REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 417 OF 2014

KIMANGA CONTRACTORS LIMITED……..…….APPELLANT

VERSUS

MARY NJERI NDICHU AND

MARY MUTHONI EPHANTUS (Suing as the Legal Representatives of the Estate of

JULIUS NDICHU MWANGI (DECEASED)……...…..…RESPONDENTS

(Appeal from the judgment of HON KINYANJUI Ag SRM delivered on 28/08/2014

in Gatundu SRMCC No. 41 of 2009)

JUDGMENT

The Respondents were the Plaintiffs at the trial Court suing on their own behalf and on behalf of the Estate of Julius Ndichu Mwangi (the "**Deceased**"). In a plaint dated 30th March, 2009, the Respondents Claimed that on or about 13/05/2008 the deceased was walking as a pedestrian along Thika-Nairobi at kwa Kairu when motor vehicle Registration number KAW 425K Mitsubishi Lorry owned by the Defendant was so negligently, recklessly, and/or carelessly driven at high speed without any due care, regard, and/or attention by the Defendant's driver, servant and/or agent that it lost control and veered off the road thereby knocking down the deceased whereby he sustained fatal injuries

The Plaintiffs sued for judgment against the Defendant for;-

(a) General Damages

(b) Special damages of Kshs. 36,435; and

(c) Cost of the suit

The Appellants filed a Statement of Defence dated 23rd January, 2012 in which it denied the claim in totality and without prejudice contended that if indeed the said accident occurred, it was solely caused and/or substantially contributed to by the negligence of the deceased.:-

In her judgment the trial Magistrate found that the deceased had contributed to the accident by 30%. The trial magistrate fixed the deceased's monthly income at Kshs. 4,792 which was the minimum wage at that time. He further noted that the deceased who died at the age of 34 years would have worked upto 60 years and she used a multiplier of 26 years and thus calculated loss of dependency as 4792x26x12x2/3

=996,736/=. A sum of Kshs. 6,935/= in special damages was awarded as the only amount that was proved. Judgment was entered in the following terms:

a) Special damages Kshs. 6,935/=

b) Pain and Suffering Kshs. 20,000/=

c) Loss of expectation of life Kshs. 100,000/=

d) Lost years Kshs. 996,736/=

(Less 30% contribution)

TOTAL **Kshs. 788,651**

Aggrieved by the trial magistrate's judgment, the Appellant filed this appeal both on liability and quantum of damages. Basically the grounds of the appeal were;

a. THAT the Learned trial magistrate erred in law and in fact in finding the Appellant 70% liable for the accident

b. THAT the Learned trial magistrate erred in law and in fact in disregarding the evidence tendered by the Appellant's witness

c. THAT the Learned trial magistrate erred in law and in fact in adopting a multiplier of 26 years in awarding damages for loss of dependency which was excessive and without taking into account the vagaries and uncertainties of life.; and

d. THAT the Learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions on liability and quantum.

This being a first appeal, the court is under duty to re-evaluate the evidence that was tendered before the lower court and determine whether the appeal has merits or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence by the judge.

From the grounds of Appeal the issues for determination therefore are;

a) Whether the learned Magistrate erred in apportioning liability at the ratio of 70%: 30%.

b) Whether the Magistrate erred in the manner she assessed the quantum of damages.

The Appeal was canvassed by way of written submissions which I have considered together with the authorities cited by the respective parties.

The Plaintiff called three witnesses. Mary Muthoni Ephantus **(PW1)** is a sister to the deceased. She testified that she received a call from the police informing her that her brother had been hit by a car. That the police told her that the accident had happened at kairu stage.

The second witness (**PW2**) Frasier Wairimu testified that she was the eye witness. Those on 13/5/2008 together with her brother, the deceased herein, were travelling from Muranga and alighted at Kwa kairu. They crossed the road to the other side. But the deceased went back to buy credit from where they had alighted. A lorry registration number KAW 425K which was being driven from Thika direction, swerved to avoid hitting a boda boda rider and veered off to the stage where people were standing but while the other people managed to escape, the deceased was hit by the lorry.

The Plaintiff's third witness PC Mohamed Rono **(PW3)** testified that his colleagues one of whom had been transferred, while the other one resigned attended the scene of the accident. He told the court that according to the report the driver stated that a pedestrian jumped over the wall separating the road and he was hit. PW3 further testified that the driver was not charged and that no eye witness recorded a statement.

On the other hand, the Appellants witness, Joel Mwangi (**DW1**) testified that he was driving motor vehicle KAW 425K from Thika to Nairobi. He was driving in the inner lane and upon reaching kwa Kairu someone jumped suddenly over the wall separating the dual roads and he hit him. He reported the accident at Ruiru police station, and he was not charged with a traffic offence. In cross examination he testified that the road was clear and the wall was about I meter tall.

This court is alive to the requirement that being the first appellate court, it must re-evaluate and analyse all the evidence that was adduced in the lower court and arrive at its own independent conclusion keeping in mind that it did not get the chance to see the witnesses and observe their demeanor.

