REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 136 OF 2019

KUBAI KITHINJI KAIGA (Suing as the legal representative

of the estate of JOHN KAIGA (Deceased).....APPELLANT

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

JUDGMENT

1. This appeal calls for the application of the test in ***Butt v. Khan*** where the principles for interfering with an award of damages were settled, as held in ***Shabani v. City Council of Nairobi*** (1985) KLR 516, 518-9, as follows:

> *"The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in* ***Butt v Khan****, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:*
>
> ***"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

See also ***Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu*****.** (1982-88), KAR 278.

2. The Appeal challenges the Judgment of Hon. A.G. Munene (SRM) delivered on 23rd October 2019 in Maua CMCC No. 71 of 2017 in a fatal injury claim in which the learned magistrate apportioned liability at 50:50 between the respondent and the rider of the motor cycle on which the appellant was a pillion passenger and awarded the sum of Ksh.90,000/-as general damages for pain and suffering and expectation of life, and dismissed a claim for loss of dependency.

3. The Appeal is premised on the five (5) grounds of appeal as set out in the Memorandum of Appeal dated 30th October 2019. They are as follows: -

> *i) That the Learned Magistrate erred in fact and in law in apportioning a liability of 50% to the Plaintiff.*
>
> *ii) That the Learned Magistrate erred in law and in fact by blaming the rider of motorbike carrying the deceased yet the rider was not a party to the suit and no 3rd Party Notice was issued to him by the Respondent.*
>
> *iii) The Learned Magistrate totally disregarded the Appellant's evidence and submissions.*
>
> *iv) That the Judgement did not take account of any legal principles in apportioning liability and its purely against the weight of evidence.*
>
> *v) That the Learned Magistrate erred in law in failing to consider that there was no 3rd Party Notice issued.*

4. The Appellant seeks to have the judgement set aside, only to the extent of the liability apportioned and the Appellant seeks to have the Respondent be apportioned 100% liability and subsequently to have a reassessment of the quantum.

5. The Appellant contends that the Learned Magistrate erred in apportioning 50% liability upon the Appellant and yet the deceased was a mere pillion passenger in the motorcycle and as such, he had no control of either the motor cycle or the motor vehicle. He further contends that the owner of the motorcycle, having not been enjoined as a 3rd party by the Respondent in the proceedings in the trial Court, then the

Respondent should have borne 100% liability. He contends that if the Respondent believed that the rider and/or owner of the motorcycle was on the wrong, he ought to have enjoined him as a 3rd party. From the submissions filed it is clear that the Appellant does not deem there was any fault on the part of the rider of the motor cycle.

6. On the part of the Respondents, they have opposed the Appeal. They filed written submissions in response to the Appellant's submissions. The Respondent argues that liability having been arrived at from the Judgment of the test suit, i.e Civil Suit No. 145 of 2017 in which parties consented to having the same be used as a test suit, then the Appellant ought first to challenge the finding of the Court in that test suit before prosecuting the instant Appeal. The Respondent further contends that the instant Appeal is fatally incompetent as the test suit remains unchallenged.

7. The brief background to the matter is that vide a plaint dated 31st May 2017, the Appellant filed a suit against the Respondent for damages for negligence flowing from a fatal accident. Materially, the decision in CMCC No. 71 of 2017 was based on the finding of the Court in the other case of CMCC No. 145 of 2017 which by consent of parties was used as a test suit.

Issues for determination

8. The central issues for determination from the pleadings and submissions filed are

a. whether a party aggrieved by a decision in a test suit may challenge a decision based on the test suit without first having challenged that test suit itself;

b. whether the apportionment of liability at 50:50 between the respondent and a non-party motor cycle rider was valid;

c. and whether the assessment of damages for loss of dependency, which the trial court declined to award and which the appellant claims at Ksh.2,000,000/-. .

Determination

Duty of first appellate court

9. This being a first appeal, the Court is under a duty to consider both questions of fact and of law. See ***Peters v. Sunday Post Limited*** (1958) EA 424 as follows:

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution;* ***if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decided.*** *Watt v. Thomas, (1947) 1 ALL ER 582; [1947] A.C. 484, applied."*

See ***Selle & Anor. v. Automobile Associated Motor Boat Company Ltd***. (1968) EA 123.

