REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 159 OF 2011

LOCHAB BROTHERS LIMITED……..…….....APPELLANT

VERSUS

JULIUS KIPCHIRCHIR YEGO *as administrator*

***of the estate of* WILSON KIPKURGAT YEGO.....RESPONDENT**

[Being an appeal from the original judgment and decree of G. A. Mmasi, Senior Resident Magistrate, in Eldoret CMCC No. 982 of 2009 delivered on 23rd August 2011]

JUDGMENT

1. The appellant is aggrieved by the judgment of the lower court dated 23rd August 2011. By a plaint dated 2nd November 2009, the respondent pleaded as follows: That on 17th May 2008, the deceased was employed by the appellant. He was inflating a tyre for the appellant's vehicle registration number KAU 993Z. There was a blowout. The ring holding the rim sprang and hit the deceased on the head. He died instantly.

2. The learned trial magistrate found the appellants *wholly* liable for the accident. The court assessed general damages at Kshs 564,000. The respondent was also granted interest and costs.

3. The appellant filed a memorandum of appeal on 12th September 2011. It raises *seven* grounds. They can be condensed into *four*. First, that the learned trial magistrate misapprehended the evidence by finding the appellant 100% liable; secondly, that the amount of general damages was exorbitant; thirdly, that there was no evidence that the deceased had dependents; and, fourthly, that the learned trial magistrate employed wrong principles in assessing damages.

4. At the hearing of this appeal, the appellant relied largely on the written submissions filed on 11th April 2016. Learned counsel submitted that the deceased contributed to his injuries. She submitted that dependency ratio of 2/3 applied was erroneous. The ratio of 1/3 was more appropriate. But in any case, there was no evidence of dependency. She attacked the award of damages as too high as to disclose an *error of principle*.

5. The appeal is contested by the respondent. There are written submissions filed on 19th February 2015. They are on a three-strand. First, that the findings on liability were consistent with the evidence; secondly, that the deceased's brother and parents relied on him. The award of *loss of dependency* was thus reasonable. Thirdly, that the appellant admitted that the deceased died in the course of his employment. I was implored to dismiss the appeal.

6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

7. I will deal first with the element of negligence. PW1 was a brother of the deceased; and, the administrator of the estate. He produced a limited grant (Exhibit 5). He said the deceased had worked for the appellant for about 2 to 3 years. His salary was Kshs 4,500. He was 31 years at the time of the accident. PW1 did not witness the accident. He received information that the deceased died at the appellant's yard. He found the body at the Moi Teaching and Referral Hospital mortuary. He produced the death certificate (Exhibit 2). He said the deceased used to help his younger brother and parents.

8. On cross examination, he said the deceased was living with his parents at Ziwa; and, used to pay school fees for his brother, Kiprop. That marked the close of the plaintiff's case.

9. The appellant called one witness. He was Maranga Otiso, an administrator at Lochab Brothers. He had worked there for 15 years. He confirmed that the deceased was their employee. He was a turn boy; and, was on duty on 17th May 2008. He said the deceased was filling a tyre. It burst; and, the rim hit him on the head killing him. He denied that the appellant was negligent. He testified as follows-

> *"The company is not to blame…I blame the deceased. The deceased had not locked up the tyre in the cage. Deceased had worked in that capacity for 3 years."*

10. Upon cross examination, he said he did not witness the accident; but he rushed to the scene immediately. The deceased had not been provided with a helmet. A supervisor called Ezekiel was also not at the scene. He said the deceased was earning Kshs 3,500 per month. He said the appellant met the cost of transporting the body for burial.

11. From my re-appraisal of the evidence, it is *not* disputed that the deceased was *employed* by the appellant; and, that he died in the *course* of his employment. At paragraph 5 of the statement of defence dated 15th February 2010, the appellant admitted *ownership* of motor vehicle KAU 993Z; and, that the deceased was filling its tyre on the date of the accident.

