REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 42 OF 2014

JULIUS MUTHUI KITHEKA.....1ST APPELLANT

SPIN KNIT DAIRY LTD.....2ND APPELLANT

VERSUS

MIKA NJAGI NYAGA

(suing as the Legal Representative of the Estate of MORRIS RUTERE NJAGI- Dcd).....1ST RESPONDENT

MWANIKI ANDERSON aka MWANIKI MUCHANGI.....2ND RESPONDENT

JUDGMENT

A. Introduction

1. In the instant appeal, the Appellants challenged the judgment and decree of Hon. Paul Biwott SPM in Embu CMCC No. 194 of 2008. The grounds of appeal are contained in the memorandum of appeal dated 18/12/2014 and filed in this court on the same day and they can be summarized as hereunder: -

1) *The Learned trial magistrate erred in law and in fact in failing to take into account relevant factors and in taking into account irrelevant aspects of evidence on record in making findings on liability, leading to an erroneous holding that the 2nd appellant's driver was 40% to blame for the accident the subject matter of the case.*

2) *The learned trial magistrate erred in law and in fact in failing to give proper consideration to and/ or failing to take into account and give proper probative force to the evidence of the Investigating Officer, which was relevant in determination of the issue as to liability, as such coming to erroneous findings on liability against the appellants.*

3) *The learned trial magistrate misapprehended the totality of the evidence in support of the appellant's defense and erred in law and in fact in failing to draw correct inferences from the available evidence on record establishing that Third Party vehicle encroached into the opposite lane and thus erred in failing to find that the 2nd Respondent's driver was fully liable in negligence in occasioning the accident.*

4) *The learned trial magistrate misdirected himself and erred in law in misinterpreting and/ or failing to take into account the effects of section 50 of the Traffic Act in regards to the issuance of a Notice of Intended Prosecution thus failing to make proper and reasoned findings and eventually apportioning liability between the Appellants and the 2nd respondent, leading to a wrong exercise of discretion in the circumstances.*

5) *The learned trial magistrate erred in law and in fact in making an assessment of damages for loss of dependency of Kshs. 700,000/- based on a dependency ratio of 2/3 (two thirds) which was not supported by evidence on record, the legal principles governing award of general damages, leading to a wrong exercise of discretion in the circumstances.*

6) *The learned trial magistrate erred in law and misdirected himself in failing to take into account the appellant's submissions on the applicable dependency ratio in the circumstances attending the matter, the sum awardable for loss of expectations of life and on the sum awardable in special damages, thereby arriving at an erroneous and an excessive award of damages to the 1st respondent*

7) *The learned trial magistrate erred in law and in fact in making an assessment of damages which was excessive in the circumstances representing a wholly erroneous estimate of damage awardable to the estate of the deceased and the loss suffered by the 1st respondent in the matter and thereby caused injustice to the appellants.*

2. The appellants thus prayed that the judgment of the Honourable trial magistrate be varied and/or set aside in whole and for the costs of the appeal.

B. Submission by the parties

3. The appeal was disposed off by way of written submissions wherein the appellants submitted in support of their grounds of appeal to the effect that the learned trial magistrate failed to properly consider the evidence on record in making finding on liability and which evidence was to the effect that the accident was caused by Toyota Station Wagon registration Number KAJ 687A driven by 2nd Respondent's authorized driver Alex MuciraNyaga. The appellants further submitted to the effect that the learned trial magistrate did not consider or understand the letter of Section 50 of the Traffic Act in relation to issuance of a notice of intended prosecution when apportioning liability. It was submitted that the 1st appellant was never prosecuted for a traffic offence and thus the Notice of Intended prosecution could not be used to apportion liability. Reliance was made on **Ndungu Mwaura -vs- Republic (1976) eKLR.** The appellants finally submitted that the trial magistrate misapprehended the principles governing an award of general damages resulting in an excessive award of damages. In support of this issue, the appellants cited a number of authorities which were to the effect that the convectional award for loss of expectation of life has been Kshs. 100,000/- and thus the award of Kshs. 200,000/- was excessive; that the loss of dependency ought to be based on a dependency ratio which is reasonable and supported by evidence on record and subjected to a reasonable multiplier but which the court did not do and hence excessive award of the same. The appellant after citing a number of authorities submitted that the loss of dependency previously awarded be set aside and substituted with Kshs. 280,000/- arrived at as such: - Kshs. 3,500/= x 12 x 20 x1/3 =Kshs. 280,000/-. The court was invited to review the same by invoking the decision in **Butt -vs- Khan (1977) KAR 1.**

