REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 109 OF 2003

SOKORO PLYWOOD LIMITED…...1ST APPELLANT

JOHN NDUATI KANGARA……..…2ND DEFENDANT

VERSUS

NJENGA WAINAINA……RESPONDENT

(Being an appeal against the judgment of Hon. Mr. Ateya in Nakuru CMCC No.183 of 2002 delivered on 2nd April, 2003)

JUDGMENT

The respondent was the plaintiff in Nakuru CMCC No. 183 of 2003, which had been commenced as High Court Civil Suit No.508 of 1996 at Nakuru. The case was by consent transferred to the subordinate court. The respondent stated in his plaint that on 11th June, 1995, the late Joyce Waithera Njenga, hereinafter referred to as *"**the deceased"*** was lawfully walking along Njoro-Mau Narok road when Ayub Mwangi Mwaura (the second defendant in the said case) so negligently drove motor vehicle registration number KAD 548H, owned by H. M. Kagoko (the first defendant) as a result of which he violently knocked motor vehicle registration number KWB 181 which subsequently hit and seriously injured the deceased. Motor vehicle registration number KWB 181 was owned by the first appellant and was being driven by the second appellant. The particulars of negligence were clearly set out in the plaint. The deceased was taken to hospital and remained there for 73 days before she died. The respondent filed the suit on behalf of himself and other beneficiaries of the deceased's estate.

The appellants filed a statement of defence and admitted that the said accident occurred but denied that there was any negligence on their part. They blamed the first and the second defendants for the occurrence of the accident.

When the matter came up for hearing, the respondent told the court that he was not present at the scene of the accident. He only said that the deceased was 60 years old at the time of her death and produced her treatment notes, police abstract and a limited grant of letters of administration that had been issued to him. The respondent called **Naomi Waithera Macharia, PW3,** as a witness. She testified that on the material day she was walking with the deceased when she heard the sound of a motor vehicle coming from behind. From her evidence it is clear that this motor vehicle was registration number KAD 548H. There was another vehicle that was following it, registration number KWB 181. This motor vehicle was being driven at a high speed and it hit motor vehicle registration number KAD 548H. She blamed the driver of KWB 181 for the occurrence of the said accident. In cross examination, she said that she did not

know which of the two vehicles hit them.

The defendants did not adduce any evidence but all the advocates made submissions. The trial court held that the appellants were 99% liable for the occurrence of the accident. The court awarded damages for loss of expectation of life at Kshs.100,000/-, damages for lost years Kshs.400,000/- and damages for pain and suffering Kshs.130,000/- all amounting to Kshs.630,000/-.

The appellants were aggrieved by the said judgment and preferred an appeal to this court. They listed four grounds of appeal which are as follows:-

"***1. The learned magistrate misdirected himself both in law and fact by finding the appellants 99% liable in disregard of evidence and pleadings on record.***

2. The learned magistrate misdirected himself both in law and fact in holding the appellants liable whereas evidence on record is contradictory and inconsistent.

3. The learned magistrate misdirected himself on the principles applicable in assessing quantum of damages thus arriving at an excessive award.

4. The learned magistrate without evidence of income misdirected himself both in law and fact in arriving at the judgment being challenged."

Mr. Nyambane for the appellants submitted that the respondent did not prove negligence against his clients. He said that PW3 did not see the motor vehicle that was coming from behind them; she only heard its sound. He added that the learned trial magistrate did not state why he found the appellants 99% liable. Counsel further submitted that the alleged motor vehicle that came from behind was not owned by the first appellant but it was owned by the first defendant and driven by the second defendant. He referred to the police abstract which he stated showed that the second defendant was charged with a traffic offence following the said accident. However, the police abstract is not in the record of appeal.

Regarding the damages awarded for lost years, Mr. Nyambane submitted that the learned trial magistrate had no basis of assessing the same since no evidence was led regarding the deceased's earnings. In his judgment, the learned trial magistrate stated that the deceased was self employed with an income of about Kshs.5,000/- per month. However, no evidence had been given to that effect. In the circumstances, the court should have been guided by the minimum wages applicable in assessing damages for lost years, counsel submitted. He cited the case of ***Chege Getahi Vs Maboko Distributors,*** HCCC No.599 of 1999 at Nairobi. In that case the true income of the deceased was unknown and the court adopted a sum of Kshs.2,000/- as the minimum monthly income. Regarding the multiplier, counsel submitted that the court should have adopted a multiplier of 8 years and not 12. He cited the case of ***Rahab Wanjiku Gitonga Vs Almas Njoroge Mungai,*** HCCC No. 59 of 1997, where the deceased was 64 years and the court adopted a multiplier of 8.