10. Consider also section 65(1) (b) of the Civil Procedure Act that –

> ***""65. Appeal from other courts***
>
> *1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed,* ***an appeal shall lie to the High Court –***
>
> *a. deleted by Act No. 10 of 1969, Sch.;*
>
> ***b. from any original decree or part of a decree of a subordinate court, on a question of law or fact;***
>
> *c. from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief kadhi or two Kadhis shall sit as assessor or assessors."*

Preliminary

11. On whether the instant Appeal is fatally incompetent for having been filed whereas the main decision of Civil Suit No. 145 of 2017 i.e the test suit remains unchallenged, as submitted by the Respondents, this Court finds that the fact that the test suit has not been challenged does not bar the institution of the Appeal. This Court is of the view that it is possible to independently lodge an appeal irrespective of the status of the test suit i.e regardless of whether or not the same has been challenged. In bringing his claim, the Appellant will however have to rely on the proceedings of the file and/or Court that dealt with the test suit, as has been done herein.

12. Supposing the Plaintiff in the said test suit was comfortable with the award, it would be implausible to expect him to go through the trouble of challenging the said decision merely for the benefit of the Appellant herein and/or Plaintiff in Civil Suit No. 71 of 2017. Similarly, it would be implausible to expect the Appellant herein, being the Plaintiff in Civil Suit No. 71 of 2017 to fold its arms and accept the finding of the Court in the test suit, despite being dissatisfied with the same, for the mere reason that the test suit remained unchallenged by the

Plaintiff in that suit.

13. On whether the instant Appeal is tantamount to stealing a match on the Respondent because the case which forms that subject matter of Appeal herein, Civil Suit No. 71 of 2017 did not go for full trial, and thus an Appeal does not lie on its merits, as submitted by the Respondent, this Court finds in the negative. The very essence of the consent recorded in Civil Suit No. 145 of 2017 was to ensure that all parties agreed to having the issue of liability be decided on the basis of the findings of the Court in the test suit despite there being no full trial in the other matter. The Respondent cannot have agreed to this legally recognized arrangement under Order 38 of the Civil Procedure Rules, 2010 only to later on argue that no Appeal may be preferred on any decisions made based on the findings of the test suit for the reason that there was no full trial. Each and every litigant has a right to approach the Court on appeal independently in as long as the legal parameters and threshold for instituting any such Appeal have been met.

14. The Respondent's entire opposition to the Appeal is limited to the aforementioned issue i.e as to whether a party may challenge a decision based on a test suit without first having challenged that test suit itself. In answer to this, this Court, respectfully asserts in the affirmative that it is indeed possible to do so. The existence of a decision on a test suit which is yet to be challenged does not bar a litigant from appealing a separate decision which was arrived at based on a finding in the test suit. The method of test suit under Order 38 (1) and (2) of the Civil Procedure Rules is described as follows:

> ***"Staying several suits against the same defendant [Order 38, rule 1.]***
>
> ***Where two or more persons have instituted suits against the same defendant*** *and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may,* ***if satisfied that the issues to be tried in each suit are precisely similar,*** *make an order directing that* ***one of the suits be tried as a test case****, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.*
>
> ***Staying similar suits upon application by defendant [Order 38, rule 2.]***
>
> ***Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several defendants could properly have been joined as co-defendants in one suit,*** *the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues."*

15. In my respectful view, a test suit is purely a convenient method for trial of multiple suits against the same defendant (or by one plaintiff against several defendants) where the issues in the suits are the same, and it does not take away the right of the individual plaintiffs, or the defendant in any case to challenge the decision in the test suit or its relevant particular suit on appeal, review or other mode of impugning the decision, as the case may be.

On the merits

16. Having said so, this Court now turns to the merits flowing from Appellant's grounds of appeal as per the Memorandum of Appeal. It is material to note that though this Appeal is from the Judgement on the Court in Civil Suit No. 71 of 2017, there having been a test suit, in analyzing the finding of the Court, we will be looking at the Judgement and proceedings of the Court in the test suit i.e Civil Suit No. 145 of 2017 as from pages 18 to 26 of the Record of Appeal.