4. On the part of the respondents it was submitted that the court apportioned liability justly between the parties that caused the accident that led to the loss of life and as such, grounds 1, 2, 3 and 4 on liability should fail. On grounds 5, 6 and 7, it was submitted that the judgment delivered by the trial court was sound and the court considered all the facts presented and applied the law appropriately and the award was fair and just. Further that the special damages were pleaded and proved.

C. Evaluation of the evidence before the trial

5. It's now settled that the role of the first appellate Court is to revisit the evidence on record, evaluate it and reach its own conclusion in a matter before it. (See **Peter M. Kariuki –vs- Attorney General [2014] eKLR). Further, there is no set format which the first appellate court ought to conform to in its** re-evaluation of the trial court's evidence but the evaluation should be done depending on the circumstances of each case and what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

6. Evaluating the evidence before the trial court and in a nutshell, the suit before the court was instituted by the 1st respondent who was the plaintiff in the trial court and wherein it was pleaded that 2nd appellant was the owner of motor vehicle registration number KAT 042U Mitsubishi tanker while the 1st appellant was its employee, authorized driver and/ or servant. That, the deceased (Morris Rutere Njagi) was lawfully travelling as a passenger in Motor vehicle registration number KAJ 687A Toyota Station Wagon when the 1st appellant in the course of his employment so negligently and recklessly drove the 2nd appellant's motor vehicle registration number KAT 042U Mitsubishi tanker causing it to collide with the Motor vehicle registration number KAJ 687A Toyota Station Wagon. This occasioned the deceased serious bodily injuries from which he died. The particulars of negligence of the 1st appellant were pleaded and the 1st respondent has claimed compensation for the same. The 2nd appellant was blamed for the accident under the doctrine of vicarious liability.

7. The defendants entered appearance and filed a joint statement of defence wherein they denied any negligence on the part of the 1st appellant and pleaded that the accident in question was solely and/ or substantially contributed to by the negligence of the driver of motor vehicle registration number KAJ 687A, one Alex Mucira Nyaga, and the particulars of negligence itemized therein. The appellants further blamed the deceased for the accident and have itemized the particulars of negligence on his part. The appellants pleaded that as a result of the negligence of the driver of motor vehicle registration number KAJ 687A which resulted in the accident between the said motor vehicle and the 2nd appellant's motor vehicle, the 1st appellant was seriously injured and the 2nd Appellant's motor vehicle got extensively damaged and as such the estate of the deceased as well as the owner of Motor vehicle registration number KAJ 687A are liable to compensate the 1st respondent as well as the appellants. The appellants pleaded that the said accident was inevitable and was occasioned by the circumstances which were beyond the control of any reasonable man acting as he would be expected faced by the circumstances attending the said accident and thus the appellants cannot be held liable.

8. The third party entered appearance and filed his Defence.

9. The matter proceeded for full hearing and each of the parties called evidence in support of their rival positions in relation to the matter before the court. PW2 (the plaintiff in the trial court and the 1st Respondent herein) testified that the deceased was his son and was employed by the 3rd Party. However, I note that he was not an eye witness and his evidence as to the occurrence of the accident could not be relied on. PW1 produced the police abstract and the police file which had the statement recorded by Corporal Mutua who was the Investigating Officer in the matter and wherein the Investigating Officer blamed the driver of KAJ 687A for failure to keep on his lane and the appellants were never blamed.

10. The defendants (appellants) called one Benjamin Mulewa (accidents' investigator retained by the 2nd appellant's insurer) and who testified to the effect that according to the investigations that he conducted, the motor vehicle KAJ 687A was to blame for the accident and

that the driver of motor vehicle KAT 042V was not responsible at all. The report was produced as DExbt 7.

