REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 133 of 2003

ABDI KADIR MOHAMMED alias MOHAMED OSMAN…..…1ST APPELLANT

KENYA PORTS AUTHORITY……..2ND APPELLANT

VERSUS

JOHN WAKABA MWANGI *(suing as the legal representative of the*

***Estate of the late DAVID KARANJA MWANGI)*……..RESPONDENT**

JUDGMENT

This is an appeal from the Judgment of Hon. H. Wasilwa Senior Resident Magistrate, Nakuru in CMCC No. 698 of 2001 wherein the respondent was awarded as against the appellants damages in the sum of Kshs 407,995/= as compensation for the death of his 12 year old son in a fatal accident which occurred on or about 7th July 2000 along Geoffrey Kamau Way within Nakuru town. The award was expressed as comprising of

(a) Kshs 10,000/= for pain and suffering

(b) Kshs 70,000/= loss of expectation of life

(c) Kshs 720,000/= loss of dependency and

(d) Kshs 115,890/= special damages

Less 50% contribution

Interest and costs were also awarded to the plaintiff/respondent. On 27th August 2003 the appellants herein filed a memorandum of appeal in which six grounds were raised. Ground 6 of the appeal was abandoned while the other five grounds were condensed and argued under two heads, liability and quantum.

Mr. Kiburi, learned counsel for the appellant, submitted that the 50% contributory negligence attributed to

the appellant was not supported by the testimonies of the two plaintiff witnesses who quite clearly, were not eye witnesses to the accident. The first witness *(the appellant)* is the father of the victim while the 2nd witness was a police officer who testified on behalf of the investigating officer and relied purely and entirely on the police record by an officer who had since passed away. Counsel submitted that there being no eye witness account and the police record produced by PW2 having, in his view, absolved the appellant of blame it followed that the plaintiffs' claim was not proved on the balance of probabilities. He submitted that the evidence adduced, having stated that the deceased ran across the road suddenly then the trial court ought not to have presumed carelessness on the part of the 1st appellant simply because he testified that he did not see the deceased until after the accident. To support his argument that liability was not proved Mr. Kiburi cited the following authorities:

1. **STEPHEN M. KUBAI vs. MELIKA AMATU & ANOTHER [2006] eKLR**

2. STEPEN MURIMI KIBUCHI vs. A. M. SUNKAR NBI H.C.C.C. NO. 1301 OF 1998 *(unreported).*

On quantum Mr. Kiburi submitted that the learned trial magistrate was in error in assessing loss of dependency in the absence of evidence of economic loss. In this regard counsel submitted that the court erroneously imported a multiplier of 30 years and a multiplicand of Shs 2,000 when no such evidence had been tendered at the trial. He submitted further that the mention of a figure of Shs 3,000 in the written submissions, filed in support of the respondent's case, was not a proper basis for determining a multiplicand. Subject to liability on the part of the appellant being established, the appellant concedes the award in respect of pain and suffering, loss of expectation of life and special damages of Shs 15,890/= as pleaded. Mr. Kiburi pointed out that there is possibility of a typographical error in the sum Shs 115,890 indicated as representing special damages in the lower court's award. On quantum counsel cited the following authorities:

1. **ALI ELMI SANEY vs. MOHAMED BAKARI NBI H.C.C.C. NO. 2225 of 1993** *(unreported)*

2. KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICE vs. A M LUBIA & OLIVE LUBIA [1982-88] KAR.

He asked the court to take particular note of the decision in **ALI ELMI** case where in the case of a minor victim of 10 years a nominal sum of Shs 100,000/= was awarded for lost years.

Opposing the appeal Miss Kereri for the respondent argued that the lower court ought not to have found the minor victim liable in negligence at all. Relying on the authorities of **Ochieng vs. Oyieko [1995] KLR 494** and **BUTT vs. KHAN [1981] KLR 349.** Miss Kereri submitted that the 50% contributory negligence attributed to the minor victim was on the higher side. She took the position that since the evidence of PW2 was based on what DW1 had told the police in regard to the circumstances in which the accident occurred, the burden rested on the defendant to prove the minor victim's negligence. Counsel submitted further that the trial court was right in its computation of dependency, in view of **section 4** of the **Fatal Accidents Act (Cap 32 Laws of Kenya)** which entitles a parent to claim damages where a child is killed in an accident. Regarding the multiplicand, counsel was of the view that a figure having been raised in submissions the trial court was right in adopting the proposed figure as a guide in assessing the damages payable under the Fatal Accidents Act. To support this she cited the following decisions.

