



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 16 OR 2016

HENRY WAWERU KARANJA.....1ST APPELLANT

PAUL KIMANI WAWERU..... 2ND APPELLANT

VERSUS

**TERESIAH NDUTA KAGIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF FRANCIS WAINAINA NG'ANG'A(DECEASED).....RESPONDENT**

(Being an Appeal from the Judgment delivered by the Hon Onchuru (Mr), Acting Principal Magistrate delivered on the 12th March, 2014)

JUDGMENT

1. This is an appeal arising from the judgment of the Thika Chief Magistrate's Court in CMCC No. 130 of 2012. That was a suit commenced by the Respondent herein (Teresia Nduta Kagiri) who is the Personal Representative of the estate of Francis Wainaina Ng'ang'a (deceased) who was her unmarried son. The cause action arose from a road traffic accident which occurred on 13/10/2010. The Plaintiff sought damages under both the Law Reform Act and the Fatal Accidents Act.

2. After the close of pleadings, the suit was fully litigated with the Respondent calling three witnesses on her behalf. The Appellants did not call any witnesses.

3. In a judgment dated 12/03/2014, the Learned Trial Magistrate found that the Respondent had proved her case and entered judgment on 100% liability against the Appellants. On quantum, the Learned Trial Magistrate awarded the following sums:

- a. Pain and suffering – Kshs. 100,000/=
- b. Loss of expectation of life – Kshs. 150,000/=
- c. Lost Years – Kshs. 1,280,000/=
- d. Special damages – Kshs. 32,350

4. Hence, in total, the Learned Trial Magistrate awarded the sum of Kshs. 1,562,350/= against the Appellants. He also awarded costs and interests to the Respondent.

5. The Appellants were aggrieved by that decision and have appealed to this Court.

6. I will begin by stating the standard of review for first appeals: the role of the first appellate Court is to reconsider and re-evaluate the evidence presented by the parties and come up with independent determinations and conclusions. However, in doing so the Court must recall that it did not have an opportunity to observe the witnesses or their demeanor and make allowance for it. See ***Kemfro Africa Ltd T/A “Meru Express Services (1976)” & Another v Lubia & Another [1987] KLR 30.***

7. After reading both the Appellants’ and Respondent’s submissions and the grounds of appeals filed herein, it is my view that I can perform my double duty of re-evaluating the entire trial and reviewing it for the alleged errors of which the Appellant complains, by recasting the Appellant’s complaints revealed in their submissions and Grounds of Appeal into seven headings:

- a. That there was no proof that the Deceased was a passenger in the vehicle;
- b. That there was no proof that the driver was negligent;
- c. That there was no proof that the vehicle belonged to the Appellants;
- d. That the Respondent had not tabled any proof of earnings to justify any award in damages for lost years;
- e. That the Respondent had not proved dependency;
- f. That the Magistrate was wrong to give double compensation under the Law Reform Act and the Fatal Accidents Act.

8. I will proceed to quickly dispose of each of the seven questions *in seriatim*.

9. First, the Appellant argues that there was no proof proffered in court that the Deceased was a fare-paying passenger in the Motor Vehicle. In particular, the Appellant argues that no receipt was produced to prove the fact that the Deceased was a passenger. They would therefore have had the Trial Court make a finding that this fact was not adequately proven to the required standard with the effect of dismissing the Plaintiff’s case.

10. After reviewing the Trial Court record, I find this complaint unavailing to the Appellant. Two witnesses testified that the Deceased was in the Vehicle. PW1 was a fellow passenger in the Motor Vehicle. He testified that he was in the Motor Vehicle and he saw the Deceased seated next to the Conductor during the ill-fated journey. He testified that only the Deceased died during the accident. PW2, Cpl Wycliff Makhanu of the Kandara Traffic Base investigated the accident and issued the Police Abstract.

