REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 226 of 2003

OL DONYO FARM LIMITED …………….………………………..APPELLANT

VERSUS

MARGARET WANGECHI NDONGA (suing as personal Representative of the estate of) Francis Njaramba Waigwa (deceased)..............1ST RESPONDENT

JOSHUA MITHIKA……………………….......…....2ND RESPONDENT

(An appeal from the judgment of the Senior Principal Magistrate, Mr. Nyakundi, delivered on 31st March, 2003 in the Chief Magistrate's Court (Milimani) Civil Suit No. 7581 of 2002)

JUDGMENT

1. This appeal arises from a suit which was brought by Margaret Wangechi Ndonga (hereinafter referred to as the 1st respondent). She had sued in her capacity as the personal representative of the estate of Francis Njaramba Waigwa – deceased (hereinafter referred to as deceased). The suit was against Joshua Mithika and Ol Donyo Farm (Timau) Limited (hereinafter referred to as the 2nd respondent and appellant respectively).

2. The claim was for damages under the Law Reform Act and the Fatal Accidents Act arising from the death of the deceased. It was contended that the deceased died as a result of fatal injuries suffered in a road traffic accident involving motor vehicle KXG 502 which belonged to the 2nd respondent and motor vehicle No. KAC 966E which belonged to the appellant. It was contended that the accident was caused by the negligence of the appellant's driver and the 2nd respondent's driver in the management and control of the aforementioned vehicles.

3. The claim was brought for the benefit and on behalf of the deceased's dependants. These were: the 1st respondent, who was the deceased's wife; the deceased's mother Dorcas Wanjiru Waigwa; the deceased's minor son Patrick Ndonga; and the deceased's two minor daughters, Beatrice Wanjiru, and Caroline Njeri.

4. The 2nd respondent filed a defence in which he denied the 1st respondent's claim maintaining that the accident was caused by the negligence of the appellant. The appellant also filed a defence denying liability for the accident maintaining that the accident was caused by the negligent manner of driving of the owner or servant or agent of owner of motor vehicle registration No.KAC 966E.

5. During the hearing in the lower court, two witnesses testified in support of the 1st respondent's case. These were the 1st respondent and Thomas Kimani, a police officer attached to Meru Traffic Base. Their evidence was briefly that an accident involving motor vehicle KXG 502 and motor vehicle KAC 966E was reported at Meru Traffic Base on 2nd June, 1997. PC Musau and PC Ndirangu visited the scene. The statements of the drivers and eye witnesses were recorded. The accident had one casualty, the deceased who died as a result of injuries which

he suffered from the accident.

6. The 1st respondent confirmed that the deceased who was her husband was 45 years old and was working with the appellant earning a salary of Kshs.3,778.=. She produced invoice payslip confirming that amount. Following the deceased's death, the 1st respondent was given a sum of Kshs.187,200/= under the workman's compensation Act. The 1st respondent maintained that as a result of the deceased's death, she and her children were denied the maintenance and support which she used to receive from the deceased. At the time of the deceased's death, the 1st respondent was 3 months pregnant and had three other children. She claimed special damages which were Kshs.8,000/= spent in buying a coffin, Kshs.2,000/= used for hire of a vehicle, Kshs.100/= for a police abstract and Kshs.20/= for death certificate. She also claimed general damages.

7. Neither the appellant nor the 2nd respondent called any witnesses. Submissions were however filed by all the parties. For the 1st respondent, it was submitted that the accident which led to the deceased suffering his fatal injuries, having arisen from a collision between the two vehicles, the issue of liability was entirely between the appellant and the 2nd respondent. Noting that none of the drivers of the vehicles or owners of vehicles involved in the accident offered any evidence, counsel for the 1st respondent referred to ***Civil Appeal No.65 of 1984, Berkley Steward Ltd, David Colle, and Jean Susan Colle vs Lewis Kimani Waiyaki***, ***[1982-88] 1KAR 1118,*** where the Court of Appeal following the case of ***Baker vs Market Harborough Industrial Co-operative Society Ltd, [1953] 1WLR 1472***, held in a situation where a collision had occurred, and it was not reasonably possible on the evidence adduced to decide who was to blame, that liability should be apportioned at 50-50% as between the two motor vehicles.