Mr. Gekonga for the respondent submitted that the evidence of PW3 was uncontroverted. The trial court was therefore right in accepting the same. He further pointed out that all the defendants in the case did not adduce any evidence and since the respondent had sued the drivers and owners of the two vehicles, it was not the responsibility of the respondents to prove which of the two drivers was to shoulder a higher percentage of liability. It was the duty of the court to make that decision and the court did so on the basis of the evidence adduced by PW3.

Regarding the figure of Kshs.5,000/- that was adopted as the deceased's monthly income, Mr. Gekonga defended the figure saying that the same was reasonable. He further submitted that the multiplier that was adopted by the trial court was 10 and not 12 years. He urged the court not to disturb the award by the trial court.

I have considered the above submissions and I have also perused the record of appeal. As rightly pointed out by Mr. Gekonga, the only eye witness who testified was PW3. She explained how the accident

occurred. None of the defendants tendered any evidence to controvert what she stated. According to her, it was motor vehicle registration number KWB 181 which hit motor vehicle registration number KAD 548H. Even though the witness did not know which of the two vehicles hit her and the deceased, she was emphatic that it was the driver of motor vehicle registration number KWB 181 who was driving at a high speed and as a result he caused the vehicle to collide with the other one, registration number KAD 548H. On the basis on that evidence, I cannot fault the learned trial magistrate for the apportionment of liability. If the appellants were not satisfied with the evidence as adduced by PW3, they ought to have adduced their own evidence but they did not do so.

Regarding ownership of the motor vehicle registration number KWB 181, there is nothing to support the submissions by Mr. Nyambane. I can only go by the pleadings. The respondents stated in paragraph 7 of the plaint that motor vehicle registration number KWB 181 was owned by the third defendant and was being driven by the fourth defendant. In the statement of defence, the third and fourth defendants admitted the contents of paragraph 7 of the plaint. In my view therefore, the appellants cannot challenge what they expressly admitted in their pleadings.

I now turn to the issue of quantum of damages. The amount awarded for loss of expectation of life at Kshs.100,000/-, is fair and reasonable. I would add that the conventional award range from Kshs.70,000/- to Kshs.120,000/-. For pain and suffering, the deceased died 73 days from the date of the accident. She suffered pain for quite a long time. The award of Kshs.130,000/- was reasonable in the circumstances.

The learned trial magistrate adopted a figure of Kshs.5,000/- as the deceased's monthly income. I agree with the appellants' counsel that the respondent did not adduce any evidence as to what the deceased's income was. He clearly stated that he had no document to prove her income. In the absence of such evidence it was improper for the trial court to accept the submission by the respondents' advocate that the deceased was in self employment and that her monthly income was Kshs.5,000/-. If that was the case the respondent who was her husband ought to have given evidence in support thereof. In my view therefore, the deceased's monthly income ought to be assessed at Kshs.3,000/-. Regarding the multiplier of 10 years, the deceased was 60 years at the time of her death. In the case of ***Rahab Wanjiku Gitonga Vs Almas Njoroge Mungai*** (supra) which was cited by Mr. Nyambane, the deceased was aged 64 years and the court adopted a multiplier of 8 years. In the circumstances of this case the multiplier of 10 was reasonable. I will therefore interfere with the award of lost years and quantify the same as hereunder:-

Kshs.3,000/- x 10 x 12 x $^{2}/_{3}$ = Kshs.240,000/-

The total award shall be as hereunder:-

1. Loss of expectation of life - Kshs.100,000/-

2. Lost years - Kshs.240,000/-

3. Pain and suffering - Kshs.130,000/-

Total - Kshs.470,000/-

In conclusion, I allow the appeal on quantum of damages and set aside the award of Kshs.630,000/- and substitute therefor an award of **Kshs.470,000/-** as hereinabove.

As the appellant has partially succeeded in his appeal, he will have one third of the costs of the appeal.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Rabera for the respondent and N/A for the appellant.

D. MUSINGA

JUDGE