income and was not a man of straw. In the case of **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Anyara Emukule J, held:-

> "…..there are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the promise of the court to determine or explore those imponderables. The duty and promise of the court is to apply the generally known period during or about which an employee of the deceased's occupation would remain in active work and retire."

The deceased died at the age of 39 years. The learned trial Magistrate assumed that he would have worked up to the retirement age of 65 years hence a multiplier of 26 years was adopted. In the trial court, the Respondents submitted that a multiplier of 16 years would have been appropriate for the deceased who would have worked approximately up to 55 years. The Appellants had submitted on 10 years. The Appellant now submit that a multiplier of 16 years which the Respondents had sought for should be adopted. In a similar case to this **Asha Mohamed Swaleh V Kennedy Bindi Muriungi & Another [2012] Eklr** where the deceased was aged 34 years, the Court used a multiplier of 15 years and held that ,"*Clearly there was no evidence that the deceased was a mechanic e.g. a licence/permit to run such a business, usually given by local authorities. The respondent did not know even where he operated from. … The best the learned trial magistrate could have done in such circumstances was to base the multiplicant on Shs. 4,000/= per month because the respondent told the court that the deceased used to give her Shs. 1,000/= per week. Or use a random sum he could consider reasonable income for casual labourer's as the base of income, because it could have been unreasonable not to allocate any sum of income to a man 34 years of age who used to go to eke out a living daily. But there was no basis to take Shs. 5,000/= as monthly income as pleaded and ignore what had been stated in evidence. In that regard the learned trial magistrate fell in error when he took the deceased's income as Shs. 5,000/= per month. Nothing was placed before court to challenge the respondent's dependency or the multiplier of 20 (the lower court actually took 15), all that remains, as found/adopted by the learned trial magistrate. Accordingly, the award of loss of dependency is varied as to a figure of Shs. 480,000/= (4,000 x $^{2}/_{3}$ x 15 x 12)."*

However, where the occupation of the deceased is proved, courts are lenient to use a higher multiplier as was the case in **Innocent Ketie Makaya Denge v Peter Kipkore Cheserek & another [2015] eKLR** the Court held that , "*Turning to the multiplier, my analysis of the evidence shows that the deceased died at the young age of 34 years. He was a businessman which means that his working life was not dependent on any prescribed retirement age. There is evidence that he was in good health prior to the accident. He would thus have continued with his business and would have continued earning probably upto about 60 years of age given the kind of business he was engaged in and the vagaries of life. The multiplier of 26 years adopted by the trial magistrate was in the circumstances not unreasonable. The same is upheld*."

In this case the occupation of the deceased was not established. The Respondents had submitted on 16 years as the multiplier which I think was appropriate in the circumstances, and bearing in mind that the deceased left behind two young children, I find that a multiplier of 16 years would be appropriate and reasonable.

I must however point out that the learned magistrate erred in discounting the sum of Ksh.100,000 for loss of expectation of life. In the case of **Hellen Waruguru** (suing as the legal representative of **Peter Mwenja Vs Kiarie Shoe Stores Ltd (Nyeri Civil Appeal No. 22/2014**), the Court of Appeal held that the estate of a deceased should benefit twice.

In the end, the appellants appeal partially succeeds and the award is reviewed as follows:-

p. Pain and Suffering Kshs. 30,000

q. Loss of expectation of life Kshs. 100,000/=

r. Loss of dependency Kshs.1,388,800/=

(10,850*16*12*2/3)

TOTAL **Kshs. 1,518,800/=**

Therefore I enter judgment for the Respondent in the sum of Kshs.**1,518,800/=.**

Each party shall bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

……..... For the Applicant

……...For the Respondent