REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 15 OF 2014

1. GEOFFREY MURIUNGI

2. NJERU INDUSTRIES LTD.....APPELLANTS

- versus -

JOHN RUKUNGA M'IMONYO (Suing as the

legal representative of KINOTI

SIMON RUKUNGA - Deceased).....RESPONDENT

(Being an appeal arising from the judgment and decree

by Hon. J. W. Gichimu, Acting Principal Magistrate in Tigania

Principal Magistrate's Civil Case No. 4 of 2013

delivered on 13/05/2014)

JUDGMENT

1. The Respondent herein, **JOHN RUKUNGA M'IMONYO,** filed **Tigania Principal Magistrate's Civil Case No. 4 of 2013** (hereinafter referred to as **'the suit'**) as a legal representative of the estate of the late **KINOTI SIMON RUKUNGA** (hereinafter referred to as **'the deceased'**) who allegedly died out of a road traffic accident on 23/11/2011. He sought for General Damages under the Law Reform Act and the Fatal Accidents Act, special damages, costs and interests.

2. The Respondent sued the first Appellant herein as the driver of the offending motor vehicle registration number KXQ 137 (hereinafter referred to as '**the vehicle'**) and the second Appellant herein as the registered owner of the vehicle. In a joint Defence the Appellants denied all the averments and put the Respondent into strict proof. The suit was fully heard. The Respondent who was the father of the deceased testified and called three witnesses: **James Mbaabu Rukunga** who worked with the deceased at the second Appellant's premises as a Tea Picker whereas the deceased worked as a Tea Weighing Clerk testified as **PW2**, Police Officer **No. 75509 PC Albert Kiprop** from Mikinduri Police Station testified as **PW3** whereas one **Samson Gichuru** testified as **PW4**. The first Appellant and one **Joel Nyagah Richard** testified for the then Defendants, now Appellants.

3. In a considered decision which was rendered on 13/05/2014 the trial court found the Appellants wholly

severally and jointly liable for the accident and awarded Kshs. 10,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life under the Law Reform Act and Kshs. 1,440,000/= for loss of dependency under the Fatal Accidents Act further to Kshs. 65,700/= on Special Damages, costs and interests.

4. The Appellants were aggrieved by the judgment and preferred this joint appeal. In an Amended Memorandum of Appeal filed on 27/05/2014 the following five grounds were preferred: -

> ***1. THAT the learned magistrate erred in law and fact in holding appellant liable while the material on record proved otherwise.***
>
> ***2. Without prejudice to the No. 1, above, the trial magistrate erred in law and fact in failing to apportion liability at least 30: to 70% in favour of the respondent in view of the fact that the deceased agreed to be driven by a drunk driver as per evidence adduced.***
>
> ***3. The trial magistrate erred in law and fact in applying income of the deceased to which was not proved instead of applying minimum government wage which was applicable at the time of deceased demises at the region of Kshs. 3000/= per month.***
>
> ***4. The trial magistrate awarded in all the headings is inordinately high; and grossly exaggerated taking to account a plethora of binding authorities on similar matters.***
>
> ***5. The entire judgment is unfair to the appellant and ought to be set aside and/or awards adjusted downward.***

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. In what seems to have been rushly-prepared submissions which even left gaps for some decisions the Appellants had wished to rely on, Counsel for the Appellants argued that the trial court erred in not considering the evidence on how the accident occurred in its totality and as such wrongly apportioned the entire blame on the Appellants. Counsel further faulted the trial court in awarding inordinately high awards on damages not based on the evidence. He further argued that the dependency ratio was to be one-quarter instead of two-thirds which the trial court settled for.

6. The Respondent opposed the appeal. He supported the decision of the trial court and prayed that the appeal be dismissed with costs. In doing so, the Respondent took the Court through the evidence adduced at the trial court and referred to several decisions majority of which are binding to this Court. He cited the Court of Appeal decisions in the cases of **Jabane vs. Olenja (1986) eKLR** and **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123** for the principles upon which an appellate Court should consider in dealing with an appeal on quantum of damages. On the aspect of liability, the Respondent relied on the case of **Samson Emuru vs. Ol Suswa Farm Ltd (2006) eKLR** in arguing that a party is bound by its pleadings. It was also argued that the defence was full of mere denials and that if the Appellants were serious in the contention that the accident was caused by a motor cycle, although they never pleaded so, nothing prevented them from taking out third party proceedings.

7. On damages, the Respondent relied on the decisions in **Roger Dainty vs. Mwinyi Omar Haji & Another (2004) eKLR** and **United Millers Ltd vs. Yano Omoro Oindo (2007) eKLR** in support of the monthly award of Kshs. 10,000/=. That of **Loise Wairimu Mwangi & Another vs. Joseph Wambue Kamau (2006) eKLR** was relied in support of the awards on pain and suffering and loss of expectation of life.

8. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –**

versus- Kiruga& Another (1988) KLR 348).

9. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

10. This appeal hinges on two limbs; that of liability and that of assessment of damages. On the question of liability, the starting point are the pleadings. It is now settled law that each party is bound by its pleadings and any evidence that tends not to support the pleadings is for rejection (See the Court of Appeal case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** and that of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281).**

11. In this case the Appellants filed a defence on 14/02/2013. Indeed, the defence was a plain denial of the averments in the Plaint and did not raise the issue of a third party. The Appellants further did not take out any third-party proceedings against the owner of the alleged motor cycle. The evidence of the Appellants on the alleged motor cycle was therefore at variance with the pleadings and could not assist them. The trial court was quite in order in disregarding that evidence as well. From the record, without the evidence of alleged third party there remains no evidence controverting the Respondent's version of how the accident occurred. The evidence of PW4 is worth believing. It was an eye-witness account. He had to wait for hours as the first Appellant went inside a bar at Mikinduri market and drunk alcohol. PW4 had to literary 'pull him' out of the bar before they left the market that night since there was no alternative transport. PW4 further narrated what happened as the vehicle was going uphill. The first Appellant lost control of the vehicle and the vehicle started going downhill. It hit the side of the road and its doors flung open thereby throwing the deceased and PW4 out of the driver's cabin onto the road. The deceased fell on the road and next to the vehicle. Without first ascertaining that it was safe to move the vehicle, the first Appellant just engaged the vehicle into motion and ran over the deceased who lay nearby. The first Appellant then disappeared from the scene on being informed by PW4 of what he had done to the deceased. PW4's evidence was tested in cross-examination but it was not shaken. PW4 remained forthright on what had exactly happened in that fateful night. The evidence of PW4was also corroborated by that of PW3 who was one of the investigating officers.

12. There is also no dispute that the vehicle was owned by the second Appellant and that the first Appellant was employed by the second Appellant as a driver of the vehicle. I hence find that the trial court did not err in finding the Appellants wholly jointly and severally liable for the accident. The appeal on liability is hereby dismissed.

13. Turning to the aspect of assessment of quantum of damages, this Court has severally stated that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277**).

14. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services** (supra) discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'***

15. This position was restated by the Court of Appeal in the case of **Arrow Car Limited -vs- Bimomo &**

2 others (2004) 2 KLR 101 and so recently in the case of **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.**

16. That being the position in law it is now for this Court to ascertain whether the awards were inordinately high in the circumstances of this case to call for the intervention of this Court. There is no dispute that the deceased was involved in the accident on 23/11/2011 and succumbed on 26/11/2011 as he underwent treatment at the Meru District Hospital. That being the case the deceased must have undergone immense pain and the minimal award of Kshs. 10,000/= for pain and suffering before death awarded by the trial court remain very reasonable. Likewise, the award of Kshs. 100,000/= for loss of expectation of life is reasonable. The trial court laid such a good basis for that award and cannot be faulted. The trial court also settled for the monthly sum of Kshs. 10,000/= on the income of the deceased. In reaching that finding the trial court remained alive to the fact that the Respondent had not proved any income on the part of the deceased but there was ample evidence that he was employed by the second Appellant as a tea weighing clerk. The court also rejected the submission that the deceased earned from farming. There being no proved income the trial court rightly reverted to the minimum wages of such cadre of employees in the tea sector and found that it was a monthly sum of Kshs. 13,674/= but since the Respondent had prayed for a lesser Kshs. 10,000/=, the trial court allowed that award. That was the best approach on the issue and as such the court did not err.

17. On the multiplier, the court settled for 18 years. The deceased was aged 38 years old and after the court considered several relevant and binding decisions it found that for such an age of a deceased courts have been settling for a multiplier between 15 years and 20 years. I have also gone through the said decisions among others and I confirm that trend. The trial court's choice of 18 years cannot therefore be faulted. There is also evidence that the deceased was married to one wife and had several children who depended on him as well as the father to the deceased who testified as PW1. The adoption of the dependency ratio of two-thirds of the monthly income is hence in order.

18. From the foregone analysis I am satisfied that the trial court made very reasonable and sound awards which were no more than what ought to have been awarded in the circumstances of this case. The court did not act on any wrong principle of law neither was it demonstrated that it took into account some irrelevant factor nor left out of account some relevant factor or even adopted a wrong approach or misapprehended the facts or made an award that was inordinately low as to represent a wholly erroneous estimate of the damages. None of the grounds of appeal has therefore succeeded.

19. The upshot is that the appeal is dismissed with costs.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 29th day of November 2017.

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JUDGE