REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI

CIVIL APPEAL NO. 491 OF 2009

SAMUEL MWANGI WACHIRA

ANTHONY NDEREVA GICHOVI.....APPELLANT

VERSUS

RAHAB WANJIRU MACHARIA and

ANNE WAMBUI MACHARIA(suing as the administrators of the Estate of JOHN MACHARIA MWAURA (deceased).....RESPONDENTS

(Appeal from the original judgment and decree of Hon. Meoli in Thika CMCC No. 984 of 2004 delivered on 6th August, 2009)

JUDGMENT

1. The Respondents sued the Appellants seeking recovery of damages alleged to have arisen out of an accident which occurred on 19th April, 2003. It was alleged that the deceased was travelling aboard m/v registration number KAP 053D along Muranga-Thika road when the vehicle was involved in an accident as a result of which the deceased sustained injuries which he succumbed to. The Respondents attributed the accident to the negligence of the 2nd Appellant who was alleged to be the driver at the material time.
2. The 1st Appellant (PW1) testified that following the deceased's demise, she obtained a police abstract (P. Exhibit 2). She stated that the 2nd Appellant was convicted for driving without appropriate licence and without Public Service Vehicle licence. She produced proceedings to that effect as P. Exhibit 3. She recounted that she and the deceased had three (3) children whose birth certificates she produced as P. Exhibit 5(a),(b) and (c). She stated that some money was spent following her husband's passing on i.e. KShs. 5,000/= for coffin, transport KShs. 10,000/= from Thika to Mwea and KShs. 10,000/= for funeral arrangements. She stated that the deceased was a farmer who could get two harvests in a year with one harvest fetching 43 bags of rice. She stated that each bag of rice could go for KShs. 3,500/=. That the horticulture produce was harvested twice in a year. The net earning was KShs. 200,000/= per year for tomatoes and KShs. 180,000/= per year from French beans. She produced a payslip as P. Exhibit 6 and a lease agreement as P. Exhibit 7. It was her testimony that the money was spent for the family basic needs.
3. PW2, Mwaura Kinyanjui stated that he is the father of the deceased. He testified that he had given the deceased $1^1/_2$ acre of land to farm on. That the deceased also had 1 acre for growing horticulture produce. It was his testimony that when the deceased delivered rice he and PW1 were paid directly.
4. The Appellants closed their case without bringing any witness.
5. The trial magistrate heard the matter and entered judgment in favour of the Respondents against

the Appellants who were found 100 % liable jointly and severally. Being dissatisfied by the judgment, the Appellants filed this appeal on the following grounds:-

i. ***The learned trial magistrate erred in law and in fact in holding the Defendants jointly and wholly liable for negligence.***

ii. ***The learned magistrate erred in law and in fact in assessing general damages at Kshs. 100,000/- for Loss of Dependency and failed to apply the principles applicable to the award of damages in fatal accident claims.***

iii. ***The learned trial magistrate erred in assessing the deceased's monthly income at Kshs. 8,000/-.***

iv. ***The learned trial magistrate erred in adopting a multiplier of 25 years.***

v. ***The learned trial magistrate erred in law in failing to consider the provisions of the Fatal Accidents Act (Cap. 32) of the Laws of Kenya and the provisions of the Law Reform Act (Cap 26) of the Laws of Kenya.***

vi. ***The award of general damages is inordinately high in the circumstances of the case.***

vii. ***The learned trial magistrate erred in not considering the submissions and authorities submitted on behalf of the Appellant.***

