REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL NO.203 OF 2013

RAIPLY WOODS (KENYA) LTD.....APPELLANT

-VERSUS-

LUCY NYAMBURA MWANGI & ANOTHER....RESPONDENTS

J U D G M E N T

Background

1. **Joseph Mwangi Kamau** (now deceased) met his death in a road accident while travelling in motor vehicle registration number KAY 004L ZA 9636 along Nakuru – Eldoret road. He was then employed as a turn boy by **Raiply Woods (Kenya) Ltd** who were said to own the accident motor vehicle. His widow **Lucy Nyambura Mwangi (1st plaintiff)** and son **Samuel Kamau Mwangi (2nd plaintiff)** successfully sued **Raiply Kenya Ltd** vide **Nakuru Chief Magistrate Civil Case No.1020 of 2010**. In the Judgment delivered on 9th September, 2013, the trial court found the defendant vicariously liable for the negligence of its driver. It awarded the plaintiff damages as follows:

Special damagaes	***-***	***0***
Pain and suffering	***-***	***25,000***
Loss of expectation of life	***-***	***120,000***
Loss of dependency	***-***	***880,000***
Total	***-***	***1,025,000***
Less damages under the		
Law Reform Act	***-***	***145,000***
Net Award		***Shs.880,000***

2. Both the plaintiffs and the defendant were aggrieved by the judgment. The plaintiffs filed appeal No.197 of 2013 on the grounds *inter alia* that:

> ***1. That the Learned Trial Magistrate misapprehended the law in arriving at an average of Kshs.11,000 as the deceased's monthly income.***
>
> ***2. The Learned Trial Magistrate erred in law in using the net income instead of using the gross income less statutory deductions in calculating the monthly earnings of the deceased.***
>
> ***3. The Learned Trial Magistrate erred in law in deducting, mathematically, the awards under Law Reform Act.***

3. The defendant **Raiply Woods Kenya Ltd** filed their cross – appeal being No.203 of 2013 on grounds that:

> ***1. The learned Magistrate erred in law and in fact in disregarding that the plaintiff failed to prove negligence and particulars of***

negligence pleaded in the Plaint and erred in holding the Defendant 100% liable.

2. The Learned Magistrate erred in law and in fact in disregarding and ignoring that the Plaintiff failed to prove that the Defendant was the registered and or beneficial owner of vehicle registration numbered KAT 004L ZA 9636 which ownership had been denied by the Defendant.

3. The Learned Magistrate erred in Law and in fact in disregarding the defence evidence in its entirety and in particular ignoring clear evidence of contributory negligence and dismissing the Defendant's claim for contributory negligence.

4. The Learned Magistrate failed to appreciate the totality of the evidence before him and erred in disregarding the submissions filed on behalf of the Defendant.

5. The damages awarded by the Learned Magistrate are excessive and unrealistic and in particular and multiplier of 10 years applied in awarding loss of dependency.

6. That the Plaintiff having admitted having received a sum of Shs.171,761.00 from the Defendants the Learned Magistrate erred in law and in fact in failing to account for the payment made and deducting the amount so paid from the award of damages.

The Appellant prayed that the Appeal be allowed and judgment against the Appellant be set aside and in the alternative that contributory negligence be provided for and damages awarded be reviewed and revised

4. The two appeals were consolidated by consent of the parties on 4th February 2016 before **Mulwa J.** when the parties also consented to canvass the appeals by way of written submissions. The parties duly exchanged and filed submissions on both appeals and highlighted the same before me on 22nd February 2017.

5. I have considered both records of appeal and the submissions as filed and highlighted by the parties. This being a first appeal, I am not bound by the findings of the trial court and I am under duty to re-evaluate the evidence and reach my own conclusions. See **Selle – Vs- Associated Motor Boat Company (1968) EA 123**. In addition, as the appellate court, I will interfere with the lower court's judgment only if the same is founded on wrong principles of fact and or law as guided by the court of appeal decision in **Nkube –Vs- Nyamiro (1983) KLR 403 that:**

> ***"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

6. Secondly, that in an award of damages, I must be conscious not to disturb an award unless it is shown to be erroneous. I take guidance from the Court of Appeal in **Ndiritu Vs Ropkoi & Another EALR 334**, where the Court held that "the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did." See also **Mwangi & Another –Vs- Wambugu (1983) 2 KCA 100** where the above principle was restated.