11. The third party (2nd respondent) gave evidence to the effect that he and his driver were never negligent. That he used to pay the deceased Kshs. 3,500/-. That negligence ought to be put against his driver and not himself and that he did not cause the accident. However, the deceased and one Alex were his employees. The parties proceeded to file their written submissions after which the trial court delivered its judgment.

12. In its judgment, the trial court found the appellants herein and the 2nd respondent (the defendants and the third party respectively) liable and apportioned liability at a ratio of 40%:60% and awarded Kshs. 920,000/- as general damages and Kshs. 57,000/- as special damages.

D. Issues for determination

13. I have read through and considered the memorandum of appeal and the submissions of both counsels. I have also considered the authorities referred to by each counsel in support of their legal propositions in the matter. Further, I have read and evaluated the pleadings and evidence tendered before the trial court while taking into account the fact that this court had no opportunity of hearing or seeing the witnesses testify and therefore, make an allowance in that respect as stated in the case of **Selle&Ano. vs. Associated Motor Boat Co. Ltd (supra).**

14. The occurrence of the accident and the motor vehicles involved is not disputed and neither is it disputed that the deceased one Morris Rutere Njagi died as a result of the said accident. Further, the ownership of the accident motor vehicle, the drivers who were driving the same as well as the authority to drive the accident motor vehicles is also not in dispute. It **is my opinion, therefore, that the appeal herein revolves around the issue of the trial court's finding on liability of the parties herein. The issue which this court is invited to decide on is** whether the trial court erred in finding the appellants liable and in assessing the general damages payable to the 1st respondents herein.

E. Determination of the issue

I. Whether the trial court erred in finding the appellants liable

15. In determining the above issue, I am alive to the trite law that the first appellate court ought not to ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

16. As I have noted above, the trial court entered judgment in favour of the plaintiff at 100% against the appellants and the 2nd respondent herein at the rate of 40%: 60% respectively. The appellants submitted that the trial court did not consider the evidence before it by PW1 and DW1 and the documents produced and which evidence blamed the accident on the recklessness and/or negligence of the 2nd respondent's authorized driver. The 1st respondent rebutted this with the submissions that the trial court well applied the evidence before it.

17. From the evidence tendered before the trial court and which I have analyzed hereinabove, it is clear that the accident was caused by the driver of the 2nd respondent herein. In the Appellant driver's statement which was produced in the trial court (both in handwritten version and the typed version), it was stated that the said driver saw a motor vehicle heading towards Embu and which was on his lane. He drove to his left and the vehicles collided head on while off the road and overturned. The statement by the Investigating Officer and whose production in court was also not objected to, indicated that the Investigating Officer when he visited the scene found the station wagon in the middle of the road while the lorry was off the road. The investigation diary and the covering report corroborated this evidence. Though the sketch map was marked for identification, the same was never produced and thus the same is not evidence before court. **(See Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR).**

18. It is my considered opinion that the evidence on record placed blame on the 2nd respondent herein in entirety. Despite the 1st respondent having pleaded negligence as against the appellants herein, there was no evidence which was tendered before the trial court as to the said negligence. The evidence by the 1st respondent pointed to the negligence by the 2nd respondent's driver. There is no way, in my opinion, the appellant herein could be held liable for negligence, the particulars whereof were never proved by the 1st respondent as doing so, would be violating the well set principle that he who alleges must prove as provided under section 107 of the Evidence Act. In fact the uncontroverted evidence is to the effect that the Appellant's driver was driving along his lane. No negligence on the driver's part was proved.

19. The 2nd appellant (the third party in the trial court) in his third party defence filed in court denied liability on his part and reiterated the contents of paragraphs 5 of the 1st respondent's plaint (which paragraph particularized negligence on the part of the 1st appellant (1st defendant in the trial court). The court gave directions on 18/04/2011 on the Third Party Notice in compliance with Order 1 Rule 22 of the Civil Procedure Rules 2010 that the issue of liability between the third party (2nd respondent) and the defendants (appellants) be determined at the hearing of the suit and the 3rd party (2nd respondent) be deemed as co-defendant in the suit.