12. The live question is whether the deceased contributed to the accident. He was employed as a *turn boy*. He was inflating a tyre. It did not call for any specialized training or supervision. But it was fraught with danger. The appellant's witness said the deceased did not place the tyre in a safety cage. The trouble is that he was not there at the time of the accident. He conceded that the deceased was not provided with safety gear. His supervisor, Ezekiel, was absent.

13. It was the deceased who was filling pressure into a tyre. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR, *John Karanja v Eastern Produce (K) Limited*, Eldoret, High Court Civil Appeal 35 of 2013 [2014] eKLR.

14. I have stated that the appellant's sole witness did not witness the accident. There is no cogent evidence that the deceased contributed to the accident. The allegation in the statement of defence that the deceased had not placed the tyre in the lock bars; or, that he failed to fill it horizontally remained plain allegations. The witness conceded that the deceased was not provided with safety gear. His supervisor, Ezekiel, was also absent. He who alleges must prove. Section 107 of the Evidence Act. See also *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P & A Cause 244 of 2002 [2016] eKLR. It must follow as a corollary that the appellant was *wholly* negligent. The appeal on liability is accordingly devoid of merit. It is *dismissed*.

15. I will now turn to *quantum* of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

16. From the evidence of PW1, the deceased was not married. He was living with his parents at Ziwa; and, used to pay school fees for his brother, Kiprop. The appellant did *not* offer any evidence in *rebuttal*. I thus concur with the learned trial magistrate that the parents of the deceased; and, the deceased's younger brother, Kiprop, were dependents.

17. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The deceased died *immediately*. The award Kshs 10,000 for *pain and suffering* was reasonable. I am also *disinclined* to disturb the award of Kshs 50,000 for *loss of expectation of life*. As I shall discuss shortly, the latter award *must* be *discounted* against any award under the Fatal Accidents Act.

18. The respondent obtained a limited grant of letters of administration. (Exhibit 5). He is a brother of the deceased. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See *Kemfro v Lubia* [1982-88] KAR 727, *Rev. Fr. Leonard O. Ekisa & another v Major Birge* [2005] eKLR.

19. From the death certificate, the deceased was aged 31. The multiplier of 18 years adopted by the lower court was *not* unreasonable. The appellant admitted that the deceased was earning Kshs 3,500 per month. That was the figure adopted by the lower court. The arithmetic by the learned trial magistrate was as follows: the proved salary of Kshs 3,500 x 18 x 12 x 2/3 =504,000.

20. The learned trial magistrate erred by allocating 2/3 of the salary to the estate. There was no evidence that the deceased devoted that kind of share to his parents or younger brother. The more reasonable ratio would be 1/3. The sum adds up as follows: 3,500 x 18 x 12 x 1/3 =252,000. It was also important to take into account the *accelerated payment*. I will round off the figure to Kshs 200,000. Furthermore, I will discount the award of Kshs 50,000 for *loss of expectation of life* under the Law Reform Act against the award under the Fatal Accidents Act. See *Kemfro v Lubia* [1982-88] KAR 727. The rationale is that all these amounts end up in the *same* estate.

21. In the result, the appeal succeeds only in *part*. The appeal on *liability* is *dismissed*. The judgment on quantum of *general damages* is *set aside*. There shall now be judgment in favour of the respondent against the appellant as follows-

i. General damages for pain and suffering…....Kshs 10,000.

ii. Loss of expectation of life……..…Kshs 50,000.

iii. Loss of earnings……....Kshs 200,000.

Subtotal……..*Kshs 260,000.*

Discount for loss of expectation of life……Kshs 50,000.

Net award.……..…*Kshs 210,000.*

22. The upshot is that the appellant shall pay the respondent the sum of Kshs 210,000. I also award the *respondent* interest and costs in the *lower court*. I order that each party shall bear its own costs in this *appeal*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 30th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Isiji for the appellant instructed by Nyairo & Company Advocates.

Ms. Torosi for the respondent instructed by Cheluget & Company Advocates.

Mr. J. Kemboi, Court Clerk.