6. This being a first appeal I am guided by the principle laid in ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.*** I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusions.
7. The appeal was canvassed by way of written submissions. It was contended that the 2nd Appellant's conviction was an irrelevant factor to consider in determining the issue of liability in negligence. It was argued that in establishing negligence a party is required to prove fault of another party and establish a casual link between the injury and an act of commission or ommission of the other party. It was argued that a conviction for the offence of driving a vehicle by a driver who is not licensed does not disclose an act or the ommission on the part of the 2nd Appellant and that the offence which could suggest negligence was the offence of causing death by dangerous driving. The Appellant cited **Chemwolo & Another v. Kubende, Nairobi Civil Appeal No. 103 of 1984 (1986) KLR 492** and Further argued that a conviction in a criminal case was is not conclusive proof that a party was negligent. It was submitted that negligence must specifically pleaded and proved and the n there are three ways of proving liability in negligence which the Respondent proved none. The first is where an interlocutory judgment has been entered and there is no need of proving negligence, the second is Section 34 of the Evidence Act, where the proceedings in a traffic case are used in a civil case proceedings and eye witness or direct witness where an eye witness who witnessed the accident testifies. On quantum, the Appellants proposed an award of KShs. 30,000/= for pain and suffering, KShs. 70,000/= for loss of expectation of life. It was the Appellants' contention that the invoices produced did not bear stamp duty receipts as required by Section 19 (1) of the Stamp Duty Act and further that the invoices did not disclose any relation to the deceased as the person named therein was called 'Johana'. It was submitted that there was no basis for the figure of KShs. 8,000/= to be adopted as monthly earning. That the trial court ought to have subjected the same to a dependency ratio of at most $^1/_2$ as opposed to $^2/_3$. The Appellant proposed a multiplier of 15 years.
8. The Respondent on the other hand submitted that traffic case confirmed that the deceased was a passenger in the suit motor vehicle and that from the evidence of the traffic case it was clear that the 2nd Appellant was negligent. It was pointed out that the Appellants did not plead contributory negligence. The Respondent that in view of the provision of Section 34 of the evidence Act, the proceedings in the traffic case was admissible. On quantum, the Respondent reiterated the averments in the testimonies of the Respondent and urged that trial court made no error in principle while making the award.
9. The Appellants did not adduce any evidence to controvert the Respondent's case. The consequence

of such failure was discussed in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:-

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

10. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni j, stated:-

> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."***

11. In the absence of evidence in rebuttal from the Respondent, it follows that the Appellant proved his case on a balance of probability against both Appellants. Even if I were to be found wrong on my disposition on lack of rebuttal, I am still of the view that the Appellant proved his case on a balance of probability for reasons I move on to discuss hereunder. Particulars of the claim were that the 2nd Appellant drove at an excessive speed, without proper look out among others. It is not clear why the 2nd Respondent failed to attend court to give his part of the story. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to tender, that evidence is presumed to have been adverse to him. In the absence of such an explanation, my view is that the driver of the subject motor vehicle was negligent. Having been the 1st Appellant's driver the 1st Appellant is found vicariously liable. In the circumstances I find the Appellants 100% liable jointly and severally.
12. 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.

13. The Appellants argued that there was no basis for the trial court's adoption of KShs. 8,000/= as monthly earnings. They also argued that a multiplier of 25 years was high and that the applicable dependency ratio was 1/3.
14. Caution must 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."

15. 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…"***

16. 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.
17. In the present case, I have carefully examined the judgment of the trial court. Having held that the documents as to income produced by the Respondent were not sufficient it was incumbent of the trial court to apply the minimum wage considering that the deceased was a man who lived on farming. The minimum wage applicable at the time for the category for which I would rate him was KShs. 9,780.95/=. However, the trial court placed it at KShs. 8,000/=. In my view, by taking a lower figure and not the applicable minimum wage, the court was aware that the Respondent should not be over compensated. There was evidence that the deceased had three children and a wife. I therefore find no reason to interfere with the dependency ratio. He was at the time of his death aged 30 years and would have worked another 30 years. Considering the vicissitudes of life, the years may have reduced by about 5 years. I find 25 years reasonable multiplier. The figure of KShs. 1,600,000/= 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/= for loss of expectation of life it had awarded under the Law Reform Act.
18. In view of the aforegoing, I find and hold that this appeal has no merit and is dismissed with costs to the Respondents. The upshot is that the trial courts judgment is upheld. Orders accordingly.

Dated, Signed and Delivered in open court this 27th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

……for the Appellant

……for the Respondent