8. With regard to quantum, counsel for the 1st respondent urged the court to adopt a multiplier of 18 years and a dependency ratio of $^2/_3$based on the deceased's salary of Kshs.3,773/=. Counsel for the 1st respondent submitted that Kshs.452,760 should be awarded for loss of dependency. Counsel further proposed a sum of Kshs.100,000/= for loss of expectation of life, Kshs.10,000/= for pain and suffering and Kshs.15,000/= for funeral expenses.

9. For the appellant it was submitted that the evidence adduced by the 1st respondent's witness Thomas Kimani and the documents produced, showed that statements were taken from eye witnesses to the accident, which confirmed that the 2nd respondent's vehicle rammed into the rear of the appellant's vehicle. Counsel for the appellant maintained that the appellant's driver was not to blame for the accident as there was nothing that the driver could have possibly done to avoid the accident. Counsel further relied on the recommendation by the police that the driver of the motor vehicle KAC 966E be charged with the offence of causing death by dangerous driving. Counsel urged the court to find the 2nd respondent or his driver or agent fully to blame but if the court was inclined to apportion any liability upon the appellant, it should hold the 2nd respondent 90% liable.

10. With regard to quantum of damages, counsel for the appellant urged the court to adopt a multiplier of 5 years and a dependency ratio of $^1/_3$, bringing the amount to be awarded to Kshs.75,460/=. Counsel further proposed a sum of Kshs.70,000/= in respect of loss of expectation of life, Kshs.10,000/= in respect of pain and suffering and Kshs.14,150/= as special damages.

11. For the 2nd respondent, it was submitted that the only evidence adduced by the 1st respondent on liability was the evidence of Thomas Kimani, who relied on the police file containing statements by various persons who were not called to testify. Counsel submitted that under Section 35(1) of the evidence Act, the 1st respondent could not rely on the evidence of persons who were not called to give direct evidence. It was therefore submitted

that the court should apportion liability equally. On quantum, counsel for the 2nd respondent submitted that a multiplier of 6 and the dependency ratio of ½ should be applied, resulting in a sum of Kshs.135,826/= as general damages. Counsel further proposed a sum of Kshs.60,000/= in respect of loss of life and Kshs.10,000/= for pain and suffering and finally Kshs.14,150/= as special damages.

12. In his judgment the trial magistrate found that there was a collision between motor vehicles KXG 502 and KAC 966E. He further found that the driver of the motor vehicle KAC 966E was to blame for the accident, and apportioned liability at 85%, the driver of motor vehicle KXG 502 bearing 15%. The trial magistrate also found that the deceased was a passenger in motor vehicle KXG 502. He awarded the 1st respondent damages for loss of dependency of Kshs.452,760/= and loss of expectation of life 100,000/=, funeral expenses of 4,000/=.

13. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:

(i) The learned Magistrate erred in holding the appellant liable at all for the accident which resulted in the death of the deceased which is the subject of the 1st respondent's claim in the original suit.

(ii) The learned Magistrate erred in holding the appellant liable in the proportion of 15% for the accident which resulted in the death of the deceased which is the subject of the 1st respondent's claim in the original suit.

(iii) The learned Magistrate erred in failing to find the 2nd respondent fully liable for the accident which resulted in the death of the deceased which is the subject of the 1st respondent's claim in the original suit.

(iv) The learned Magistrate erred in failing to dismiss the 1st respondent's suit against the appellant with costs.

(v) The learned Magistrate erred in apportioning 15% liability to the appellant.

(vi) The learned Magistrate erred in holding that the appellant had been negligent to the extent of having contributed by 15% to the occurrence of the accident in which the deceased lost his life.

14. Following a consent recorded by the parties, written submissions were filed and exchanged and the court is invited to determine the appeal based on those submissions. For the appellant, it was submitted that the statement of the eye witnesses all confirmed that the appellant's driver was not at fault and therefore the trial magistrate erred in finding the appellant liable by 15% for the accident while the appellant was also a victim as his vehicle was hit from behind by the 2nd respondent's motor vehicle. It was maintained that the full blame and liability for the accident must fall squarely on the 2nd respondent's driver. Counsel further submitted that the evidence of Thomas Kimani completely exonerated the appellant's driver. The court was therefore urged to allow the appeal and set aside the judgment of the lower court, and substitute thereof an order holding the 2nd respondent fully and solely liable to the 1st respondent in respect of all damages.

