



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO 23 OF 2016**

**MARGRET WANGARI KIAMBUTHI.....APPELLANT**

**AND**

**JANE NJERI NGUGI & JOHN MUTHEMBA NJUGE**

**(suing for and for and on behalf of the dependants and**

**estate of ARIOS KINYANJUI MUKIRAI (Deceased).....RESPONDENTS**

**(Being an appeal from the Judgment of Honourable D.N. Musyoka Principal Magistrate in PMCC No 269 of 2009 at Kikuyu delivered on 12<sup>th</sup> July 2016)**

**BETWEEN**

**JANE NJERI NGUGI & JOHN MUTHEMBA NJUGE**

**(Suing for and for and on behalf of the dependants and**

**estate of ARIOS KINYANJUI MUKIRAI (Deceased).....PLAINTIFFS**

**VERSUS**

**MARGRET WANGARI KIAMBUTHI.....APPELLANT**

**JUDGMENT**

**INTRODUCTION**

1. In his judgment delivered on 12<sup>th</sup> July 2016 the Learned Trial Magistrate, Hon D.N. Musyoka, Principal Magistrate awarded the Respondents the sum of Kshs 1,036,715/= made up as follows:-

<b>Loss of Dependency</b>	<b>Kshs 855,840/=</b>
<b>Loss of Expectation of life</b>	<b>Kshs 100,000/=</b>
<b>Pain &amp; Suffering</b>	<b>Kshs 50,000/=</b>
<b>Special Damages</b>	<b>Kshs 31,875/=</b>

**Plus costs of the suit and less ten per cent (10%) contributory negligence.**

2. Being dissatisfied with the said judgment, the Appellant filed her Memorandum of Appeal dated 11<sup>th</sup> August 2016 on 12<sup>th</sup> August 2016. She relied on five (5) Grounds of Appeal. Her Record of Appeal was dated and filed on 14<sup>th</sup> June 2017. She filed her Supplementary Record of Appeal dated 8<sup>th</sup> September 2017 on 11<sup>th</sup> September 2017. Her Written Submissions was dated 20<sup>th</sup> December 2017. The Respondents Written Submissions were dated 20<sup>th</sup> March 2018 and filed on 21<sup>st</sup> March 2018.

3. When the matter came up for hearing on 21<sup>st</sup> March 2018 the parties asked this court to write its judgment based on their Written Submissions which they relied upon in their entirety. This judgment was therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issues that had been placed before it for its determination:-

**1. Whether or not the award of quantum was manifestly excessive in the circumstances of this case so as to warrant interference by this court.**

**2. Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.**

6. This court therefore dealt with the issues under the separate heads shown herein below.

### **I. LIABILITY**

7. Grounds of appeal Nos (1) and (2) were dealt with together as they were both related.

8. The Appellant contended that the Learned Trial Magistrate erred when he apportioned liability at 90% -10% against her for the reason that the Respondents did not prove the involvement of the deceased in the accident herein as the evidence of PW 2 the police officer (sic) indicated that the pedal cyclist in the case herein was "Elias Kinyanjui Mukirai" and not "Arios Kinyanjui Mukirai" as was shown in the pleadings in the lower court. Further, she argued that Richard Maina, (hereinafter referred to as "PW 2") was not listed as a witness in the Police Abstract Report.

9. He relied on the cases of **Mbugua David & Another vs Joyce Gathoni Wathene & Another [2016] eKLR** and **Lakhamishi vs Attorney General [1971] EA 118** where the common thread was that if a judge is confronted with conflicting evidence of how an accident occurred, he should apportion liability equally.

10. On their part, the Respondents submitted that the Appellant did not adduce any evidence to controvert their evidence on how the accident occurred. They relied on the case of **Francis Mati Nyambu vs Francis Karengi [2009] e KLR** where Lenaola J ( as he then was) stated that where no counter-evidence is given to challenge evidence that had been adduced, then liability would attach on a hundred (100%) per cent basis. They stated that the Learned Trial Magistrate was more than lenient when he held that the deceased would bear ten (10%) per cent liability.

11. This court looked at the pleadings and noted that the deceased was referred to as "Arios Kinyanjui Mukirai". No. 45378 PC Moffat Kwahu (hereinafter referred to as "PW 3") erroneously referred to as PW 2 by Appellant in her submissions in this court, referred to him as "Elias Kinyajui Mukirai."

12. Notably, the Death announcement, Death Certificate, Chief's letter, Limited Grant Ad Litem all referred to the deceased as "Arios Kinyanjui Mukirai." Despite the different spellings of the deceased's name and PW 3's reference to him as "Elias", this court was not persuaded by the Appellant's submissions that "Arios" and "Elias" were two (2) different people as the different spelling of the deceased's name was inconsequential. This was a red herring that the Appellant had thrown to distract this court from determining the real issues that had been placed it for determination

13. Turning to how the accident occurred, as this court noted, the Appellant did not adduce any evidence to controvert PW 2's evidence who testified that he witnessed the Appellant's Motor Vehicle hit the deceased who was cycling at the material time. It was irrespective that he was not listed as a witness in the Police Abstract Report because there is no mandatory provision of the law that all witnesses must be listed in the Police Abstract Report before a hearing commences. Indeed, witnesses are at liberty to adduce evidence as it is at times not practical for all witnesses to avail themselves to record their statements before the Police Abstract Report is issued. Often times, a Police Abstract Report is obtained soon after an accident occurs but not necessarily after all witnesses have recorded their statements.