20. At the hearing of the suit, the said third party (2nd respondent) blamed the 1st appellant herein for the accident. However, there was no evidence which was tendered in court by the said 2nd respondent to prove the negligence on the part of the 1st appellant. In his witness statement which he adopted as his evidence, he stated that he gathered at the scene that the motor vehicle registration number KAT 042U was being driven at a high speed. In my opinion, this piece of testimony would not be admitted as prove of negligence as the same was hearsay.

21. To sum up the above, it is my opinion that the 2nd respondent and the 1st respondent failed to discharge their burden to prove negligence on the part of the 1st appellant herein. They did not discharge their legal and evidential burden as was required of them by section 107, 109

and 112 of the Evidence Act and which sections were appreciated by the court in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** where the Court of Appeal held that: -

> ***"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

22. From the evidence on record and which was not controverted, the 2nd respondent's driver was the one liable for the accident. He drove the motor vehicle negligently and veered off his lane and collided with the 1st appellant head-on. The 2nd respondent did not controvert this strong evidence as to his driver's liability and neither did he prove negligence on the part of the 1st respondent. It is my opinion as such that the 2nd respondent's driver one Alex Mucira Nyaga ought to be held 100% liable for the accident.

23. As I noted above, the 2nd respondent did not dispute the fact that the said Alex Mucira Nyaga was his employee as an authorized driver. In his witness statement which he adopted in the trial court as his evidence in chief, he stated that on the material day, he dispatched one of his salesmen, Mr. Morris Rutere Njagi and a driver Mr. Alex Mucira Nyaga to Mwea, to deliver cakes to his various customers using his motor vehicle registration number KAJ 687A Toyota Station wagon. The accident in question occurred while the said persons were en-route to the said place and thus they were within the course of their employment. The said driver was the one who was blamed for the accident.

24. Under the doctrine of vicarious liability, an employer is liable for the negligence of the employee while in the course of his employment. As such, it is my opinion that by the fact that the 2nd respondent's driver was liable in negligence and leading to the death of the deceased herein, the 2nd respondent herein ought to be held liable for the negligence of the said driver under the said doctrine of vicarious liability.

25. It is my considered opinion therefore that, the trial court misapprehended the evidence before it as to the liability of the parties before it. As such, the finding by the trial court ought to be interfered with and substituted with a finding that the 2nd respondent herein was 100% liable for accident and the said liability being vicarious as a result of the acts of his driver one Alex Mucira Nyaga.

II. Whether the trial court erred in assessing the general damages payable to the 1st respondent herein

26. In its judgment, the trial court awarded Kshs. 920,000/- as general damages. It seems that this is the quantum which the appellants have challenged. In arriving at the said quantum, the trial court awarded Kshs. 200,000/- for loss of expectation of life, Kshs. 20,000/- for pain and suffering on the grounds that the deceased died on the same day and Kshs. 700,000/- for loss of dependency under the Fatal Accidents Act and which amount was computed as follows; 3,500 x12 x 25 x 2/3= 700,000/-.

27. It was the appellants' submission that the trial magistrate misapprehended the principles governing award of general damages resulting in an excessive award of damages. In support of this contention the appellants cited a number of authorities which were to the effect that the convectional award for loss of expectation of life has been Kshs. 100,000/- and thus the award should be within the sum of Kshs. 100,000/-; that the loss of dependency ought to be based on a dependency ratio which is reasonable and supported by evidence on record and subjected to a reasonable multiplier but which the court did not do and hence excessive award of the same. The appellant as such after citing a number of authorities submitted that the loss of dependency awarded by the trial court be set aside and substituted with Kshs. 280,000/- arrived at as follows: - Kshs. 3,500 x 12 x 20 x1/3 =Kshs. 280,000/-.

28. The principles on which an appellate court will interfere with the trial court's findings on award of damages have been clearly discussed in a number of cases. In the case of **Butt v Khan 1982 -1988 1 KAR** the court pronounced itself 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 he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*** *(*See also **P.A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR**).