Issues in Appeal No.203/2013.

7. The appeal in 203/2013 concerns both liability and quantum.

Liability

8. The appellant (**Raiply Woods Ltd**) has set out three grounds disputing liability. They state in grounds 1, 2 and 3 that there was no prove of negligence that the ownership of the motor vehicles was not proved and that evidence of contributory negligence was not taken into account. They also state that the award was excessive. I will deal with each sequentially.

Negligence

9. The appellant's submission is that the particulars of negligence pleaded in the plaint as "*driving at an excessively high speed", "without exercising necessary skills required", "failing to brake", "swerve or stop to avoid the accident", losing control of the said vehicle" and hitting, knocking and crushing the deceased"* were not proved. They submit that it was the duty of the plaintiff to prove the particulars. They cite the case of **Eastern Produce (K) Ltd Vs Christopher, Eldoret High Court Civil Appeal No.43 of 2001** where the Court held that:

> ***"It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in case of Kiema Mutuku V Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258****, where it was held that*: ***"there is as yet no liability without fault in the legal system in Kenya, and the Plaintiff must prove some negligence against the defendant where the claim is based on negligence***."

10. In the proceedings before the trial court the plaintiff **Lucy Nyambura Mwangi (PW1)** testified that her husband was a turn boy in the defendant's vehicle. Indeed the defendant company did not dispute that the deceased was in their employ and aboard the lorry time of the accident. Evidence relating to the driver's negligence was given by **PW3 No.46166 P.C. Daniel Muinde** who recounted the accident as captured in the OB report No.47 of 8th January 2010. The OB indicated that there was an accident in which motor vehicle KAT 004L ZC

9636 Mercedes Benz trailer lost control and swerved and landed in a ditch instantly killing the deceased. The witness testified that it was noted that the driver one **Khalid Said** was drunk at the time of the accident; that he was arrested and placed at the police cells and later charged in a Court in Molo.

11. The OB report which clearly documented the accident was not controverted at the trial. Indeed the appellant's driver one **Khalid Said Bisher** who testified for the defence gave the details of the accident which largely accorded with the OB record. He told the court that he was driving the motor vehicle KAT 004L/ZC 9636, make Mercedes Benz on the fateful date and confirmed that the deceased who was employed by the appellant company as a turn boy was a passenger in the said vehicle when the accident occurred.

12. He said that an oncoming trailer was trying to overtake a mini bus and he had to give way to avoid a head on collision. He stated thus, *"I left the road and when I attempted to return to the road, my motor vehicle skidded (sic!) and knocked the road embankment"*. In cross examination he stated… *"I swerved off the road to give the trailer way to avoid a head on collision. I was then unable to move back to the road….. the trailer knocked the road embankment"*.

13. From the evidence above, I find that the particulars of negligence were sufficiently proved on a balance of probability and that the learned trial magistrate did not err in so holding. The trial court rightly considered all evidence placed before it and came to the correct conclusion that the driver was negligent and lost control of the vehicle. As admitted by the driver himself he swerved and was unable to move back to the road. I would therefore dismiss the ground that negligence was not proved.

Contributory negligence

14. The appellant submits that the trial court failed to consider the appellant's submission that there was contributory negligence on the part of the deceased. They contend that the deceased was thrown out of the motor vehicle because he failed to wear a seat belt. To that end the appellant seeks to have liability be apportioned on account of the contributory negligence on the part of the deceased.