17. On the issue of liability as flowing from the facts, this Court notes that the Court in the Judgement, relying on the evidence tendered found that: -

> ***"2 questions emerge:-***
>
> ***1. Why did the motor cycle not wait for the road to clear before getting into the main road?***
>
> ***2. Why did the motor vehicle herein not stop in view of the fact that the point of impact was 15 metres away from the motor vehicle left lane?***
>
> ***The aforestated leads to the conclusion that both parties were to blame. I find that the Defendant's driver contributed 50% to the cause of the accident. He did not stop, this shows he could not control the motor vehicle to a stop. On the other hand, the motor cycle ought not to have joined the main road without waiting for the traffic to clear.***
>
> ***In summary, the Defendant was found 50% to blame for the accident"***

18. In this respect, the trial Court found that both the rider of the motorcycle and the driver of the Respondent's vehicle were to blame. However, despite having found the rider of the motor cycle partially responsible for the accident, this Court notes that the trial Court did not address itself to the fact that no such rider of the motor cycle had been enjoined to the proceedings.

19. The Appellant has submitted that there having been no 3rd party (rider of the motor cycle) enjoined to the proceedings, the Court should have apportioned liability on the Respondent at 100%.

20. This Court finds that the trial Court erred to the extent that it did not address this very pertinent issue i.e the omission to enjoin a third

party. It is not in dispute that as per Order 1 Rule 15 of the Civil Procedure Rules 2010, the duty to enjoin a third party lies on the Defendant who is attributing fault to the acts of the said third party. The catch in this phrase is the very last part i.e ***"who is attributing fault to the acts of the said third party"***

21. The question to ask in this respect is who is the party that introduced the element of fault on the part of the rider of the motor cycle. This is because the duty to enjoin lies with the party that seeks to have the Court find fault on the third party.

22. This Court has perused the Statement of Defence filed by the Respondent herein who was the Defendant in the trial Court. At paragraph 4, he has particularized the Deceased's negligence. From the pleadings as filed, the Respondent was quiet on whether it attributes the occurrence of the accident on the rider of the motor cycle.

23. However, from the evidence adduced during hearing, it is clear that the Respondent blamed the rider of the motor cycle for among others, failing to give way and entering suddenly on the main road without taking precaution.

24. In the premises, it is apparent that the Respondent sought to ascribe liability and/or contribution to the rider of the motor cycle, a third party. He therefore had a duty to enjoin him.

25. In the case of ***James Gikonyo Mwangi vs D M (Suing through his Mother and Next Friend, IMO*** (2016) eKLR at paragraph 41 thereof, Okwany J held that: -

> ***"I find that the Respondent (Plaintiff in trial Court) had no reason to enjoin a third party to the suit as the Respondent was positive that that it was the Appellant's (Defendant's) driver and nobody else.***
>
> ***"I blame our driver for speeding and veering off its lane. That is why I did not enjoin the other Motor Vehicle"***
>
> ***It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7."***

26. In the instant case, the issue of the rider of the motor cycle being negligent was raised by the Respondent itself and therefore, this Court finds that the Respondent had a duty to enjoin the said rider and/or owner of the motor cycle as a third party.

27. This issue not having been dealt with by the trial court, the upshot and/or end result is that the mistakes of the rider of the motor cycle were automatically ascribed to the Plaintiff (appellant herein) since the rider of the motor cycle was not made a party to the proceedings and in the same breadth, persons who are not party to a suit cannot and should not be affected by the decisions of the Court in the suit.

28. There is something of misjustice in the decision because the Appellant, being a pillion passenger on the motor cycle had no control over the motor cycle and it was, therefore, wholly unfair for the trial Court to ascribe any liability arising from the mistakes of the rider of the motor cycle on the Appellant passenger himself.

29. This Court also finds that this error was occasioned by the Respondent for failing to enjoin a third party from whom it claimed contribution. Since it is the Respondent who raised the issue of the third party, that is, the rider of the motor cycle during hearing, this Court takes the view that having failed to join the rider of the motor cycle as a third pursuant to third party proceedings under Order 1 Rule 15 of the Civil Procedure Rules, the Respondent must bear the whole blame for the accident. Accordingly, this Court finds that the Respondent should shoulder 100% liability for the accident.

