



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 11 OF 2016**

**UPSTREAM GROUP LIMITED.....APPELLANT**

**-VERSUS**

**DAMARIS NYAKEMWA ACHARI**

**ROGERS ONSANTE ACHARI**

**JARED KOMBO ACHARI & JOSPHAT ONTIERI ACHARI**

(Suing on behalf of the estate of

**JACKSON NYAKUNDI ACHARI-Deceased).....RESPONDENT**

*[An appeal from the Judgment of the Hon Resident Magistrate J.C. Bii*

*in Kangundo PMCC 2 of 2013 delivered on 27.1.2016]*

**BETWEEN**

**DAMARIS NYAKEMWA ACHARI**

**ROGERS ONSANTE ACHARI**

**JARED KOMBO ACHARI & JOSPHAT ONTERI ACHARI**

(Suing on behalf of the estate of

**JACKSON NYAKUNDI ACHARI-DECEASED).....PLAINTIFF**

**-VERSUS-**

**UPSTREAM GROUP LIMITED.....1<sup>ST</sup>DEFENDANT**

**MURANGA WHOLESALERS LIMITED.....2<sup>ND</sup>DEFENDANT**

**JUDGEMENT**

1. According to a plaint filed in the subordinate court and amended on 22.4.2015, the respondents were the legal representatives of the deceased and while the deceased was walking along Kangundo Road near Malaa Estate on 9.1.2010 along Machakos-Nairobi the appellants' driver, agent or servant recklessly and negligently drove motor vehicle registration No. KAT 165E Isuzu Lorry causing it to knock the deceased and thereby occasioning serious bodily injuries which led to his death after three weeks of treatment. The suit was brought on

behalf of the estate of the deceased under the Law Reform Act and on behalf of the deceased under the Fatal Accidents Act. The respondent claimed damages from the appellant and pleaded negligence as particularized in Paragraph 6 of the Complaint and also pleaded *res ipsa loquitur*. It was pleaded that the deceased was a 23 year old businessman who took care of his mother and that the respondent claimed from the appellant and the 2<sup>nd</sup> defendant loss of expectation of life. The respondent sought special damages of Kshs 109,475/- and general damages, interest and costs of the suit.

2. In their defence, the appellant denied the accident, denied the injuries and denied negligence on their part. The appellant pleaded that the accident was wholly and substantially contributed to by the negligence of the deceased. They further denied the particulars of dependency and loss and damage in paragraphs 7A to C of the amended complaint and prayed that the suit be dismissed with costs. It was pleaded that the suit was statute barred and leave shall be sought to have the complaint struck out. It was pleaded that the suit was bad in law and an abuse of court process.

3. The suit proceeded for hearing on **14.5.2015** where the Respondent and an eye witness testified for the respondent while Mwilu Ndugu testified for the appellant.

4. Parties filed submissions and the court delivered an undated judgement in which Hon. Bii held the Appellant liable and the 2<sup>nd</sup> defendant vicariously liable for the accident and awarded the Respondent damages amounting to **Kshs. 2,569,675/-** inclusive of special damages of **Kshs 109,695/-**.

5. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 2.1.2016. Counsel prayed that the judgement of the trial court and the orders made on 27.1.2016 and the decree be set aside, that the court finds that negligence was not proven; that the award on quantum be reviewed, dismissed and/ or set aside; that in the alternative the court order that the suit be heard *de novo*.

6. The appeal was canvassed *vide* written submissions. It is only the respondent's submissions that are on record. Learned counsel for the respondent *vide* their submissions framed four issues for determination; that is whether the lower court erred in finding for the respondent against the appellant in the lower court; Whether the judgement and all consequential orders made in the lower court should be set aside; Whether the learned magistrate erred in finding that the respondent was entitled to damages and Who should get the costs of the appeal.

7. On the first issue, counsel for the respondent agreed with the findings of the trial court and submitted that the appeal did not raise any issues that were appealable. It was counsel's argument on the 2<sup>nd</sup> issue in placing reliance on the case of **Chen Wembo & 2 Others v IKK & Another (Suing as Legal representatives and administrators of the Estate of CRK (Deceased) (2017) eKLR** that the amounts awarded were fair for loss of expectation of life. Counsel agreed with the findings of the trial court on the damages awarded and on the issue of costs in placing reliance on the case of **Joseph Oduor Anode v Kenya Red Cross Society (2012) eKLR** urged the court to award the respondent the costs.

8. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

**9. I have given the facts of the case and the pleadings the attention it deserves and I have considered the case of Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu [1982-88] KAR 278 as quoted in Edith Gicuku Mungai v John Njiru Njeru & another [2019] eKLR that observed that:**

**“A court on appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.”**

10. Upon evaluating the pleadings, and more specifically the averment by the appellant to the effect that “the suit was statute barred and leave shall be sought to have the complaint struck out” the legal issue that I am commended to find is whether the suit was competently before the court.

11. The provisions of Section 29 of the Limitation of Actions Act provides that where the person injured as a result of a tortious act or omission of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died. And therefore it follows that where such period of twelve months from the date when the deceased dies has lapsed, unless, by application of Sections 22, 27 and 28 of the Limitation of Actions Act, leave of court is sought and obtained extending such period for bringing an action, the action would be statute barred.

12. From the pleadings, the accident occurred on 9.1.2010 and this is confirmed from the evidence of Pw1, Rogers Onsante Achari. From the evidence of Pw2, Jared Kombo Achari, the deceased died on 31.1.2010. The suit ought to have been filed by 31.1.2011 and in the instant case it was filed on 10.1.2013. It is my considered view that there is no evidence of any application for leave that was sought by the respondents on record to file the suit out of time and in the absence of the same, the Civil Suit No.2 of 2013 is time barred. It follows that the suit is not properly before the court and ought not to have seen the light of the day.

13. I therefore find that the appeal is successful on the grounds of the law and not on the grounds raised in the appeal but on a ground raised by the appellant in the pleadings which was not considered by the trial court. Hence I find the trial court went into error. In this regard the judgement and decree of the trial court made in respect of **Civil Suit No. 2 of 2013** are set aside and substituted with a finding that the suit in the trial court is dismissed for being time barred and for being filed contrary to the provisions of Sections 22, 27, 28 and 29 of the Limitations of Actions Act. Having come to this conclusion I do not find it necessary to delve into the other issues.

14. In the result it is my finding that the appeal has merit. The same is allowed. The judgement of the lower court is hereby set aside and substituted with an order dismissing the respondent's suit with costs to the appellant. The costs of the appeal are awarded to the appellant.

It is so ordered.

Dated and delivered at **Machakos** this **7<sup>th</sup>** day of **May, 2020**.

**D. K. Kemei**

**Judge**