(i) David Mukii Mereka vs. Richard Kanyago & 2 others HC.C.C. No. 78 of 2000

(ii) David Njunge Mwangi vs. B.O.G. Njiiri High School H.C.C.C. No. 2409 of 1998

In reply Mr. Kiburi submitted that no burden of proof rested with the appellant as regards contribution since PW2's testimony, to the effect that the driver of the accident vehicle was not to blame, clearly exonerated the appellants from blame. He submitted that the authorities cited by the respondent to support the damages under the Fatal Accidents claim were distinguishable in that the victims in those

cases were young adults in whose case there was reasonable expectation of future employment, given their age and status in life.

The accident, age of the victim and the ownership of the accident vehicle are not in dispute. The respondent who brought this action as the legal representative of the estate of the late David Karanja *(victim)* testified only that on the material date he had given his late son permission and bus fare to attend the Nakuru Show and that the boy never returned home. He set out to look for him but was unsuccessful in tracing him. In the course of his enquiries he learnt of the accident. He found his son's body at the mortuary. He testified that he did not know how the accident occurred but did obtain a police abstract, which he tendered in evidence, in which it was stated that his son was knocked down by the subject motor vehicle, KAC 436C. His testimony was that his son was a clever and respectful 12 year-old boy in class 4 at Kimango primary school. The respondent produced receipts evidencing an expenditure of Shs 15,890/= on the funeral. He also produced the police abstract report. Under cross-examination, the respondent testified that, in addition to himself, the deceased was survived by two brothers and his mother. PW2's evidence was based entirely on the findings of one Sgt. Owuor said to have been the investigating officer. The findings were that a fatal accident had occurred along Geoffrey Kamau near Midlands (Hotel) involving the motor vehicle registration No. KAC 436C, owned by the Kenya Ports Authority and a pedestrian David Karanja Mwangi. The findings, alleged to have been those of the investigating officer were stated as follows:

"***1. Inspection report revealed no pre-accident defect and***

speed of vehicle was 30-40 km 'has' (sic) regarding crowd in town.

2. It was daytime and visibility was clear.

3. There was no pot hole off (sic) the road

4. The victim who was a victim was from showground crossing the road running and couldn't be seen."

PW2 testified that when compiling the report, the investigating officer relied wholly on the evidence of the driver and his passengers who said that they only noticed the juvenile after he entered the road running and that they could not avoid the accident. Also that the driver braked but all in vain. The juvenile was later identified as David Karanja mwangi from Rongai and he is believed to have caused his death. The report recommended a public inquest. There is no evidence of any independent witness to the accident. Under cross-examination PW2 stated that the driver was not to blame for the accident and that except for the driver and his passengers, there were no other independent witnesses. He stated that the passengers recorded statements.

In passing judgment, the learned trial magistrate took note of the fact that the appellants called no witness to testify on their behalf. She dismissed PW2's evidence that the vehicle was being driven at between 30 to 40 km holding the view that, if that were so then the brakes said to have been applied "***would have sufficed."*** The learned trial magistrate proceeded to find that the explanation that the victim was seen after only being hit went to establish carelessness on the part of the driver. She did not however lay a basis for apportioning contributory negligence at the ratio of 50:50.

The nature of the appeal is such that this court has been asked to determine, firstly, whether the learned trial magistrate misdirected herself in her evaluation of the evidence when she made her finding on liability and secondly, whether her decision both on liability and quantum was premised on the wrong principles of law or influenced by extraneous factors not supported by the evidence tendered. The problem presenting itself is the absence of eye witness evidence as to how the accident occurred. The only relevant evidence in that regard is the abstract report and the police record produced by the respondent and his witness. No indication was given by PW2 as to when the report he presented before court was compiled. According to the said witness the author of the report does not appear to have visited the scene of the accident but relied solely on what the appellants' driver and his passenger told him. Can

that evidence, which in actual fact is hearsay, be taken as representing an accurate account of what caused the accident to the extent of exonerating the driver of the accident vehicle and to attribute all blame on the juvenile victim? I think not.

The evidence represented by the police record is itself contradictory in that, on one hand it is stated that the victim was

"***from showground crossing the road running and could <u>not be seen"</u>***

and on the other, that the driver and passengers

"***only noticed the juvenile after he had entered the road running and they could not avoid the accident."*** Yet, the same report stated that the motor vehicle was moving at a slow speed of between 30 to 40 kms due to a crowd in the town. It appears to me that the learned trial magistrate, taking the said piece of evidence as the best evidence available was right in finding negligence on the part of the driver. That the learned trial magistrate read carelessness on the part of the driver is not, in my considered view, an importation of personal opinion into the case. The respondent had, in the particulars of negligence pleaded, inter alia, that the driver of the accident vehicle was negligent in:

"***(i) Driving the said motor vehicle without any proper look out***

(ii) …..

(iii) Failing to see the deceased in sufficient time or at all inorder to avoid hitting the deceased

(iv) …….

(v) Driving at a speed too fast in the circumstances."