29. The principles for making an award under the head of loss of expectation of life were laid by the court in **Uganda Electricity Board vs. Musoke [1990-1994] EA 581** where the court held that; -

> ***"Award for loss of expectation of life is made on the basis of loss of prospective happiness by the deceased and the following are the principles for making an award under this head of damages: -***
>
> ***1. Before any damages are awarded in respect of the shortened life, of a given individual, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.***
>
> ***2. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.***

3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. <u>When an individual has reached an age to have settled prospects, having passed the risk and uncertainties of childhood and having in some degree attained an established character and firmer hopes, his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.</u>

4. Stripped of these technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in putting a money value on the prospective balance of happiness in years that the deceased might have lived, the Judge is attempting to equate incommensurables. Damages, which would be proper for a disabling injury, may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen……..."

30. The deceased herein was 24 years old when he died (the death certificate was produced in court). There is no evidence that the deceased would have had unhappy life. Considering cases with similar facts in award of lost years, in **<u>James Njiiri & 2 others –vs- FPU & another [2019] eKLR</u>** the appellate court upheld the award of Kshs. 150,000/- by the trial court where the deceased died at the age of 29 years and who was working as a mason and self-employed. Taking into consideration all that, it is my opinion that Kshs. 200,000/- as was awarded by the trial court was excessive in the circumstances. The appropriate award under that head ought to be Kshs. 150,000/-.

31. For dependency under the Fatal Accident Act, the applicable principles under the Fatal Accident Act were well stated in the case of In **<u>Ezekiel Barng'entuny –vs- Beatrice Thairu HCC No. 1638 of 1988</u>**where Justice Ringera (as he then was) held thus;

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."

32. The appellants invited this court to apply a dependency ratio of 1/3 as it was impossible for him to survive on 1/3 of his salary as the trial court gave a dependency ration of 2/3 which was excessive in absence of supporting evidence. The appellants also invited the court to apply the multiplier of 20 years as opposed to 25 years which was applied by the trial court. The appellants did not challenge the multiplicand of Kshs. 3,500/-.

33. PW2 testified that the deceased used to be paid Kshs. 3,500/- and that he used to support the family (his mother and two siblings) with Kshs. 2,000/- per month. That makes a dependency ratio of about 2/3. It is my opinion that the dependency ration was on the higher side. In my opinion, it is unreasonable for a person to survive on Kshs. 500/- for a whole month. Being a young man as he was, it is my opinion that he would customarily spend slightly more on himself than would an elderly man. I opine that a dependency ratio of 1/3 would be the most appropriate in the circumstances.

34. The trial court (in determining the loss of dependency) observed that the deceased was aged 24 years at the time of his death and thus applied the right number of years (multiplier) being 25 years. This in my opinion was bearing in mind the expectations of earning life of the deceased, the expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents.

35. It is my opinion that taking into account all the above, the trial court proceeded on wrong principles and further misapprehended the evidence in some material respect and thus arriving at an award for general damages which was inordinately high. In particular, the trial court erred in awarding Kshs. 200,000/- as loss of expectation in life and further in applying 2/3 as the dependency ratio in computing the general damages for loss of dependency.

36. It is my opinion in conclusion that that the appeal ought to succeed partly and to the extent of the award Kshs. 920,000/- as general damages. The said award ought to be substituted with an award of ***Kshs. 520,000/-*** made up as follows; -

a. Loss of expectations of life = Kshs. 150,000/-

b. Pain and suffering= Kshs. 20,000/-

c. Loss of dependency under Fatal Accident Act;

3,500 x 12 x 25 x 1/3 = Kshs. 350,000/-

37. The award of Kshs. 57,100/- as special damages was never challenged. However, from the perusal of the record before this court, the receipts attached evidences payment of a total of Kshs. 56,800/- and the same is the amount which ought to be awarded. The award of Kshs. 57,100/- thus ought to be set aside.

38. As for the costs, its trite law that the same is at the discretion of the court. However, where costs ought to be granted, they usually follow events. It is my opinion that the appellant is entitled to half the costs of the appeal. I award it.

39. Orders accordingly.

Delivered, dated and signed at Embu this 2nd day of December, 2020.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondents