REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 568 OF 2010

PERES WAMBUI KINUTHIA

PETER KAIRO GIKONYO……………………………………APPELLANTS

VERSUS

S.S. MEHTA & SONS LIMITED………………..………………RESPONDENT

(*An appeal from the original judgment and decree in Milimani Commercial Courts CMCC No. 6878 of 2006 delivered on 18th November, 2010 by Hon. Mr. S.N. Riechi (C.M.))*

J U D G M E N T

1. The Appellants filed CMCC No. 6878 of 2006 as administrators of the estate of the late David Irungu Gikonyo ("***deceased***'") against the Respondent seeking damages under the Fatal Accidents Act and the Law Reforms Act. They also sought special damages and loss of consortium on the part of the 1st Plaintiff.

2. Undisputed facts are that the deceased was an employee of the Respondent. On 9th June, 2005 while in one of the Respondent's road construction sites, the deceased was ran over by the Respondent's motor vehicle registration number KAG 625Z Mack Tipper as a result of which he died.

3. In its statement of defence, the Respondent denied that the deceased was at the time in his ordinary course of employment; that the accident occurred due to the Respondent's negligence; that it issued a cheque of KShs. 10,438/20 in settlement of the deceased's estate claim or that the deceased was aged 29 years and earning KShs. 21,000/- inclusive of house allowance and overtime pay. The Defendant also denied the applicability of the doctrine of *res ipsa loquitor*.

4. None of the Plaintiff's witnesses who testified witnessed the occurrence of the accident. The 1st Appellant, PW1 testified that the deceased was aged 27 years at the time of his death; her and the deceased had been married for two years and had one issue called Smith Gikonyo; that the deceased used to earn KShs. 20,000/= and an overtime and that subsequent to the deceased's death, the Respondent issued her with a cheque of KShs. 10,000/= which she returned since the money was little. The 2nd Appellant, PW2 testified that he visited the scene of the accident after a fortnight. He stated that the scene had blood stains and was an open space with no obstruction.

5. DW1, Joseph Gakunga Gathara testified that he was in the company of the deceased at the material time; that the deceased stopped the suit motor vehicle with an intention of hitching a hike. As the vehicle slowly approached, the deceased tried to hold the handle on the front cabin near the exhaust, slipped and fell. When he tried to stand, the front hind tyres run over him waist down.

6. DW2, David Muriithi Chege an accountant with the Defendant testified that the deceased was earning a basic salary of KShs. 10,000/-, house allowance of KShs. 2,000/-, overtime of KShs. 7,692/30, at a rate of 1.5 % and overtime of KShs.1,230/- at a rate of 2% when he was paid twice i.e. the gross salary was KShs. 20,923/50. That after the necessary deductions the deceased received a net pay of KShs. 16,015/05. He stated that the salary varied with overtime work done from month to month.

7. The learned trial Court found liability at the ratio of 60:40 against the Respondent and entered judgment in the following terms:-

Loss of dependency KShs. 2,400,000/=

Pain and suffering KShs. 10,000/=

Loss of expectation of life KShs. 100,000/=

Loss of expectation of life was deducted from the award made under the Fatal Accidents Act.

Sub-Total **KShs. 2,410,000/=**

Less 40% contribution KShs. 946,000/=

Total **KShs. 1,446,000/=**

Special damages Nil

8. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on the grounds that:

