REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 57 OF 2010

PHYLLIS WAIRIMU MACHARIA…………………….APPELLANT

VERSUS

KIRU TEA FACTORY…………………....…………..RESPONDENT

(Being an appeal from the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 111 of 2009 (Hon. S.Muketi) on 17th March, 2010)

JUDGMENT

The appellant's son, John Muraya (deceased) died in a road traffic accident which involved the respondent's motor vehicle registration number KAQ 416 P. The accident is said to have occurred on 7th November, 2008 along Gacharageini –Mioro road.

The appellant sued in her capacity as the legal representative of the deceased for damages for the benefit of his estate under the **Law Reform Act (Cap 26)** and for the benefit of his family under the **Fatal Accidents Act, Chapter 32** Laws of Kenya.

In the plaint filed in the magistrates' court, the appellant averred that on the material date, the deceased was boarding the respondent's motor vehicle when its driver drove off and thereby caused the deceased to lose his grip on the vehicle and fall down as result of which he was crashed by the same vehicle. It was the appellant's case that the accident was caused by the respondent's driver's negligence in driving or managing the vehicle.

According to the appellant, the deceased sustained fatal injuries as a result of which he succumbed and died. At the time of his demise the deceased was aged 34 and was a professionally trained teacher who is said to have been in good health and whose expectation of life was suddenly cut short by this accident.

In its defence, the respondent denied the appellant's claim and in particular denied that an accident involving its motor vehicle occurred as alleged or at all. In what I understand to be respondent's pleading in the alternative, the respondent contended that if any accident involving its vehicle occurred, then it was not caused by its driver's negligence as alleged but was solely attributable to the deceased's negligence. It prayed that the appellant's suit be dismissed with costs.

At the conclusion of the hearing, the learned magistrate found as a fact that the deceased waved down the respondent's vehicle and that its driver slowed down as if to stop but then sped off without stopping; she also held that the deceased attempted to board the vehicle while it was in motion. In these circumstances, the learned magistrate held the deceased and the respondent's driver equally liable for the accident and consequently she apportioned liability at the ratio of 50:50.

On quantum, the learned magistrate made the following award subject to 50% contribution:-

a.	Pain and suffering Kshs	10,000/=
b.	Loss of expectation of life	100,000/=
c.	Loss of Dependency	420,000/=
d.	Special damages	26,600/=
	Total	**556,600/=**

The appellant was dissatisfied with this award and the basis upon which it was made and therefore filed the present appeal. The appeal was based on seven grounds which have been itemised in its memorandum of appeal as follows:-

1. The learned trial magistrate erred in fact and in law in making a finding that the deceased and the defendant were equally to blame, a finding that was not supported by the pleadings or the evidence.

2. The learned trial magistrate misdirected herself on the evidence on record thereby arriving at the wrong conclusion on liability.

3. The learned trial magistrate erred in fact and in law in failing to consider all the relevant circumstances in awarding damages under the Law Reform Act and the Fatal Accidents Act.

4. The learned trial magistrate erred in fact and in law in failing to award special damages pleaded and proved.

5. The learned trial magistrate erred in failing to award costs of the suit to the plaintiff without any valid reason.

6. The learned magistrate erred in failing to take into account a relevant factor that the deceased was already a registered teacher whose prospects were to "tremendously increase in time and thereby affect the relevant multiplier".

7. The learned magistrate erred in fact and in law in failing to evaluate all the evidence on record thereby arriving at a wrong conclusion.

This being the first appeal from the lower court, it is incumbent upon this court to interrogate the evidence afresh and come to its own conclusions independent of those that the trial court came to but bearing in mind that it is the latter court which saw and heard the witnesses, an advantage that this court does not have. While emphasising this legal obligation Sir Clement Lestang, V.P in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA** 123 at 126 said:-

> "***I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***"

The appellant testified that the deceased was her son; he was born in 1974 and at the time of his death he had qualified as a P1 primary school teacher from Eregi teacher's college. As a professional teacher he

had also been registered with the Teachers' Service Commission, apparently awaiting deployment but in the meantime, he had been engaged to teach, on temporary basis, at Muthangai primary school where he is said to have been earning Kshs 5,000/= per month.