15. I have considered the evidence in this respect. It is true that the appellant pleaded contributory negligence in its defence. The evidence given by the driver was that he did not know whether the deceased had tied the seat belt. The respondent also produced a motor vehicle inspection certificate (Exh. No 1.) to show that the vehicle was fitted with seat belts. Considering the driver also testified that the turn boy was thrown out of the vehicle through the windscreen. I would agree with the appellants that it was more probable than not that the turn boy did not have his seat belt on at the time of impact. On the other hand, and as I have already found, it was proven that motor vehicle was negligently driven by the driver. By his own admission, he lost control of the said motor vehicle thereby occasioning the accident. In the circumstances of the accident, I find that the deceased had no control over the motor vehicle which the driver caused to skid and hit the road embankment. Clearly he had minimal control of those circumstances and I find that driver bears the greater apportionment of negligence. I proceed to apportion the same at 90:10 as against the appellants' driver.

Ownership of motor vehicle

16. In this appeal, the appellant **Raiply Woods Ltd** has raised the issue of ownership of the motor vehicle stating as a ground that it was not proved that the defendant was the registered or beneficial owner of the motor vehicle **KAT 004L ZA 9636**. It states that the defendant had at paragraph 3 of its statement of defence denied ownership and any beneficial interest in the accident motor vehicle and that having done so, it was incumbent upon the plaintiff to prove such ownership through the production of an official search certificate from the registrar of motor vehicles. The appellant relied on the case of **Thuranira Karuri Vs Agnes Ncheche, Civil Appeal No.192 of 1996 (Court of Appeal, Nyeri)** where in rejecting the police abstract as evidence or proof of ownership the Court of Appeal held thus:-

> ***"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."***

17. The respondent on the other hand while admitting that it did not produce a certificate of search, submits that the plaintiff produced numerous other exhibits which show that the **Raiply Woods Ltd** was the owner of the accident motor vehicle. They cite the case of **Jotham Mugalo Vs Telkom (K) Ltd Kisumu HCC. No.166 of 2001** where **Warsame J** (as he then was) held that a certificate of search was not the only way of showing ownership of a motor vehicle. They also cite **Samuel Mukunya Kamunge Vs John Mwangi Kamuru Nyeri HCCA. No.34 of 2002** where **Okwengu J (**as she then was) held that Section 8 of the Traffic Act left room for one to disprove that the actual ownership of the vehicle was not with the person registered.

18. Although the burden of proof lay with the party who alleged that the defendant was the owner of the motor vehicle, the evidential burden cast upon the defendant to prove any particular fact which it desired the court to believe its existence. Other than denying ownership however, the defendant did nothing more. It ought to have shown that it did not own the vehicle. Nonetheless the facts in this case disclose clearly that **Raiply Woods Ltd** was the owner of the accident vehicle. Evidence tendered by the plaintiff was that her deceased husband was in the employ of the defendant as a driver. She displayed several documents authored by **Raipy Woods Ltd** which confirmed that the deceased was their employee. These were the bundle of payslips (Exhibit 3 (a-f); a letter written by the personnel manager of the defendant company stating that the deceased was their employee (Exhibit 5); and, a receipt of payment made by the defendant company to the plaintiff following the death of the deceased in the accident in question (Exhibit 8). On the other hand, the appellants acknowledged the said payment in their own pleadings at the trial and have also raised it as a ground in this appeal.

19. Besides this, the defendant company called its driver who testified that he was the employee of the defendant company and was driving the defendant's motor vehicle when the accident occurred. While it is true that the plaintiff did not produce a certificate of search to demonstrate ownership, I find the evidence on record so overwhelming that it would be a mockery of justice to hold on to the position that the non- production of the search certificate was fatal to the plaintiffs' case. I am persuaded by the case law cited above that a certificate of

search is not the only proof of ownership of the motor vehicle. It is my finding therefore that the defendant did own the motor vehicle KAT 004L ZA 9636 and that the fact of ownership on appeal is a belated attempt to evade responsibility.