i. ***The Learned Chief Magistrate gravely erred in fact and in law in apportioning liability at 60%:40%.***
ii. ***The Learned Chief Magistrate gravely erred in fact and in law in relying heavily and conclusively on the evidence of DW1 as a basis for apportionment of liability at 60%:40% when the appellants had urged the court to treat DW1's evidence cautiously having been a witness initially available for the appellants only to turn up on the hearing day and testify for the respondent.***
iii. ***Learned Chief Magistrate gravely erred in law when he failed to consider the circumstantial evidence of PW2 when PW2 testified that he visited the scene of the accident in the company of police officers and that the accident had occurred off the road as evidenced by dry blood.***
iv. ***The Learned Chief Magistrate erred in adopting a multiplicand of KShs. 15,000/- when evidence adduced proved beyond reasonable doubt that the deceased earned KShs.21,000/- per month.***
v. ***The Learned Chief Magistrate erred in adopting a multiplier of 20 years when the deceased would have retired at 60 years.***
vi. ***The Learned Chief Magistrate erred in recognizing HCCC No. 1192 of 2002 Nairobi where Lady Justice Angawa adopted a multiplier of 25 years for a 28 years old deceased and failing to adopt at least 24 years for a 29 years old deceased in the circumstances of the case herein.***
vii. ***The Learned Chief Magistrate erred in deducting a sum of KShs. 100,000/-***
viii. ***The court's award of damages for pain and suffering and loss of expectation of life was inordinately low in the circumstances.***

9. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**).

10. It was submitted on behalf of the Appellants that the driver of the suit motor vehicle was not cautious in his driving considering DW1's testimony that the deceased tried to board the vehicle from the front of the vehicle and that the vehicle was said to have a side mirror. They opined that the driver should have

been held to be 100% liable. They cited the cases of **Isabella Wanjiru Karanja v. Washington Malele, Nairobi Civil Appeal No. 50 of 1981 (1982-1988)1 KAR 186** where Chesoni J observed:-

> ***"What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep a greater lookout for other road users."***

11. On its part, the Respondent submitted that the Appellants had not proved their case. That were it not for the evidence of DW1, liability against the Respondent would not have been established and that the deceased should have shouldered a greater portion of liability than the 40% apportioned by the trial court.

12. The evidence establishing liability is that of DW1 who was an eye witness. It is clear from his evidence that initially the deceased and DW1 were standing on the side of the road. The deceased waved down the driver of KAG 625Z for him to hike a lift. The driver slowed down probably to allow the two to board the vehicle. However, the driver did not completely stop the vehicle. His testimony was as follows:-

> ***"We came to the road. There was a road and diversion. We stood beside the road waiting for a company vehicle to give us a lift. While there a lorry came carrying murram. He waved his hand to stop the vehicle. The vehicle came. The motor vehicle was moving slowly, he went near and held handle on the front cabin near the exhaust. He slipped and fell down. He tried to stand up but the front tyres run over him on the waist below. I raised an alarm the driver stopped the motor vehicle."*** (Emphasis added)

13. It is clear from the foregoing that the driver of the subject motor vehicle saw the deceased wave to stop him. That is why he slowed down to let the deceased probably board the vehicle. The driver did not bring the vehicle to a complete stop as would be required of him. The vehicle was a company vehicle used to ferry the Respondent's employees of which the deceased was one of them. It is not clear why he failed to stop the vehicle completely to allow the deceased and DW1 to board. It is however, clear that the deceased did not rush to board the vehicle unexpectedly. He had waved down the vehicle and the driver was expecting the deceased that is why he slowed down the vehicle. Although the vehicle had side mirrors, it is not clear whether the driver saw the deceased slip and fell down for him to stop the vehicle and avoid to over run him.

14. Part of the particulars of negligence pleaded by the Appellant were that the Defendant's driver drove the subject motor vehicle recklessly and carelessly; that he failed to brake, swerve or in any other way failed to avoid running over the deceased. To my mind, having been waved down, and having slowed down the vehicle, it was incumbent upon the driver to either completely stop the motor vehicle or to be alert and keen whereby he would have seen the deceased slip and fall and thereby apply brakes and avoid running over the deceased. It is worth noting that the driver, who was in the employment of the Respondent was not called to testify and deny the version of DW1 or explain how the accident occurred. It is not clear from the record why the Respondent failed to call such a crucial witness. His testimony would have explained and/or clarified whether he saw the deceased attempt to board the vehicle or he saw the deceased slip and fall. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. It was never suggested that the driver was no longer in the employment of the Respondent or he could not be found to clarify the issues I have raised. In the absence of such an explanation, my view is that the driver of the subject motor vehicle should have bore much more liability than the 60% allocated by the trial court.