It was the appellant's testimony that though the deceased was single he catered for the appellant's needs and that out of his monthly pay, he would spent Kshs 2000/= on the appellant's household needs and also give her the sum of Kshs 1000/=.

Apart from seeking for general damages, the appellant also sought for special damages of Kshs 26, 600/= comprising the expenses that the appellant is alleged to have incurred as a result of the deceased's death.

John Maina (PW2) testified as the witness who witnessed the accident in which the deceased died. According to his evidence, the deceased was not only his friend but that he also knew him as teacher at Muthangari primary school where this witness also schooled. On 7th November, 2008, at about 7.00 pm, so he testified, the deceased joined him at Gatere tea buying centre where they chatted for about 25 minutes before the deceased asked to be escorted to a bus stage to travel to Mioro. After about 100 metres of their walk, they saw a vehicle coming behind them travelling towards the direction of Mioro. According to him, it was not moving very fast but was travelling at a moderate speed. The deceased waved down the vehicle and it stopped, off the road. As the deceased was boarding the vehicle, it is said to have sped off causing the deceased to fall; he was then hit by "the side iron bar" and run over in the process. The deceased lost consciousness and was later taken to hospital the same evening.

The witness' description of the vehicle was that it was an open canter lorry, registration number, KAQ 416P designed to carry green leaf tea. Infact sometimes after the accident the vehicle came back packed with green leaf tea. The deceased is said to have attempted to board its rear at the time of the accident.

Curiously, the witness testified that though this vehicle came back after the accident nobody, including this witness, bothered to stop it yet according to him, the vehicle and its driver were well known in that locality. When question about this apparent omission, the witness testified that "*there was no need to stop it*".

Corporal Kiprono Too Barnabas (PW3) from Kiriaini police post where the accident was reported confirmed that indeed an accident involving the respondent's lorry and the deceased did occur on 7th November, 2008 and that there was an inquest in Murang'a law courts concerning the accident. The outcome of the inquest was, however, not clear from this witness testimony.

The only witness to testify for the respondent was the ill-fated vehicle's driver, **Espindito Ngai Wamutitu**. He gave his itinerary of the places he had driven about the time the accident occurred. He said that at the material time he drove the vehicle from the factory towards the Mioro route. He dropped empty sacks for packing of tea leaves at Gatare, Karangi and then at Mioro tea buying centres. He drove back through the same centres colleting tea which he delivered to the factory at around 9.30 pm. He then retired for the day until 2.am the following day when he was called by the respondent's manager telling him that the vehicle he had been driving had hit somebody and therefore he was required to record a statement with the police.

The witness said that he was alone in the cabin at the time and that nobody ever stopped him for a lift at any point while on his rounds to and from the tea buying centres. He denied that he ever carried any unauthorised passenger whether in the cabin or at the back of the vehicle. He testified that there was sufficient space for two passengers in the cabin and normally clerks would share the cabin with him whenever they had to travel together.

Confronted with this evidence, the learned magistrate had to establish, as she correctly held, who between the respondent and the deceased was liable for the accident and secondly, the extent of the damages payable, if at all.

Her finding on the first issue was that both the deceased and the respondent were evenly liable for the

accident and thus she apportioned liability equally between them. In coming to this conclusion, the learned magistrate made a finding of fact to the effect that the deceased waved down the vehicle which made as if to stop but sped off before the deceased boarded it.

The finding by the learned magistrate seems to have been contrary to the evidence before her; this is so because none of the witnesses ever testified that the driver slowed down to pick the deceased but sped off before he could board it. The two witnesses who could probably have witnessed the accident gave contradicting testimonies.

On the one hand, the driver of the vehicle testified that nobody stopped him along the way in the course of his itinerary and that even if he had been stopped by any hitch-hiker, he would not have stopped because he was not to carry any passenger apart from those authorised by the respondent.

The appellant's witness, on the other hand, testified that the deceased waved down the vehicle and in fact it stopped but started moving before the deceased could board it; it crashed the deceased in the process.

The impression I get from the eyewitness' evidence is that having been stopped to pick the deceased, the driver of the vehicle must have been aware that the deceased had either failed to board the vehicle or had fallen off from it when he drove off because he went without him. What the driver may or may not have known is that he had crashed the deceased.

What I found baffling about the eye witness' testimony is that when the vehicle returned on its way back to the factory he did not bother to stop it or approach its driver to alert him of the accident, assuming that he was not aware. It is only the following morning that the driver was informed by his manager that he had hit the deceased.

When I consider the driver's and the eye witness' accounts against the forgoing background, it appears to me that it is more probable than not that the deceased may have fallen and crashed after he attempted to climb on a moving vehicle. I have reached this conclusion because if it was true that the driver stopped to carry the deceased (albeit without the authority of the respondent) as the eye witness suggested, I do not see why he could not accommodate him in the cabin which had sufficient space for two passengers.

Viewed differently, I cannot see why the deceased should have attempted to travel at the back of an open lorry which was designed to carry tea leaves and not passengers. Irrespective of the circumstances under which the accident occurred, it was always going to be risky if not illegal for the deceased to travel at the back of a lorry which by design did not cater for passenger safety.

That the deceased may have been tempted to climb a moving vehicle is also apparent from the eyewitness' testimony that the vehicle was "not moving very fast" and that "it was moderate". This testimony appears to be consistent with the appellant's pleadings that the deceased fell when he either lost grip or could not properly grasp a particular part of the vehicle. I suppose that a simple fall from a stationery vehicle would certainly not have such devastating consequences.

In the face of this evidence, I am inclined to think that at the very least, it was not established on a balance of probabilities that the driver of the ill-fated lorry was solely responsible or even contributed, by as much margin as attributed to him by the learned magistrate, to the occurrence of the accident from which the deceased died. However, since the respondent did not cross-appeal, I have no reason to disturb the learned magistrate's finding on liability; the best I can do in the circumstances is to dismiss the appellant's appeal in this regard and in particular grounds 1 and 2 of the appeal.

On the question of quantum, the general principle applicable in considering an award of damages at this appellate stage is that while the assessment of damages is within the discretion of the trial court, the appellate court will only interfere where the court below, 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. Talking about the distinct roles of the two courts in assessment of damages, the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed**

Khan [1982-88] KAR 5 said as follows:-

> ***"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 appellant contested damages awarded under the Law Reform Act for the benefit of the deceased's estate and the Fatal Accidents Act for loss of dependency.

To begin with the learned magistrate awarded the sum of Kshs 10, 000/= for **pain and suffering**. The appellant asked for an award of Kshs 50,000/= under this head and relied on the Court of Appeal decision in **Nyeri Civil Appeal No. 214 of 2004 Joyce Mumbi Mugi versus Co-operative Bank of Kenya & Two Others** in which an award of Kshs 300,000/= was made for pain and suffering.

I have read that decision and what I gather is that the reason the claimant was award such a sum for pain and suffering was because the deceased suffered severe burns and a fracture on the right femur; more importantly, he did not die immediately after the accident but died a day after. In awarding this sum, the court obviously considered the period the deceased had to bear the pain from the burns and the fracture before he finally succumbed to his injuries.

The deceased in the instant case died on the spot, at least no evidence was led to show that he died sometime after the accident. There's therefore no comparison between the circumstances of death in the instant case and those obtaining in the *Joyce Mubi Mugi case* (supra). Accordingly, the basis upon which the appellant asked for an amount of Kshs 50,000/= was inapplicable in this case and thus an award of Kshs. 10,000/= under this head cannot be said to be inordinately low as to warrant any interference by this court.

On **loss of expectation of life**, the appellant was awarded Kshs 100,000/=; I have read the submissions by counsel for the appellant and it is apparent from those submissions that he was satisfied with the award; I will leave it undisturbed.

