REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 38 OF 2015

ANN NJERI NJOROGE.....1ST APEELANT

CHARLES NJOROGE KINYANJUI.....2ND APPELLANT

VERSUS

NEW KENYA CREAMERIES COOPERATIVE LIMITED..RESPONDENT

(Appeal from judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 101 of 2014 (Onyiego Chief Magistrate, as he then was) on 2nd September, 2015)

JUDGMENT

The appellants are the administrators of the estate of Samuel Kinyanjui Koiya (herein 'the deceased') who died in a road traffic accident on 14th May, 2009. The accident involved the deceased's motor vehicle registration number KAS 164 V driven at the time by the deceased himself and the respondent's lorry registered as number KXP 985 driven by the respondent's employee, one Boaz Kirwa.

It was the appellants' case in the subordinate court that the accident was wholly attributable to the respondent's driver and, to that extent, the respondent was vicariously liable. It is for this reason that they sued the respondent for damages under the Law Reform Act, cap. 26 and the Fatal Accidents Act, cap. 32.

On its part, the respondent not only denied negligence on the part of its driver but also denied in toto the appellants' claim and went further to lodge a counter-claim against the appellant for the sum of Kshs. 2,027,237/=; part of this claim was for compensation for the loss of milk which its truck was transporting and the expenses incurred towards assessment of the extent of the damage of the truck and its repair.

After hearing the parties, the trial court found both the deceased and the lorry driver to have been negligent but in varying degrees; in particular, the deceased was held to have been 60% liable while the respondent was held to be 40% culpable. The court further made an award of Kshs. 9,247,000/= in both general and special damages in favour of the appellant but subject to the extent of the deceased's contribution to the accident.

As for the respondent's counter-claim, the court found that the respondent had not proved it on a balance of probabilities; it was thus dismissed with costs to the appellants.

The appellants were dissatisfied with the trial court's judgment and for that reason they appealed to this honourable court seeking to have the judgment and the decree set aside and substituted with the finding that the respondent was solely to blame for the accident. Their grounds of appeal are set out as follows:

1. The learned magistrate erred in finding that the appellant was 60% liable for the accident despite empirical evidence to the contrary;

2. The learned magistrate erred in arriving at a decision that was wholly against the weight of uncontroverted evidence by an eye witness;

3. The learned magistrate failed to find the respondent wholly liable for the accident despite an eye witness' account that it was liable;

4. The learned magistrate erred in apportioning liability at the ratio of 60:40 without any basis in law or fact; and,

5. The learned magistrate erred in apportioning the award of 9,120,000 at the ratio of 60:40 in favour of the respondent.

It is apparent from these grounds that the appellants' gripe with the decision of the trial court revolves around one thing only-liability. The appellants' simple case is that from the evidence available, the respondent was the sole architect of the accident out of which their kin perished; based on this understanding, the learned magistrate is argued to have misdirected himself in evidence in finding that the deceased not only contributed to the accident but he also so contributed to a larger extent.

As the first appellate court, I have the obligation to evaluate the evidence on record afresh and come to my conclusions irrespective of the learned trial magistrate's findings of fact. My conclusions may as well be consistent with those that the subordinate court came to or, on the other hand, they be at variance. Regardless of my findings, however, I have to bear in mind that the court of first instance had the advantage of seeing and hearing the witnesses and was thus best placed to appreciate certain aspects of evidence which this court is not privy to. (see **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) E.A. 123**).

The appellant appears to be content with the award on quantum of damages except for that aspect of contribution which, of course, is tied to the primary question of liability. The respondent's concern with the award is that the trial court did not have pecuniary jurisdiction to make the award and for this reason it filed a cross-appeal. Despite scouring through the record, I did not get to see the so-called cross-appeal but both parties seem to be in agreement in their submissions that a cross-appeal was filed. Assuming it was filed, I would consider the question of whether the magistrate's court had jurisdiction to make the sort of award it made as fundamental and which ought to be disposed of it before addressing any other issue.

As noted, the learned magistrate made an award of Kshs. 9,247,000/= of which Kshs. 9,120,000/= was the award under Fatal Accidents Act. This amount was of course subject to contribution. The simple question raised by the respondent is whether the trial court had the necessary pecuniary jurisdiction to make this award.

The answer to this question lies in the Magistrates Court Act, Cap. 10 (repealed) and in particular section 5 thereof; that section provided as follows:

The Magistrates' Courts shall have jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed-

> ***(a) Seven million shillings for a Chief Magistrate;***
>
> ***(b) Five million shillings for a Senior Principal Magistrate;***
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> ***(c) Four million shillings for a Principal Magistrate;***
>
> ***(d) Three million shillings for a Senior Resident Magistrate; and***
>
> ***(e) Two million shillings for a Resident Magistrate.***

This is the law that was in force as at 2nd September, 2015 when the court delivered its judgment. This being the case, and, considering the provisions of section 5(a) in particular, it is clear that the learned magistrate did not have jurisdiction to entertain the suit before him.