His investigations showed that the Deceased was in the vehicle when the accident occurred. Indeed, he charged the driver of the Motor Vehicle, the 2ndAppellant with the offence of causing death by dangerous driving. The person with respect to whose death the charges related was the Deceased. The case was Traffic Case no. 20 of 2010 at Kandara Law Courts. Cpl Makhanu produced both the Police Abstract and the Judgment from the Traffic case. Both are clear and unequivocal that the Deceased was a passenger in the Motor Vehicle and died as a result of the judgment. It really is idle for the Appellant to argue on appeal that the fact that the Deceased was in the Motor Vehicle was not established on a balance of probabilities. In my view, that fact was proven beyond the required threshold both by documentary evidence and the testimonies of PW1 and PW2 which both remained unshaken on cross examination.

11. Second, the Appellants complains that the Respondent did not prove to the required standards that the 2ndAppellant was negligent. This complaint is largely based on the fact that PW1 told the Court that he did not know what speed they were moving and that he did not tell whether the Deceased had belted up. The Appellants think that the evidence of PW1 should have been given little or no weight at all.

12. The Appellants ignore the fact that the 2ndAppellant was charged in a Traffic Case and found guilty

of causing death by dangerous driving. The judgment of that traffic case was produced in Court as conclusive proof of this fact. Even without more, this would have been sufficient to meet the threshold in a civil case. However, here, we have the extra evidence of a passenger in the Motor Vehicle who positively testified to the reckless manner in which the Motor Vehicle was driven. It was being driven at a high speed, he said. And that the 2nd Appellant was trying to “overlap and overtake” when the accident occurred. The fact that he did not know what speed the Motor Vehicle was travelling in does not necessarily detract from the conclusion that the driver was driving reckless. Neither does the fact that PW1 did not know whether the Deceased had his seat belt on. This latter issue could, perhaps, go to the question of contributory negligence – but it was not pursued at all.

13. Suffice it to quote from the judgment of the Traffic Case:

I have considered the evidence adduced by the prosecution and the defence and the question for determination is whether the accused caused the death of Francis Wainaina by careless driving. The witness stated that the vehicle was driven at a high speed but none could tell how fast. They also all said that the accused was trying to overtake another vehicle when the accident occurred because it was a corner. The driver corroborated this but said he was trying to avoid the accident. Then if he was driving at a reasonable speed he would have kept his distance and would have stopped. There was no evidence that the vehicle he was overtaking was stationary (sic) as he alleged. All the prosecution witnesses stated he was overtaking at a corner and there was an oncoming vehicle. The sketch plan shows there was a bend and a continuous yellow line which is a no overtaking zone. I found that the accused was careless in his driving and caused the death of Francis Wainaina Nganga.

14. With this finding of a competent court, findings which were not challenged on appeal against the judgment of the Learned Trial Magistrate in the Traffic case, very little else need be added to conclude that the Trial Court committed no error at all in finding that the 2nd Appellant was, indeed, negligent in causing the death of the Deceased.

15. Third, the Appellants argue that there was no proof that the Motor Vehicle belonged to the 1st Appellant, and that, therefore, it was wrong for the Trial Court to conclude that the 1st Appellant was vicariously liable for the negligence of the 2nd Appellant. The Appellants’ complaint in this regard is that the Respondent in the Trial Court did not produce any official search to prove that the Motor Vehicle belonged to the 1st Appellant and that he only relied on the address on the Motor Vehicle. Without the production of the official search, the Appellants argue, there is no proof that the Motor Vehicle belonged to the 1st Appellant. As such, the 1st Appellant should never have been held vicariously liable.

16. I begin with the observation that in civil cases such as the present one, the standard of proof is on a balance of probabilities. Essentially, this means that the Plaintiff in a civil claim must prove that his case is more probable than not or that each particular element of his case is more probable than not. Can we say that the Respondent established, on a balance of probabilities that the Motor Vehicle belonged to the 1st Respondent?