The court awarded Kshs 26,600/= as **special damages** pleaded and proved; indeed in her evidence, the appellant produced receipts for this amount incurred as funeral expenses. It is curious therefore that even after this award was made one of the grounds upon which the appellant purported to impugn the learned magistrate's decision was that she did not award special damages, pleaded and proved. Suffice it to say here that ground has no basis and ought to be dismissed.

As for the **loss of dependency**, there was sufficient and uncontroverted evidence that the deceased was a qualified teacher though in temporary employment at a primary school where he earned Kshs 5,000/= per month. The evidence that he spent Kshs 3000/= on his mother was also not displaced. But even in the face of this uncontroverted evidence, the learned magistrate still found that the deceased would spend 1/3 of his earnings on his family.

Certainly, a third of Kshs 5000/= is not equivalent to Kshs 3000/=; simple arithmetic would work out that figure to approximately Kshs 1,667/= which is only a little over half of the monthly sum that the deceased is said to have spent on his family.

As noted the evidence that the deceased spent Kshs 3,000/= was uncontroverted and there is no reason or any basis given in the judgment why it should not have been taken into account in calculating the loss of dependency. By disregarding this evidence and adopting the fraction of a third in calculation of loss of dependency, the learned magistrate not only failed to consider the evidence that she ought to have considered but as was said in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **case (supra),** she also ***"misapprehended the evidence in some material respect and so arrived at a figure which was inordinately low."***

Having said that I would opine that though it is slightly above Kshs 3000/= two thirds of the deceased's earnings would have been a more appropriate fraction of the deceased's salary to adopt in calculation of the loss of dependency.

As for the multiplier, the learned magistrate held that the deceased would probably have been employed in the civil service and he probably would have worked for 21 years considering as she did that the retirement age in government was 55 years. The appellant contested the multiplier on the ground that the retirement age had been increased to 60 years while the case pending before court.

It must be noted that at the time of the deceased's death, he was only a prospective employee of the government and it was not proved that he was going to be absorbed in the civil service on any certain date in future; however, with or without government employment, the deceased was certainly not a layabout who was going to spend the rest of his life waiting for government employment; as it turned out, he would certainly have been gainfully engaged elsewhere and taking the preponderance or vicissitudes of life into account an approximation 21 years as the period he would have actively worked and earned his income was not far off the mark. In **Nakuru High Court Civil Appeal No.142 of 2009, Comply Industries Limited versus Daniel Kiprotich Busienei** Emukule, J adopted a multiplier of 20 yet the deceased was aged 21. A multiplier of 21 for a person aged 34 cannot, by any stretch of imagination be said to be unreasonable in the circumstances of this case.

Subject to contribution therefore, I would disturb the learned magistrate's award under the head of loss of dependency and substitute with the following award:-

Kshs (5,000 x 12 x 21x 2/3) = 840,000/=

I would, in the final analysis, substitute the learned magistrate award with the following award subject, of course to 50% contribution:-

a. Pain and suffering Kshs	10,000/=
b. Loss of expectation of life	100,000/=
c. Loss of Dependency	840,000/=
d. Special damages	26,600/=
Total	**976,600/=**

This award shall attract interest from the date of judgment in the subordinate court.

The question of costs was raised as one of the grounds in the appeal and the appellant's contention on this issue was that the appellant had succeeded in her claim and therefore was entitled to costs.

The question of costs is addressed in **section 27 (1) of the Civil Procedure Act** which provides as follows:-

27. Costs

> ***(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

Essentially, according to this provision of the law, the court seized of any suit has a wide discretion to

determine the extent of the costs payable and to whom between or amongst the parties to the suit those costs should be paid; however, this discretion is subject to the proviso that costs will always follow the event unless for good reason the court orders the contrary.

The appellant partly succeeded in her claim against the respondent; in my view she should have been awarded costs proportional to her success. I will accordingly award her costs of the suit in the lower court but those costs shall be subject to 50% deduction. She will, however, get the costs of the appeal.

The appeal is therefore allowed to the extent of variation of the award and the order on costs in the lower court. It so ordered.

Dated, signed and delivered in open court this 15th day of January, 2016

Ngaah Jairus

JUDGE