15. To my mind therefore, I agree with and apply the dicta of Chesoni J in **Isabella Wanjiru Karanja case** (supra) that he who has control of a lethal machine or instrument is called upon and is obliged to keep a greater look out than the one who has none. I say so because it is clear in this case that firstly, the deceased did not rush onto an oncoming vehicle, he saw a company vehicle which ordinarily picked the company employees; he waved it down to stop; the vehicle slowed down to allow him board; he never run onto its way. It is only that he wrongly attempted to board the vehicle while it was in motion. The trial

Court did not consider all these issues while apportioning liability. In this regard, I consider a contribution of 20% on the part of the deceased to be reasonable. Accordingly, I will assess liability at 80%-20% against the Respondent.

16. As regards the admission of the evidence of DW1, the Appellant's complaint has no basis. Firstly, there is no property in a witness. Secondly, the Appellant's Counsel was given an opportunity to test the veracity of DW1's testimony. To my mind, the trial court was entitled to deal with the matter as it did. I do not think that there was any need to warn itself on the evidence of DW1 just because of the circumstances alluded to by the Appellants. DW1's evidence was direct and was more reliable than that of PW2 who visited the scene two weeks after the accident. In the circumstances, ground No. 1 succeeds while ground No.s 2 and 3 of the Memorandum of Appeal fail.

17. Ground No.s 4 to 8 of the Memorandum of Appeal are against the damages awarded to the Appellants. The principles to be applied by this court in the circumstances are well known. In the case of **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** the Court held:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)***

These then are the principles this court will follow and apply.

18. The Appellants argued that the court should have applied a multiplicand of KShs. 21,000/- based on the evidence of PW1. They also urged for a multiplier of 31 years on the basis that the deceased would have retired at 60 years. They placed reliance on **Nairobi HCCC No. 1192 of 2002 Beatrice Wanjiku Guchuki v. Veronica Sironga** and **Nakuru HCCC No. 357 of 1999 Alice Mboga v. Samuel Kiburi Njoroge**. On loss of expectation of life, they urged that a sum of KShs. 200,000/- would be appropriate considering that the deceased was a young man aged 29 years with a young wife and child. For pain and suffering, it was submitted that the deceased suffered immense pain and award of KShs. 200,000/- would be appropriate. It was urged that funeral expenses should have been awarded at KShs. 100,000/- as Visram J did in **Jane Katumbu Mwanzia v. The Attorney General & Another, HCCC No. 3177 of 1997**. The Appellants concluded that the dependants should have been awarded under the now repealed Workmen Compensation Act, Cap 236 Laws of Kenya KShs. 1,260,000/- thus 21,000/- × 60 months.

19. Great caution should be exercised in awarding damages under the Law Reforms Act and the Fatal Accidents Act to ensure that the awards are not duplicated. See **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** where the court said:

> ***"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act…This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act'…anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya."***

20. Section 2(5) of the Law Reforms Act, Cap 26, Laws of Kenya reiterate the above quoted provision. It stipulates:

> ***"(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act…"***

There was no complaint on the amount of award under the Law Reform Act. The only complaint was that the same should not have been deducted from the award under the Fatal Accidents Act.

21. In the case of **Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30** the Court of Appeal was categorical that the words *"to be taken into account"* and *"to be deducted"* are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are *"taken into account."* That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction.

22. Accordingly, what is required in order to avoid double compensation is for the court to have in mind and therefore take into account the award under the Law Reform Act when making an award under the Fatal Accidents Act. In my view this is the better way of construing Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act Cap 26 Laws of Kenya. Otherwise there will be no need of having to bring the suit under both statutes only for the award in one to be deducted from the award made in the other. Indeed, in the **Kemfro Africa Ltd** case (supra), the Court of Appeal declined to deduct KShs. 25,000/= that had been awarded under the Law Reform Act from the award of KShs. 150,000/= awarded under the Fatal Accidents Act Cap 32 Laws of Kenya on the basis that the trial court had taken into account the said award.