14. Bearing in mind that the Appellant Motor Vehicle was more lethal than the bicycle the deceased was cycling, in terms of the serious injuries it could cause in an accident, and PW 2's and PW 3's evidence was unrebutted, this court was persuaded to find that ten (10%) per cent contributory negligence against the deceased was fair and reasonable in the circumstances of the case. As the Respondents pointed out, there was a possibility of the Appellant having borne a higher percentage of negligence for having caused the accident herein.

15. In the premises foregoing, this court found Amended Grounds of Appeal Nos (1) and (2) not to have been merited. The same are hereby dismissed.

### **II. QUANTUM**

16. Grounds of appeal Nos (3), (4) and (5) were dealt with together as they were all related but were addressed separately.

## **A. PAIN AND SUFFERING**

17. The Appellant submitted that the Learned Trial Magistrate erred when he awarded the Respondent a sum of Kshs 50,000/= for pain and suffering and opined that a sum of Kshs 10,000 would have fair in the circumstances of the case.

18. On their part, the Respondents were emphatic that the sum of Kshs 50,000/= was reasonable. They relied on the case of **Joseph Kahiga Gathii & Paul Muthaiya Kahiga (Suing as the Administrators of the Estate of Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga both (deceased) vs World Division Kenya & 2 others [2014] eKLR** where Ougo J awarded a sum of Kshs 50,000/= as the deceased died on their way to hospital. It was their submission that the Appellant did not demonstrate to this court how she arrived at the sum of Kshs 10,000/=.

19. This court wholly concurred with the Respondents' observation that the Appellant did not demonstrate how she arrived at the sum of Kshs 10,000/= for pain and suffering. Indeed, she did not place any case before this court to support her argument.

20. A perusal of the lower court proceedings shows that on 10<sup>th</sup> December 2016, Arios Kinyanjui Mukirai (hereinafter referred to as the "deceased"), a cyclist, sustained fatal injuries along Nairobi- Limuru Road after being hit by the Appellant's Motor Vehicle Registration Number KAS 464T. On page 16 of his judgment, the Learned Trial Magistrate noted that the Appellant had contended that a sum of Kshs 10,000/= was fair because the deceased died while being taken to hospital.

21. It is a well laid principle that an appellant court will not interfere in an award merely because it could have awarded a lower amount than the amount the trial court awarded. Indeed, in the case of **Butt vs Kiyan [1981] KLR 349**, it was held as follows:

**“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”.**

22. Having considered the parties arguments in this regard, this court was not persuaded that it should interfere with the Learned Trial Magistrates discretion to award a sum of Kshs 50,000/= for pain and suffering because, bearing in mind the inflationary trends, the said figure as can be seen in the case of **Joseph Kahiga Gathii & Paul Muthaiya Kahiga (Suing as the Administrators of the Estate of Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga both (deceased) vs World Division Kenya & 2 others** (Supra), was fair and reasonable in the circumstances of the case herein.

## **B. LOSS OF DEPENDENCY**

23. The Appellant argued that the Respondents did not adduce evidence to prove that the children listed in their Complaint belonged to the deceased and consequently, the application of the dependency ratio of 2/3 was not justified. In addition, she stated that the Learned Trial Magistrate did not take into consideration the vagaries of life when he adopted multiplier of twenty (20) years.

24. On their part, the Respondents pointed out that the deceased was aged thirty five (35) years at the time of his death and that the Learned Trial Magistrate took into consideration the vicissitudes of life when he adopted a multiplier of twenty (20) years instead of the twenty (25) years they had proposed. They still relied on the case of **Joseph Kahiga Gathii & Paul Muthaiya Kahiga (Suing as the Administrators of the Estate of Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga both (deceased) vs World Division Kenya & 2 others** (Supra).

25. It was clear from the evidence of the deceased's wife, Jane Njeri Ngugi (hereinafter referred to as "PW 1"), that the deceased was aged thirty five (35) years and was working as a mason at the time of his death. A perusal of the Certificate of Death that was adduced in evidence showed that the deceased was aged thirty five (35) years of age.

26. This court carefully combed both the hand written and typed proceedings and did not see any evidence of the Appellant having adduced oral or documentary evidence in court. Indeed, in her Written Submissions in the Trial Court, there was no indication that she testified or called any witnesses in support of her case.

27. In the absence of any evidence to the contrary, this court found the Respondents' evidence that the deceased was aged thirty five (35) years at the time of his death, that he was working as a mason at the time and that he and PW 1 were blessed with two (2) children as per the letter dated 12<sup>th</sup> January 2007 by Chief Mungai Kaburu of Mahindi Sub-Location that was adduced in evidence to have been uncontroverted and unshaken.

28. As the Appellant had proposed a dependency ratio of 2/3 in the lower court, a position that was correctly pointed out by the Respondents, she could not be heard to contend that the Learned Trial Magistrate should have adopted a different dependency ratio. She could not be permitted to approbate and reprobate on this issue.

29. Accordingly, this court found that there was no merit in the Appellant's Grounds of Appeal Nos (3), (4) and (5) and the same are hereby dismissed.

## **DISPOSITION**

30. For the foregoing reasons, this court's decision was that the Appellant's Appeal that was lodged on 12<sup>th</sup> August 2016 was not merited and the same is hereby dismissed with costs to the Respondents. This court therefore affirms the Judgment that was entered in favour of the Respondents against the Appellant.

31. For the avoidance of doubt, interest on the decretal sum will be at court rates and will run from the date of judgment until payment in full. This court deemed it prudent to pronounce itself on the applicable rate of interest as the Learned Trial Magistrate did not appear to have addressed the same in his judgment.

32. It is so ordered.

**DATED at NAIROBI this 28<sup>th</sup> day of July 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at KIAMBU this 30<sup>th</sup> day of July 2018**

**C.MEOLI**

**JUDGE**