17. To establish ownership of the Motor Vehicle, the Respondent relied on the evidence of PW2, Cpl Makhanu. He testified that the Motor Vehicle belonged to the 1st Appellant. He produced the Police Abstract which indicated as much. He testified that his first indication that the Motor Vehicle belonged to the 1st Appellant was the name and address on the Motor Vehicle itself. Secondly, he confirmed the fact when the 1st Appellant showed up at the Police Station to re-claim the Motor Vehicle after the accident. The 1st Appellant had to show him the log book to the Motor Vehicle in order for the Police to release the Motor Vehicle to him. Cpl Makhanu testified that he saw the log book and confirmed that it showed that the Motor Vehicle belonged to the 1st Appellant.

18. In the face of this evidence, the Appellants simply deny that ownership was proved to the requisite threshold of proof. Evaluating the evidence on record, I do not concur with the Appellants. It is true that no Certificate of Search was presented to show ownership. It is also true that a Certificate of Search is perhaps one of the most reliable way to prove ownership of a Motor Vehicle in a suit such as this one. However, it is not the only method. Like all matters at issue in a suit, ownership of a Motor Vehicle can

be established through *viva voce* evidence and other means.

(See *Charles Mageto & Another v Sospeter Ndung'u Kamau, Civ. Appeal No. 158 of 2011 at Nyeri; Margaret Waithera Maina v Michael K. Kimaru, Civ. Appeal no. 16 of 2015 at Nairobi*.) Here, it was established by the oral testimony of Cpl. Makhanu who referenced a log book he had seen. He also testified that he released the Motor Vehicle to the 1st Appellant. Finally, he testified that the Motor Vehicle had the 1st Appellant's address on it. I have no doubt that these are independent pieces of evidence that, seen together, and without any other evidence militating against them, to conclude that the ownership of the Motor Vehicle by the 1st Appellant was established on a balance of probabilities.

19. Next, I will deal with the issue of damages. The first salvo that the Appellants throw in this regard is that the Plaintiff did not prove how much the deceased used to earn and that he used to give her Kshs. 10,000 per month. The Appellants complain that no document at all was produced to show that the deceased used to send the money to her mother. There is, further, no evidence to show how much the deceased was earning as a clothes trader at Salama Market.

20. I need to dispose off several aspects of the appeal here quickly. First, the Appellant says that the Plaintiff did not prove that they are entitled to any sums for loss of dependency or lost years because she did not prove that she was the mother of the deceased. I do not agree that the Respondent did not prove that she was entitled to this head of damages. She testified quite straightforwardly that she was the mother of the deceased and that the deceased used to give her Kshs. 10,000 every month. In cross examination, all the Appellant's counsel did was to ask her if she had come to court with a letter from the Chief to prove that she was, indeed, the mother to the deceased. The Respondent responded in the negative. The lack of a Chief's letter is not an automatic proof of the negative: that the Respondent is not the mother of the deceased. Indeed, her oral testimony, believed by the Learned Magistrate was sufficient to prove that she was the mother.

21. The same is true about the proof of dependency. She testified that the Deceased used to give her Kshs. 10,000 per month. It is true that she did not produce any document to prove this – but the law does not say that a document must be produced to prove such an assertion. The law demands that each allegation must be proved on a balance of probabilities. Here, the Respondent testified that she received Kshs. 10,000 per month from the Deceased. She was not cross-examined on the claim. The Learned Trial Magistrate was therefore entitled to make a finding that that was the amount of money she received from the Deceased. In any event, the Learned Trial Magistrate used the sum of Kshs. 10,000/= not as the amount the Deceased used to give to the Respondent but as the total earnings per month for the Deceased.

22. The Appellants have also argued that the Learned Magistrate erred in fact and in law in awarding damages to the Respondent under both the Fatal Accidents Act and the Law Reform Act thus awarding damages which were inordinately high compared to damages in similar cases. The Appellants cited the famous *Kemfro Africa Limited T/A Meru Express Services (1976) & Another [1985] eKLR*. In this case, the Court of Appeal stated that:

... The net benefit will be inherited by the same Dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

23. That court added that:

This is so despite the provisions [of the Law]...