23. In the present case, I have carefully examined the judgment of the trial court. The court assessed the deceased's income at KShs. 15,000/=, the figure suggested by the Respondent. The court had found the deceased's monthly net pay to be KShs. 16,015/=. In my view, by taking a lower figure and not the amount that had been found to be the net income shows that the court was aware that the Appellants should not be over compensated. The figure of KShs. 2,400,000/= awarded under the Fatal Accidents Act was not so excessive as to suggest that the trial court did not take into account the award of KShs. 100,000/= it had awarded under the Law Reform Act.

24. My foregoing position is fortified by the holding in **Kemfro Africa Ltd** case (supra) at Pg 38 wherein Kneller JA observed:-

> ***"And did the Judge take into account of the assessment for the estate under the Law Reform Act when it came to that for Lubia under the Fatal Accidents Act? He added all the assessments together, it is true, but in my judgment, an arithmetical deduction need not be set out as for an examination answer. The test is whether or not this court can be satisfied the judge remembered before he assessed the loss for Lubia at KShs. 150,000/= that Lubia would inherit the KShs. 25,000/= from Myra's estate? In my view he did and I base that on the way in which he directed himself and the sum he awarded Lubia under the Fatal Accidents Act which even if the KShs. 25,000/= under the Law Reform Act not taken into account was not manifestly excessive."*** (Emphasis added)

To my mind therefore, there was no basis of deducting the sum of KShs. 100,000/= under the Law Reform Act from the award made under the Fatal Accidents Act. At least from the record, the trial Court does not appear to have shown the reason for the deduction. Ground 7 succeeds.

25. On loss of dependency, the deceased had a wife and one child who depended on him. He was aged 28 at the time of his death and was in employment earning approximately KShs. 16,015/05 net per month, I take it that the deceased was the sole breadwinner of his family as testified by the 1st Appellant and put the dependency at 2/3 of his income. As for multiplier, I have considered that the deceased was employed

on a permanent and pensionable basis and could have worked to the retirement age of 60 years considering that he was in good health at the time of his death. However, taking the vicissitudes of life and the authorities cited by Counsel into consideration, the multiplier of 20 years applied by the trial court in my view was reasonable. Further, taking into consideration what I have held about the award under the Law Reform Act, the multiplicand of KShs. 15,000/= per month seems to be reasonable. Accordingly, Grounds 5, 6 and 8 of the Appeal fails.

26. There shall therefore be judgment for the Appellants as follows:-

a. Award under Law Reform Act

i. Pain and suffering KShs.10,000/=
ii. Loss of expectation of life KShs.100,000/=

b. Under Fatal Accidents Act

$15,000 \times 12 \times 20 \times {}^{2}/_{3}$ = KShs. 2,400,000/=

Total KShs.**2,510,000**/=

As the deceased bears 20% contribution, the damages due to him would be KShs.2,510,000/= less KShs. 502,000/= therefore KShs. 2,008,000/=. Although the Appellants' Counsel submitted on special damages, since there was no substantial ground of appeal against the finding of the lower court on that issue, I will not make any pronouncement on it. However, this not being the final Court of Appeal, if my opinion was sought, notwithstanding the decision in **Jane Katumbu Mwanzia –vs- T.M. Mwanzui & Anor NBI HCCC No. 3177 of 1997 (UR)**, I will still not have granted the same having not been specifically pleaded nor strictly proved or at all.

27. Since the appeal was only partially successful, I will award half the costs of the appeal to the Appellants. The Appellants will also have the costs of the trial Court.

It is so decreed.

Dated, Signed and Delivered at Nairobi this 28th day of January, 2015.

…………………….

A MABEYA

JUDGE