It is neither in dispute that the Appellant's driver was driving the motor Vehicle registration number KAW 425K nor is it in dispute that the said vehicle hit the Deceased. . The testimony of PW2 as well as that of DW1 is in agreement that the said accident occurred at Kwa Kairu.

What is in contention actually is whether the deceased was knocked at the bus stage as alleged by PW2 or whether he was knocked on the road whilst jumping over the wall as testified by DW1. From the testimony of PW3, police went to the scene but he did not produce the report or the sketch maps. He testifies that indeed he read the report and that DW1 had recorded a statement that he hit a pedestrian who was crossing over the wall. PW3 also testifies that no eye witness recorded a statement at the police station.

I find difficulties in reasoning with PW2 that the deceased was hit whilst at the stage for the reason that PW2 did not state the lane in which the vehicle was being driven on. In deed PW2 failed to explain how the boda boda distracted the lorry for it to swerve to the stage. Further, PW2 who is a sister to the deceased did not record a statement at the police station. It is my finding that the allegation that the deceased was hit whilst at the stage is not convincing and I find the DW1's explanation more plausible.

PW3 in cross examination stated that, the deceased was hit whilst he tried to jump over the wall as per the statement of the driver DW1. In court, DW1 gave the same testimony that the deceased was jumping over the barrier wall separating the two roads when he was hit. Nonetheless I also find that, the driver was negligent on his part in that he was not on the lookout. According to his testimony, the road was clear and that being the case, had he been keen he would have seen the deceased jumping over the wall and thereby apply brakes and control the vehicle in a manner to avoid the accident. It was at 5 pm in day light, and the road being clear meant that the driver's visibility was not obstructed.

The evidence tendered herein leads to a conclusion that the deceased was hit whilst crossing the road over the barrier wall in which case the deceased contributed to the accident. After analyzing the evidence on record, I find that both the deceased and the driver are to blame for the accident. The deceased took a risk of jumping over the wall oblivious of the risk that he was exposing himself to. On liability I find that the deceased contributed to the accident by 50% and I proceed to apportion liability equally.

ON QUANTUM OF DAMAGES

The general principle applicable in an appeal on quantum is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where trial judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**).

The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated that;"*An*

appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

The occupation of the deceased in this case was not proven. Rather than the allegation that he was a driver, no evidence was tabled to prove the same In the case of **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Anyara Emukule J, held:-

> "…..***there are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the promise of the court to determine or explore those imponderables. The duty and promise of the court is to apply the generally known period during or about which an employee of the deceased's occupation would remain in active work and retire*.**"**

The deceased died at the age of 34 years. He was a driver according to the testimony of PW1 which allegation was not substantiated. The learned trial Magistrate assumed that he would have worked up to the retirement age of 60 years hence a multiplier of 26 years was adopted. The Appellant submitted that a multiplier of 10 year should be adopted. In a similar case to this **Asha Mohamed Swaleh V Kennedy Bindi Muriungi & Another [2012] Eklr** where the deceased was aged 34 years, the Court used a multiplier of 15 years and held that,*"Clearly there was no evidence that the deceased was a mechanic e.g. a licence/permit to run such a business, usually given by local authorities. The respondent did not know even where he operated from. … The best the learned trial magistrate could have done in such circumstances was to base the multiplicand on Shs. 4,000/= per month because the respondent told the court that the deceased used to give her Shs. 1,000/= per week. Or use a random sum he could consider reasonable income for casual labourer's as the base of income, because it could have been unreasonable not to allocate any sum of income to a man 34 years of age who used to go to eke out a living daily. But there was no basis to take Shs. 5,000/= as monthly income as pleaded and ignore what had been stated in evidence. In that regard the learned trial magistrate fell in error when he took the deceased's income as Shs. 5,000/= per month. Nothing was placed before court to challenge the respondent's dependency or the multiplier of 20 (the lower court actually took 15), …….."*

However, where the occupation of the deceased is proved, courts are lenient to use a higher multiplier as was the case in **Innocent Ketie Makaya Denge v Peter Kipkore Cheserek & another [2015] eKLR** where the Court held that,

> ***"Turning to the multiplier, my analysis of the evidence shows that the deceased died at the young age of 34 years. He was a businessman which means that his working life was not dependent on any prescribed retirement age. There is evidence that he was in good health prior to the accident. He would thus have continued with his business and would have continued earning probably upto about 60 years of age given the kind of business he was engaged in and the vagaries of life. The multiplier of 26 years adopted by the trial magistrate was in the circumstances not unreasonable. The same is upheld*.**"**

In this regard , and bearing in mind that the deceased left behind three young children, I find that a multiplier of 20 years would be appropriate and reasonable

In the result the appellant's appeal partly succeeds and the award will be as follows:-

1. Special damages Kshs. 6,935
2. Pain and Suffering Kshs. 20,000
3. Loss of expectation of life Kshs. 100,000/=

4. Lost years Kshs.383,360/= (4792x20x12x2/3)

(Less50% contribution)

TOTAL **Kshs. 510,295**

The Appellant is awarded half the costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **22nd** Day of **September, 2017.**

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Appellant

…….For the Respondent