Reform which declares that - "the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act ... anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya.

The legal approach taken by Kemfro is now considered trite. It is, however, not clear at all what head of damages the Appellants here claim is double compensation. I would assume they are referring to the award of damages under the head loss of expectation of life. If so, I do not think that the principle established in the Kemfro Case supports their position. The practice that has emerged from our case law is that where damages are awarded for loss of dependency or lost years, the damages for loss of expectation of life is limited to a conventional sum. Indeed, that was the approach the Court took in ***Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013]eKLR*** which the Appellants' counsel cited to me with approval.

24. That is precisely what the Learned Trial Magistrate did here by awarding the sum of Kshs. 150,000/=. I do not find that figure to be inordinately high as to warrant interference by this Court.

25. Finally, on the issue of the dependency ratio to be used in calculating the sum to be awarded for lost years, the Appellants insist that it was wrong for the Learned Trial Magistrate to use the ration of two-thirds. They maintain that he should have used the ration of one third (1/3) because it was clear from the evidence that the Deceased was not married and did not have any children.

26. The manner of assessment of damages under the Act was succinctly put by Ringera J., in ***Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)*** where he stated as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

27. As I have already found that the figure of Kshs. 10,000/= would, conceivably have been the right one to use as the multiplicand. The Learned Trial Magistrate, however, used the sum of Kshs. 8,000 as the multiplicand. It is not clear how the Learned Magistrate arrived at the figure of Kshs. 8,000/=. The amount raised in evidence (and pleadings) and not controverted was Kshs. 10,000/=. That should have been the multiplicand. It is the multiplicand I will adopt in this judgment.

28. As for the multiplier, the Learned Trial Magistrate used the figure of 20 years. Neither parties appear to have a problem with that. Since I do not find the multiplier unreasonable given the circumstances, I will not disturb that finding.

29. The problem is on the dependency ratio to be used. The Appellants insist that it was a misdirection for the Trial Court to use a ratio of two-thirds given that the Deceased was unmarried and did not have children.

30. I have looked at our decisional law on this point. It would appear that our Courts tend to lower the dependency ration when the Deceased is an unmarried child and the claimant the parent. This is due to the presumption that such a child spends less at home by virtue of being unmarried. Of course, this is a presumption that can be rebutted by actual evidence. Hence, in ***Mary Kerubo Mabuka Vs Newton Mucheke Mburu & 3 others (2006) eKLR*** the court used a multiplier of 20 years on a 26 year old unmarried lady and a dependency ratio of ½. Similarly in the case of ***Alice O. Alukwe Vs Akamba Public Road Services Ltd (2013) eKLR***, the court used a dependency ratio of 1/2 on an unmarried lady aged 24 years. In ***Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR***, the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years. The principle emerging from these cases is that the Court will use a lower dependency ratio where the Deceased was unmarried and therefore less inclined to spend his or her

earnings at home. Given this emergent practice, I would agree that the use of the dependency ratio of two-thirds here was high. I would, in consonance with the emerging judicial practice, go with a ratio of one-half (1/2) in the circumstances of this case.

31. The result, then, would be that I will re-compute the damages to be awarded for loss of dependency or lost years as follows: Kshs. 10,000/= x 12 x 20 x ½. The total amount to be awarded under this heading will therefore be Kshs. 1,200,000/=.

32. There is no appeal against the other awards of damages and there is no reason for me to disturb them. They will, therefore, remain intact.

33. The end result, then, is the following:

a. The appeal against the finding on liability is dismissed.

b. The damages awarded to the Respondent shall be re-computed as follows:

Pain and Suffering Kshs. 100,000

Loss of Expectation of life Kshs. 150,000

Lost Years Kshs. 1,200,000

Special Damages Kshs. 32,350

Total Kshs. 1,482,350

34. Since the Appellants have succeeded in part, I will not award any costs in this appeal.

35. Orders accordingly

Dated and delivered at Kiambu this 27th day of February, 2017.

JOEL NGUGI

JUDGE