On a balance of probabilities the evidence tendered proved the above and the learned trial magistrate was therefore justified in finding as she did. A closer re-evaluation of the said evidence suggests to this court that the driver and passengers of the accident vehicle, in narrating the incident, must have told the investigating officer only what was favourable for their case. There is also the possibility that the deceased investigator, God rest his soul, may have compiled the report after gathering further information on the case. The report having stated that the accident occurred along Geoffrey Kamau Road near Midlands (Hotel), how would the driver and his passengers know that their victim was from the showground which is no where near the said spot? To this I can only say that the idiom that dead men tell no tales applies equally to boys and leave matters at that.

Counsel for the respondent has submitted that the appellant ought to have been found 100% to blame for the accident on the basis that the minor of 12 years in this case cannot be said to have been aware of the danger. It was held in **<u>OCHIENG</u> vs. <u>AYIEKO</u> [1985] KLR 494** that a child of tender years cannot normally be guilty of contributory negligence unless it was established that

"***the child had the requisite road sense; that he was of such an age as to be expected to understand what necessary precautions to take on the road."***

It was similarly held in **<u>BUTT</u> vs. <u>KHAN</u> [1981] KLR** that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in **<u>GOUGH</u> vs. <u>THORNE</u> [1966] 1 WLR 1387** *(referred to in the **<u>BUTT</u> vs. <u>KHAN</u>** decision*) was whether the child was of such an age as to be expected to take precautions for his or her own safety and finding of contributory negligence can only be made if blame could be attached to the child. In the absence of an eye witness account in the present case and having found the investigating officers' evidence quite unreliable, it cannot be said with certainty whether or not the deceased in this case did actually run into the road as claimed. Despite that being the

evidence tendered by the witness called by the respondent the same cannot be the basis for finding the minor 50% to blame. For the father to have allowed him to attend the show on his own despite his tender years, there is no doubt that the deceased, whom the respondent described as a clever boy did possess the necessary capacity to be aware of danger and the need to take precautions for his own safety. I am of the considered view that 10% would be the reasonable contribution on his part.

As regards quantum it is only the loss of dependency or lost years which is in dispute. The learned trial magistrate did not lay a basis for the assessment under this head but appears to have considered the respondents' submission. Admittedly, the task of assessing damages under the Fatal Accident Act is a difficult and complicated one, due to the many uncertain and imponderable circumstances that make an arithmetic calculation impossible, and the case is more complex with minor victims, where the earning in the lost years is far distant and speculative. Yet, doing the best they can, courts do assess damages for lost years even in those cases since the same are assessable, depending on the facts and circumstances of each case. (See **HASSAN vs. NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS [1986] KLR 467.**

The deceased herein was aged 12 years old. He was a bright and confident child, as is demonstrated by the fact he would personally take interest in an Agricultural Show and attend the same unaccompanied. His father testified that he was a clever and respectful boy. Clearly therefore, his future prospects can be said to have been quite good. He would probably complete his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents welfare and probably share his earnings with his siblings as well. The respondents advocates proposed that the lost years be calculated on a modest figure of Shs 3,000/= monthly pay, which the lower court reduced to Shs 2,000/=. Clearly the said figures are unreasonable given that the minimum wage in Kenya today is about Shs 6,500/=. I do not think the deceased, had he lived would have earned a salary below this amount whatever occupation he may have engaged in. The figure of Shs 3,000/= proposed by the respondent ought not to have been reduced by the learned trial magistrate without assigning any reason for so doing. I find that it was erroneously reduced leading to an inordinately low award. As earlier stated the deceased would probably have succeeded in his education proceeding upto University level. He would then enter the labour market at 24 years and probably work upto the normal retirement age of 55 years. This would give him a working life of 31 years, not far removed from the 30 years proposed by the respondent. Considering however, the remoteness and speculative element of his lost years, the uncertainties and imponderables of life, and there being no indication as to how long dependency would have subsisted *(the dependants' ages having not been provided),* I am of the view that a multiplier of 25 years would be reasonable. I would therefore assess dependency as follows:

Shs 3,000 x 12 x 25 = 900,000

For reasons stated in this judgment the appeal cannot succeed. On the other hand I find that this court must interfere with the lower court's award and substitute the same as follows:

(i) Pain and Suffering Shs 10,000.00

(ii) Loss of expectation of life Shs 70,000.00

(iii) Loss of dependency Shs 900,000.00
980,000.00

Less 10% contribution 98,000.00 882,000.00

Add special damages 15,890.00
897,890.00

Accordingly the appeal is hereby dismissed and judgment entered for the respondent in the sum of Shs 897,890/=. The respondent shall have costs of the appeal.

Dated signed and delivered at Nakuru this 6th day of November 2009

M. G. MUGO

JUDGE