I appreciate the dilemma that the learned magistrate might have found himself in because it is this Honourable Court that had on 2nd April, 2014 unilaterally transferred the appellants' suit to the magistrate's court for determination. It may be that the judge who ordered the transfer assumed that the award the appellants were eligible for would not exceed the pecuniary jurisdiction of the subordinate court. Whatever the reason behind the transfer, this court cannot confer jurisdiction where none exists and neither can a magistrate's court proceed to preside over and dispose of a matter in the belief that it has been conferred jurisdiction by this court when it is apparent that it is deprived of jurisdiction by statute either expressly or by necessary implication.

More often than not, courts make reference to the decision of the Court of Appeal **in the Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (1989) KLR 1** whenever a question of jurisdiction arises; this decision is usually apt because, in it, the court not only defined what jurisdiction entails but also reiterated that it is a necessary precondition for any court or tribunal to determine the issue before it; it is for this reason that this question must be interrogated at the earliest opportunity possible. In their own words, the judges of appeal had this to say (at page 14 of the judgment):

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

For avoidance of doubt, the learned judges went further and explained what 'jurisdiction' entails and in this regard, they made reference to a passage from ***Words and Phrases Legally Defined, Volume 3 at page 113*** where it is stated:

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both***

these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of particular facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

In light of these pronouncements, I would opine that although there was an order for transfer of the suit to the magistrate's court, the appropriate course that the learned magistrate ought to have taken when he realised the possibility of making a higher award than that which he had jurisdiction to make, was to down his tools and leave it to the parties to make the appropriate application to have the suit returned to this court for disposal. It is possible that the magistrate's court could have foreseen the extent of the probable award from the evidence presented before it if not from the parties' respective pleadings.

I must admit, however, that if the amount of damages awarded to the appellants was what they were rightly entitled to, then it is this Court that initiated the original error in transferring this suit to the lower court. Nevertheless, that mistake could not and ought not to have been the excuse for the lower court to assume jurisdiction in a matter where it was not seized of such jurisdiction; to the extent that it did, its proceedings and its final determination amount to nothing more than a nullity. If I have to echo the words of the learned judges in **Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (supra), 'w*here a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing'*.** It follows that there is no valid judgment against which the appellants could even appeal and for this reason I would dismiss the appellant's appeal.

In the event that I am wrong and therefore I should assess and evaluate the evidence afresh as I would ordinarily be bound to, my attention would be drawn to that part of the evidence on who between the deceased and the respondent's driver could possibly have been responsible for the accident or whether they were both negligent in equal measure or, in the alternative, in varying degrees. For the same reason, I wouldn't venture into the question on quantum of damages for, based on the material before me, both parties appeared to be content with the award save for the question of jurisdiction, at least as far as the respondent is concerned.

It is apparent from the record that none of the appellants witnessed the accident; however, Anderson Muthengi (PW3) whom they called in support of their case was an eye witness. On the material day, he was travelling in a public service vehicle from Kakuzi to Thika. The vehicle in which he was travelling was a few metres behind the deceased's car. From where he was seated, he could see the respondent's lorry, a milk tanker, coming from the opposite direction. Suddenly, the lorry lost control and hit the deceased's car; its cylindrical tank was detached from the chassis and fell on the left side of the lorry. The driver's cabin went the opposite side of the road and blocked the right lane in which vehicles from the lorry's opposite direction, including the deceased's car, were travelling.

This witness, together with other passengers he was travelling with, rushed to the scene; they found the deceased alone, unconscious in his car. They removed him from the car and got help of a good Samaritan who drove the deceased to the hospital in Thika town. Muthengi accompanied him.

Peter Mungai (PW2), a records officer at Thika referral hospital where the deceased was taken for treatment corroborated Muthengi's evidence that he, Muthengi and one John Ngure Muchai appeared in the hospital's casualty register as having brought the deceased to the hospital on 14th May, 2009 and that he was pronounced dead on arrival.

The only other testimony on the appellants' behalf was by the deceased's wife, the 1st appellant. Her evidence was more relevant in assessment of damages due to the deceased's estate and his dependants than on liability for the accident for the obvious reason that she was not an eye witness.

The respondent's driver, Boaz Kirwa (DW1), testified on its behalf. He admitted that indeed an accident involving the respondent's lorry and the deceased's car occurred at Kenol on Nyeri-Nairobi road on 14th May, 2009. On the material day, he was driving the milk tanker from the respondent's Dandora factory in Nairobi to Kiganjo in Nyeri. It was his evidence that the accident occurred when the deceased's vehicle attempted to overtake the vehicle ahead, which he described as a canter. He swerved off the road, apparently to the left but that the deceased also drove to the same side. His lorry's flywheel got disconnected and the tanker was detached from the trailer or chassis. He further testified that the deceased's car was in the middle of the road. The collision, according to him, was on his left lane.