Quantum

20. Both appellants in their respective appeals have expressed dissatisfaction with the quantum of damages. For the appellant in 203/2013 (Raiply Ltd) they submit that the damages awarded were excessive and unrealistic, that multiplier of 10 years was erroneous and that Kshs.171,761.00 paid to the plaintiff by the defendants ought to have been deducted from the final award. The appellant in 197/2013 on the other hand was aggrieved by the Kshs.11,000 perceived to be the monthly income of the deceased instead of Kshs.18,919; the application of net income instead of gross income and the deduction of the award under the Law Reform Act. I will deal with the issues together.

21. In **Grace Kanini Mithini Vs KBS Ltd & Another Nairobi HCCC No.4708 of 189. Ringera J** (as he then was) restated the principles that guide the court in the assessment of damages under the Fatal Accident Act in the following terms:

> ***"The court must find out as a fact what the annual loss of dependency is. In so doing, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fraction to be applied. Each case must depend on its facts. When a Court adopts any fraction that must be taken as its finding of fact in the particular case. The annual loss of dependency must be multiplied by a figure representing a reasonable number of years per case. In considering that reasonable figure, commonly known as the multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased's age, his expectation of working years, the ages of the dependants and length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand of the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and, if wisely invested, good returns can be expected."***

22. Further, before disturbing the award by the trial court, and as stated by the court of appeal in **Kemfro African Ltd T/A Meru Express Services Vs A.M. Lubia and Olive Lubia (Civil Appeal No. 21 of 1984),** I *must be "satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this, he amount is so inordinately high that it must be a wholly erroneous estimate of the damages."*

23. The appellants in Appeal No.197 of 2013 submit that the trial court erred in arriving at Kshs.11,000/= as the deceased's net pay when evidence had been tendered (P Exh.3 (a) – (f) to show that he earned Kshs.20,276 and the statutory tax stood at Kshs.1,357 + 320 + 200 = Kshs.1,877/=. The respondent on the other hand submits that the net salary would be gross income less all the statutory deduction including P.A.Y.E., NHIF, and NSSF. Considering the record and the submissions, I find no basis for the sum of 11,000/= found by the court. I would find the deceased's net salary to be 20,000/= less demonstrated statutory charges amounting to 1,927/= making a net income of Kshs.18,073/=. I find no basis why the trial court considered voluntary deductions including personal loans deductions and applied an average of the salary over time while it was evident from the payslips that the deceased's gross salary at the time of his death stood at 20,000/=. I would apply 18,000/= as the net salary of the deceased. I find no fault with the multiplier of 10 years applied by the court and the 2/3 dependency ratio. The evidence clearly shows that the deceased was 50 years old and all things being equal would have retired at 60 years.

24. A final issue for my consideration is whether or not the money paid to the complainant by the **Raiply Woods Ltd** should be deducted from the final award. The complainant acknowledged receipt of Kshs.171,761/=. Exhibit 8 was a receipt issued by **Raiply Woods (K) Ltd** to the complainant Lucy Nyambura Mwangi being full and final settlement of her late husband's accounts as at 08th January 2010. The complainant further testified at trial that she had received the said sum. It is not clear to me from the proceedings however whether the money related to the deceased's accounts at work or was compensation arising from his death. It was upon the appellant (then defendant) to prove to the court that the said amount was indeed part-payment of the estate's entitlement under either the Law Reform Act or Fatal Accidents Act. This was not done and I would hesitate to speculate.

25. In the result my final award would be:-

Special damagaes	***-***	***0***
Pain and suffering	***-***	***25,000***
Loss of expectation of life	***-***	***120,000***
Loss of dependency	***-***	***1,440,000***
Total	***-***	***1,585,000***
Less 10% contributions	***-***	***158,500***
Less damages under the		
Law Reform Act	***-***	***145,000***
Net Award	***Shs.***	***1,281,500***

As each party has partly succeeded in their appeal, I order that each party bear their costs in the respective appeals while the plaintiff gets 90% of the costs in the lower court with interest from the date of that court's judgment.

Judgment delivered, dated and signed in open court this 27th day of July, 2017

.....

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Mbiyu for appellant

Mr. Ndichu holding briedfor respondent