Quantum of damages

30. Although the Appellant has submitted on quantum, it is a cardinal rule of law that the substance of the Appeal flows from the contents of the Memorandum of Appeal. This is the essence of the provision requiring that an Appeal be brought by way of Memorandum of Appeal pursuant to Order 42 of the Civil Procedure Rules, 2010, which provides as follows:

> ***"Grounds which may be taken in appeal [Order 42, rule 4.]***
>
> ***The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:***
>
> *Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."*

31. It is clear that at the appellate Court would only be required to address the issue of quantum if it had been raised in the Memorandum of Appeal, and the appellant is barred, save with leave of court, from urging a ground of appeal which is not set out therein. The only way the Court would have been able to address this issue, despite it not having been included in the Memorandum of Appeal is if the Appellant had sought leave of Court to be heard on the said point. No such leave has been sought by the Appellant.

32. But even then, had it been open for this Court to go into the issue of quantum, this Court finds that the Appellant has not raised sufficient

basis under the test in ***Butt v. Khan***, supra, to have this Court disturb the finding of the trial Court.

33. On pain and suffering, the trial Court awarded Ksh 10,000/=. The Appellant has submitted that the injuries suffered by the deceased were grievous. He has however retracted its submission at the trial Court for Ksh 100,000/= and prays for Ksh 75,000/=. On pain and suffering, the accident had been fatal, this Court finds that the figure of Ksh.10,000/= was sufficient since the interval of time between the accident and the death of the deceased was not prolonged. On loss of expectation of life, this Court finds that the sum of Ksh 80,000/= awarded was sufficient since the deceased was at the twilight of his life at 75 years old.

34. On loss of dependency, the Appellant has asked for a lump sum figure of Ksh 2,000,000/=. There is no breakdown of how this figure has been arrived at. I dealt with the issue of loss of dependency in my decision in the case of ***Crown Bus Services Limited & 2 Others vs Jamilla Nyongesa and Amida Nnyongesa*** (Legal Representatives of Alvin Nanjala) (Deceased) Kabarnet HCCA No. 9 of 2019 where I held as follows concerning the formula for calculation of dependency:

> ***Both parties agree as to the formula for computation of dependency as observed by Ringera, J. as he then was in Beatrice Wangui Thairu case, supra. Indeed, Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another cited by the Court of Appeal for Eastern Africa in Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:***
>
> ***"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:***
>
> ***"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."***
>
> ***Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):***
>
> ***"That the method of assessment of damages adopted by the learned chief justice was correct.""***
>
> ***Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.***

35. The above formula invites this Court to look at the income of the Deceased, his age at the time of his death and the number of years he would have been expected to live and the dependents that he had. Although this Court agrees with the submission by the Appellants that production of certificates and/or documents is not the only way of proving earnings, the Court expected him to have given evidence as to the nature of his income and an estimate of the returns, monthly or otherwise, that the Deceased got from his farming activities. This was not proved. He merely claimed a lump sum figure of Ksh.2,000,000/= as compensation.

36. Further, on the age, the Deceased died at 75 years of age. No evidence was led as to probable working years left for the Deceased, if at all he was in good working condition, so as to guide the court in determining as suitable multiplier.

37. On Dependants, this Court observes that no birth certificates were availed and it is not possible to ascertain that these were his children. No evidence was adduced to show whether any of the grandchildren of the deceased were living with him, let alone whether there were such children. The trial Court also held that none of the Deceased's children were married, no ages of the children were given and the children may well have been providing for the deceased rather than the other way round. The court will, therefore, not award any sum for loss of dependency.

38. On special damages, it is trite law that special damages must not only be specifically pleaded but must be proven. No evidence of the same was provided.

39. This Court, therefore, finds no reason to disturb the trial Court's finding on quantum. See ***Butt v. Khan***, supra. First, for the reason that the same was not raised in the Memorandum of Appeal and, second, no leave was sought under Order 42 Rule 4 of Civil Procedure Rules.

ORDERS

40. Accordingly, for the reasons set out above, the court makes the following orders:

1. The judgment of trial court on liability is set aside and the court apportions liability at 100% on the part of the Respondent.

2. The court does not interfere with the award of damages at Ksh.90,000/- and there shall, therefore, be judgment in favour of the

appellant against the respondent for the sum of Ksh.90,000/- together with interest and costs as awarded by the trial court.

3. The costs follow the event and, therefore, costs of the Appeal shall be borne by the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutembei & Kimathi Advocates, the appellant.

M/S Mogeni & Co. Advocates for the Respondent.