15. For the 1st respondent, it was submitted that the statements of the eye witnesses sought to be relied upon by the appellant were unsigned and that none of the alleged makers of the statements gave evidence at the trial. Therefore, the evidence was inadmissible under Section 35(1) of the Evidence Act. It was contended that the only evidence that was not in dispute at the trial was the fact that a collision occurred between motor vehicle Registration Nos. KXG 502 and KAC 966E. It was argued that since the drivers of the said vehicles chose not to testify, it was open to the trial magistrate to apportion liability the way he did. The court was therefore urged to uphold the finding of the lower court on liability.

16. For the 2nd respondent it was submitted that the statement produced by the 1st respondent's witness, showed

that that the accident was caused by a tyre burst of the 2nd respondent's motor vehicle, and that the 2nd respondent's driver put on the headlights of his vehicle to warn the appellant's driver but the appellant's driver did not heed the warning, resulting in the 2nd respondent's motor vehicle hitting the appellant's vehicle. It was argued that had the appellant's driver exercised due care, he could have avoided the accident by heeding the warning and swerving. It was further submitted that the court was wrong in relying on the evidence of the 1st respondent's witness and the statements produced as the witness was not an eye witness and the makers of the statements were not called to testify. It was submitted that although the certified copy of the judgment did not show the reason for the trial magistrate's holding the appellant 15% to blame, the 2nd respondent should not be prejudiced by that omission.

17. I have carefully reconsidered and evaluated all the evidence that was adduced before the trial court. I have also considered the submissions made before this court and before the trial court. I do note that none of the 6 grounds of appeal raise the issue of quantum, nor do they challenge the trial magistrate's finding that the deceased was a passenger in motor vehicle KXG 502 and died as a result of an accident involving motor vehicle KXG 502 and KAC 966E. The issue raised in this appeal is therefore the issue of liability and apportionment.

18. I have perused the certified copy of the judgment of the trial magistrate contained in the record of appeal. It is apparent that although the judgment is certified to be a true copy of the original, there are various portions of the judgment which have been omitted. This makes it difficult to understand the reasoning in the judgment. Although the original handwritten judgment is in the lower court file, the handwriting of the trial magistrate though neat, is rather difficult to decipher. Therefore, the reason why the trial magistrate apportioned liability at 85% as against the 2nd respondent and 15% as against the appellant is unclear.

19. It is apparent from the evidence which was adduced before the trial court that none of the witnesses who testified were eye witnesses. In fact, none of the witnesses testified to having been to the scene of the accident. The crucial witness regarding the accident was Thomas Kimani, however, this witness simply relied on records from his office. None of the police officers who visited the scene or took measurements or statements of the witnesses was called to testify. Although Thomas Kimani produced the police file which contained the statements of the witnesses, the trial court ought not to have relied on the contents of the statements. This is because the makers of the statements were not called to testify nor was the veracity of their evidence tested by cross-examination. Further, the statements were inadmissible under Section 35(1) of the Evidence Act as they were not the original signed copies nor were they produced by the makers. At best, Thomas Kimani's evidence was only sufficient to prove that an accident did occur between motor vehicles KXG 502 and KAC 966E. I find that the trial magistrate was wrong in apportioning liability as between the appellant and the 2nd respondent based on the statements which were produced.

20. The fact of the collision involving the two motor vehicles having been established, both the appellant and the 2nd respondent were in possession of evidence relating to how the accident occurred. Each was under a responsibility under Section 112 of the Evidence Act to avail the evidence relating to the circumstances of the accident in order to disprove the negligence alleged against him. Having failed to do so, the following words of *Denning L.J. in Baker vs Market Harborough Industrial Cooperative Society Ltd [1953] 1WLR 1472 at 1476* would be apt:

> "*Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them…*"

21. In this case, the court had no concrete evidence to distinguish the blame between the two drivers. The court therefore ought to have apportioned liability equally. That is to say, that the appellant has no reason to complain about the apportionment of 15% against him as he ought to have shouldered 50% liability. Nonetheless, the 2nd respondent not having appealed against the judgment of the trial magistrate, I uphold the judgment of the trial magistrate and dismiss the appellant's appeal. I award costs of the appeal to the 1st respondent only.

Those shall be the orders of this court.

Dated and delivered this 26th day of January, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Mrs. Otieno for the appellant

Mwangi for the 1st respondent

Ms Mwihaki for the 2nd respondent

Eric - court clerk