The trailer, according to his evidence, snapped, the cabin went off to the right while the tanker fell on the left side of the road. It was his view, that the snapping and the tanker's disentanglement were as a result of the collision.

He also confirmed that police officers came to the scene and drew sketch map. He denied being responsible for the accident.

Police constable Amos Ngunjiri (DW2) testified on the respondent's behalf; he, however, informed the court that he did not have the police file in respect of this particular accident. All he had was the report of the accident entered in the occurrence book on 14th April, 2009 by police officers whom he identified as Corporal Langat, Corporal David and Police Constable Norman Wafula. None of these officers testified though.

That is as far as the evidence by both the appellants and the respondent went. For reasons that will become clearer in due course, my assessment of this evidence leads me to the conclusion that the respondent's driver was solely to blame for the accident.

As noted, the eye witness' account was that the milk tanker lost control and hit the deceased's car. He was categorical that the latter vehicle was not overtaking at the time of the accident. He was able to recount the events leading to the accident because he had a clear view of the traffic ahead of the vehicle in which he was travelling; it was his uncontroverted evidence that he was seated in the front seat of this vehicle which was barely 40 metres behind the deceased's car.

In these circumstances, I find no plausible reason for rejecting the eye witness' account of how the accident happened. His credibility was not questioned. My assessment of him is that of a good Samaritan who not only witnessed the accident but who also went an extra mile in rescuing the deceased from the wreckage and taking him to the hospital. He cannot be said to have had any particular interest in the matter as to make up stories in favour of the appellant.

Apart from the tanker's driver's denial of the eyewitness' account, the latter's testimony was not discounted by any independent evidence. Police constable Amos Ngunjiri who would have shed some light in this regard did not have the police file and therefore it was not clear whether the police conducted any investigations on cause of the accident and if so, whether there were any findings of such investigations.

It would appear that in apportioning liability for the accident, the learned magistrate relied entirely on an accident report as recorded in the police occurrence book to the effect that the deceased's car was attempting to overtake the vehicle ahead when it collided head-on with the milk truck. The learned magistrate also appears to have been swayed by the fact that the lorry driver was not charged with any offence, probably because of the accident report.

With due respect to the learned magistrate, this report was not investigated; worse still, the police officers who are alleged to have made the report and entered it in the occurrence book after visiting the accident scene did not testify and thus the veracity of their report could not be tested by way of cross-examination; it follows that Constable Ngunjiri's testimony was, at best, hearsay and for that reason alone, it ought not have been the basis upon which the learned trial magistrate faulted the deceased and attributed a larger share, or any measure of liability for that matter, on him.

The tanker driver's evidence did not, in my humble view, raise any probability that the deceased was wholly or largely contributed to the accident. According to him, the deceased's car attempted to overtake a canter ahead of it; to avoid a head-on collision, the tanker driver swerved to the far left but, in the latter's words, the deceased 'followed him'. Yet, this witness testified further that the point of impact was on his left lane.

If it is true that the lorry swerved to the far left, the collision could not have possibly occurred on the left lane in which the lorry was travelling. Further, it is not possible that the driver's cabin could have settled on the right lane after it was delinked from its trailer if at all the lorry driver swerved to the far left.

The most probable picture one gets from the evidence of the lorry driver is that the link between the cabin and the trailer may have snapped as a result of which the lorry lost control and hit the deceased's vehicle in the process. If that is not the case, the lorry driver simply failed to drive, manage or control his vehicle in such a way as to avoid the accident. Either way, he was soley liable for the accident and I so find.

From the foregoing analysis I would have allowed the appellant's appeal and set aside the trial court's judgment on liability if only that court had the requisite jurisdiction. I would have found the respondents 100% liable for the accident and the learned magistrate's order in this regard should have been substituted accordingly. However, for the reasons I have given, the appeal cannot be allowed. It is hereby dismissed.

As mentioned earlier I did not have occasion to see the respondent's cross-appeal although the appellant's acknowledged in their submissions that it was filed. Irrespective of whether it was filed, I cannot have overlooked the question of whether the subordinate court had jurisdiction to determine the case before it. Considering that it is a question that manifested itself, at least as far as the respondent is concerned, in the judgment, it is a question that was bound to be raised at this appellate level by either of the parties. It is also a question that I suppose, this court could have taken up on its own motion considering that it is a question of law that goes to the jurisdiction of the trial court. For these reasons, I will not make any order on the respondent's 'cross-appeal'. Considering the role this court played in the transfer of the appellant's suit to the magistrate's court, I will also not make any order on costs. Orders accordingly.

Signed, dated and delivered in open court this 30th November, 2018

Ngaah Jairus

JUDGE