REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 140 OF 2014

JENIFER WAMBUI.....APPELLANT

V E R S U S

STEPHEN NJOROGE..... 1ST RESPONDENT

NADI AHMED ZAI ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. S. N. Mbugi (Mr.), Chief Magistrate delivered on 17th October, 2013 in Thika CMCC No. 762 of 2010)

JUDGEMENT

1. On or about 2nd July 2009, Charles Ng'ang'a Njoroge, the deceased, was lawfully riding motorcycle registration no. K.M.C.E 053B along Delmonte Greystone Road when it was knocked by motor vehicle registration no. KAH 553W. The aforesaid motor vehicle at the time of the accident, Jeniffer Wambui, the appellant herein was the beneficial owner while Nadia Ali Ahmed Zain, the 2nd respondent herein was the registered owner of the aforesaid motor vehicle. As a result of the accident the deceased got fatally injured. Stephen Njoroge Ndungu the 1st respondent eventually obtained letters of administration in respect of the estate of Charles Ng'ang'a Njoroge. Upon obtaining letters of administration, the 1st respondent filed a compensatory suit claiming for *inter alia*, damages for the fatal injuries the deceased suffered. Hon. Mbungi, learned Ag. Chief Magistrate heard the suit and in the end found the deceased and the respondents equally to blame for the accident. The respondent was eventually awarded ksh.529,290 as general damages which amount would be subjected to 50% contribution. Being dissatisfied, the appellant preferred this appeal while the 1st respondent preferred to file a cross-appeal to challenge the decision of the trial court. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal and the cross-appeal disposed of by written submissions. At the time of writing this judgment, the 1st respondent was the only party who had filed his submissions.

2. I have re-evaluated the case that was before the trial court. I have also considered the written submissions filed against the appeal and those filed in support of the cross-appeal. The arguments presented hinge on a challenge on liability and quantum. On liability, it is submission of the appellant that the learned Ag. Chief Magistrate erred to make an order apportioning liability to the appellant yet there was a cogent evidence showing that the appellant did not contribute in any way to the accident. The appellant was of the view that the deceased was wholly to blame for the accident. The 1st respondent on the other hand is of submission that the appellant should have been held wholly to blame in view of the evidence of an eye witness. It is pointed out that the evidence of both PW2 and PW3 show that motor vehicle registration KAH 553W moved from its lane and went to the lane of motorcycle registration no. K.M.C.E 053P at the extreme left. It is said that the motor drove at very high speed thus hitting the motor cycle which had desperately moved off the road. It is the basis of these evidence that the 1st respondent urged this court to allow his cross-appeal by holding the appellant wholly liable for the accident. I have considered the divergent arguments and further analysed the evidence. Samuel Kamau (PW3) told the trial court that he was a pillion passenger aboard motor cycle registration no. K.M.C.E 053B when it was knocked by motor vehicle registration no. KAH 553W. P.W.3 stated that the motor vehicle was coming from the opposite direction while the motorcycle was riding on the left hand side of the road. PW3 also stated that the motor vehicle lost control and hit the motor cycle throwing him and the deceased to the bush. PW3 explained that the motor cyclist moved to the extreme left to avoid being hit but was

eventually hit outside the road. PW3 stated that the motor vehicle was being driven in high speed and the accident occurred in a slight bend. The appellant summoned Joel Maina Kamau (DW1) to testify in support of the defence case. DW1 told the trial court that he was seated in the front passenger seat when he witnessed the accident unfolding. He claimed that the motor vehicle was not driving at high speed. He alleged that the motor cycle came from the opposite direction at high speed and on the lane of the motor vehicle. DW1 blamed the motorcyclist for riding on the wrong lane at high speed. It is not in dispute that both PW3 and DW1 were the only eye witnesses who were summoned to testify. The duo gave evidence which contradicted each other. PW3 blamed the driver of the motor vehicle for driving on the wrong lane and at high speed. DW1 made similar accusations as against the rider of the motorcycle. The police investigating officer was not summoned to give the independent side of the story. In the circumstances of this case it is only fair and just to have the rider of the motorcycle and the driver of the motor vehicle share blame in equal measure. It is my humble view that the order apportioning liability in the ratio of 50:50 should not be interfered with. Consequently the ground seeking to impugn the order on liability is dismissed in both the appeal and cross-appeal.

3. The decision on quantum was also challenged both in the appeal and cross-appeal.

4. The appellant challenged the multiplicand of ksh.5,000/= arguing that the same was awarded without evidence. It is also argued that the trial court fell into error when he awarded a multiplier of 20 years for a 36 year old. The 1st respondent pointed out that the deceased's correct age at the time of his death was 24 and not 36 years as claimed by the appellant. The 1st respondent was of the view that a multiplier of between 30 and 35 years was the most reasonable. The 1st respondent also complained that the multiplicand of ksh.5,000/= was too low in the circumstances. The 1st respondent proposed a multiplicand of kshs.9,000/= to be reasonable. Let me consider the question in respect of the multiplicand. The certificate of death shows that the deceased was aged 24 years at the time of death as opposed to 36yers as suggested by the appellant. The learned Ag. Chief Magistrate also noted that the deceased was aged 24 years at the time of his death. The learned Ag. Chief Magistrate considered the nature of the job the deceased did as a motorcycle rider and came to the conclusion that the deceased would actually do that kind of a job for 20 years. On my part I agree with the learned Chief Magistrate. I therefore see no reason to interfere with the multiplier of 20 years.

5. The second limb of this appeal is in respect of the multiplicand.The learned Ag. Chief Magistrate considered the figure of ksh.5000/= proposed by the appellant and ksh.7,200/= proposed by the 1st respondent. The learned Chief Magistrate took note of the fact that there was no evidence of the income the deceased received on a monthly basis. He found the figure of ksh.5,000/= to be reasonable. The record shows that the appellant suggested in her submission a multiplicand of kshs.5,000/=. She has now disowned the figure she suggested on appeal which the trial magistrate found to be reasonable. On my part I am satisfied that the figure of kshs.5000/= is fair and reasonable in the absence of any plausible evidence. Again, I find no merit in the challenge on the multiplicand applied by the trial court.

6. The final ground argued on appeal is the question as to who was the owner of the motor vehicle registration no. KAH 553W. The appellant has complained that the trial magistrate had failed to determine that the 2nd respondent was the owner of the motor vehicle registration no. KAH 553W and by also failing to find that the transfer of the aforesaid motor vehicle had been effected in compliance with the Traffic Act. The 1st respondent urged this court to reject the submission arguing that a police officer from the traffic department testified to the effect that at the time of the accident motor vehicle registration no. KAH 553W was owned by the appellant. I have examined the recorded evidence and it is clear that P.C Stanley Kosgei (PW1) produced a police abstract form which indicates that the appellant was the owner of the aforesaid motor vehicle as at the date of the accident. The record does not indicate that the appellant or her counsel opposed to the production of the police abstract form as an exhibit in evidence. In the case of **Joel Munga Opija =vs= East Africa Sea Food Ltd, C.A no. 309 of 2010 (KSM),** the Court of Appeal expressed itself and observed that when an abstract is not challenged and is produced in court without any objection, its contents cannot latter be denied.

7. I find the challenge on the ownership of the motor vehicle registration KAH 53W to be unmeritorious.

8. In the end, I find both the appeal and the cross-appeal to be without merit. They are dismissed with an order directing each party to meet its own costs of the appeal.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent