REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO.9 OF 2015

JOHN THANGA RINDIRI.....1ST APPELLANT

WILDLIFE TRACKS TOURS & TRAVEL.....2ND APPELLANT

-VERSUS-

PETER WAHOME KAGIRI & IRENE WAKIURU KIGOTHO (Suing as the legal representatives of the estate of

RICHARD KARIUKI KAGIRI).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. W.A Juma, Chief Magistrate, which was delivered on 13th April, 2015 in Nyeri PMCC No.134 of 2013)

JUDGMENT

1. According to the plaint filed on 12th April 2013, on 11th December 2007 Richard Kariuki Kagiri was walking along the pavement of the Mukurweini Road near Ngoru area when he was hit by motor vehicle registration no. KAV 868 V Toyota Hiace driven by John Thanga Rindiri, 1st Appellant, and owned by Wildlife Tracks Tours & Travel, 2nd Appellant.

2. Richard Kariuki Kagiri sustained fatal injuries. He was survived by his wife minor child and a brother the respondents herein. The deceased's wife and brother, they became the legal representatives of the deceased, and brought suit in the lower Court against the Appellants seeking for:-

i. Kshs. 79,000/- as special damages

ii. General damages under the Fatal Accidents Act Cap 32 Laws of Kenya and the Law Reform Act Cap 26 Laws of Kenya

3. The Appellants denied liability and wholly blamed the deceased for the occurrence of the accident.

4. In a Judgment delivered on 13th April 2015 the trial Court held as follows; On liability against the appellants jointly and severally at 90%: 10% contribution by the deceased. On damages: for the respondents

i. Pain and suffering Kshs. 10,000/-

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

iii. Loss of dependency (Kshs. 30,000/-x12x22yrsx2/3) Kshs. 5,280,000/-

iv. Special damages Kshs. 52,000/-

v. Less 10% contribution Kshs. 544,000/-

Total Kshs.4,897,800.00

5. Aggrieved by this decision the Appellants preferred the instant appeal on the following grounds: -

a. The learned trial Magistrate erred in law and in fact in finding the Appellants 90% liable for the accident despite the absence of evidence.

b. The learned trial Magistrate erred in law and in fact in the manner that she assessed damages for loss of dependence and in awarding damages that were excessive in the circumstances.

c. The learned trial Magistrate erred in law and in fact in adopting Kshs. 30,000/- as the multiplicand in calculating dependency in absence of evidence in proof of the deceased's earnings.

d. The learned trial Magistrate erred in law and in fact in adopting a multiplier of 22 years which was excessive without taking into consideration the vagaries and uncertainties of life and the relevant law governing assessment of damages for loss of dependency.

e. The learned trial Magistrate erred in law and in fact in failing to take into consideration and deduct the award under the Law Reform Act from the award under the Fatal Accidents Act.

f. The learned trial Magistrate erred in law and in fact in failing to consider the Appellants' submission on liability and quantum and in so doing she arrived at an erroneous decision.

6. Parties agreed to dispose of the appeal through written submissions, Wambugu, Munene and Kiplagat advocates for the appellants and Gichuhi Mwangi and Associates advocates for the respondents.

7. The Appellants submitted that the Respondents did not prove the particulars of negligence except for reliance on the Appellant's conviction for the offence of causing death by dangerous driving ; that there is no basis for the 90% liability saddled on the Appellants, that PW2 Andrew Sora, the Base Commander Mukurweini Police Station, could not tell how the accident occurred as there were no sketch maps drawn they relied on the case of **Patrick Mutie Kimau & Another vs. Judy wambui Ndurumo Nairobi Civil Appeal No.254 of 1996**.

8. On quantum, the Appellants did not fault the trial Court's adoption of 2/3 as dependency ratio but argued that the multiplier of 22 years and multiplicand of Kshs.30,000/- as salary of the deceased was unfounded ; that the salary was not proved. The employer company did not produce a payroll, or pays lips or proof of any statutory deductions; that the proper multiplicand would have been at the minimum wage of Kshs. 4,792/- for a general labourer. The Appellants relied on **Ann Njoki Njenga vs. Umoja Flour Mills & Another (2006) eKLR**.

9. The Appellants also submitted that the award under the Law Reform Act ought to have been deducted from the award under the Fatal Accidents Act. Failure to do so occasioned duplicity of awards as held in **Kemfro Africa Ltd t/a Meru Express Services (1976) & Another vs Lubia & Another (No.2) (1987).**

10. The Respondent submitted that the evidence of PW2 was cogent and clearly showed that the accident was caused by the 1st Appellant; that this was confirmed in the cross-examination of the 1st Appellant who admitted having been convicted and sentenced to pay a fine of kshs.30,000/- for the offence. The respondent relied on Section 47A of the Evidence Act; that the 1st Appellant admitted to have failed to apply brakes at the time of the accident for fear of being attacked, that the deceased was knocked on the roadside evidence of sheer recklessness on the part of the 1st Appellant.

11. On quantum, the Respondents submitted that both the multiplier of 22 years and the multiplicand of 30,000/- were proved; that the deceased was an energetic young man aged 28 years and there was proof that he was employed and earned a monthly salary of Kshs. 30,000/-, that evidence of earnings did not necessarily have to be documentary e.g. pay slips and bank statements. Reliance was placed on the Court of Appeal decision of **Jacob Maruja vs. Simeon Obaya (2005) eKLR**.

12. The Respondents also submitted that damages under the Law Reform Act on loss of expectation of life and pain and suffering are benefits to the deceased's estate. Under Section 2(5) of the Act these benefits are in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act. The Respondents relied on **David Kahuruka Gitau & Another vs. Nancy Ann Wathithi Gitau & Another (2016) eKLR**.

i. From the appeal the issues for determination are: Whether the Respondents proved negligence on the part of the 1st applicant.

ii. Whether the award of 90:10% liability between the parties was justified by the evidence.

iii. Whether the salary of Ksh 30,000 applied in calculating the loss of dependency was proved.

iv. Whether the multiplicand of 22 years was justified.

13. This being a first appeal this Court is guided by the ratio in **Selle vs. Associated Motor Boat Company Ltd (1968) EA 23 at page 126** where it was held: -

"Briefly put they (the principles) are that the Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.

In particular, this Court is not bound necessarily to follow the Trial Judge's finding of fact if it appears that he clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence; of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally"

14. This duty of the first appellate Court was echoed most recently by the Court of appeal in **Peterson Ndung'u and 5 Others vs. Kenya Power & Lighting Company Ltd (2018) eKLR** where the Court cited its earlier holding in **Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** thus: -

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -**
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> **"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

15. Coming to the issues whether the respondents proved negligence on the part of the 1st appellant. The trial Court held: -

> **"The Court appreciates that the Plaintiffs have not proved the particulars of negligence set out in the plaint but for the fact of conviction and the police abstract…Considering that the Plaintiffs did not avail evidence of the accident to the extent that I indicated earlier and the fact that the accident occurred at night, I would put a 10% liability upon the deceased."**

16. The trial magistrate indicates that she found as a fact that the plaintiffs did not prove the particulars of negligence set out against the 1st appellant but went on to award 90% against the appellants These particulars of negligence are set out at paragraph 6 of the plaint: -

> a. Driving too fast at an excessive speed in the circumstances and losing control of the motor vehicle registration No. KAV 868V so as to cause the accident.
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> b. Driving a defective motor vehicle.
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> c. Failing to have any sufficient regard to other road users while driving.
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> d. Failing to brake, swerve, stop, slow down or otherwise so as to control the motor vehicle to avoid causing the accident.
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> e. Causing death to the deceased by dangerous driving.
>
> f. Veering off the road as to cause the accident.
>
> g. Being reckless and careless in driving the said motor vehicle including the doctrine of *res ipsa loquitur*.

17. I have perused the record. No evidence was led to prove the particulars of negligence. There was no eye witness as to how the accident happened. The police officer who testified produced the police abstract to prove that an accident happened. The conviction of the 1st appellant was also proof that an accident happened. But as to how it happened the it is 1st appellant who testified:

> "On 11th December 2007 at 11:00pm I was from Karatina going to Othaya. Before I reached Mukurweini, at a certain centre, I was driving a Nissan motor vehicle KAV 868V (reads from paper). Before I reached the center there were caravats (sic). I was doing at 50KPH. I came across about 6-7 men walking in staggers. When I came close to them one jumped into the road. I did not see him after that, I do not know if he is the one who died. I heard a bang on my vehicle. There was no oncoming vehicle. I braked a little to avoid hitting them, I did not stop, I feared being attacked. I blame the guy who jumped onto my vehicle"

18. On cross examination he told the court that it was possible the slight breaking caused the accident, that he feared he would be attacked, that he never went to report the accident and was arrested and charged with the offence of causing death by dangerous driving. Section 47A of the Evidence Act provides as settles the issue on the import of his conviction.

> "A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

19. Hence the only evidence on how the accident happened is what the 1st appellant told the court. He takes some of the blame and places some of the blame on the deceased. That it was the deceased who stepped into the road into his path, that he feared to brake. There is no evidence that the deceased was walking on the road side as submitted by counsel. There is no evidence that he was hit while off the road. I do agree with the holding in **Peter Okello Omedi vs Clement Ochieng** that road users owe each other a duty of care so as not to endanger their lives or those of the other road users. Be that as it may the 1st appellant failed to stop and also failed to report to the police upon leaving the scene, hence ensuring that the police would not visit the scene when it was still fresh to obtain the necessary evidence. Obviously the deceased could not have made that report. In my view that was the conduct of a guilty person. Had he reported immediately after leaving the scene the evidence from the scene he is now saying was not available may have been available. Hence he ought to carry the larger burden of liability.

20. On quantum the appellate court must be cautious in disturbing the award of damages by the trial Court and is guided by a mass of authorities on this principle including the Court of Appeal decision of **Ken Odondi & 2 Others vs James Okoth Omburah T/A Okoth Omburah & Co. Advocates (2013) eKLR** where it was held:-

> "We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

21. PW3 testified that he was the employer of the deceased and used to pay him a salary of Kshs. 30,000/-. The respondent relied on the Court of Appeal case in **Jacob Ayiga Maruga & Another vs. Simeon Obayo (2015) eKLR** held: -

> "We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

22. That authority is distinguishable. In this case the respondent chose to rely on documentary evidence. That evidence has to be evidence that is credible. It was pleaded in the plaint that the deceased worked with KPLC before joining Aurora Services Limited *'as a foreman with a monthly income of more than Ksh 30,000."*. Note the respondents in their list of documents only attached item 7 referring to 'Employment Letters 'the documents from KPLC showing that he was earning the sum of Ksh 9,386/- as at 30th June 2004, as 'Artisan Mate Assistant' . These were filed on 12th April 2013 and the letter from Aurora was not among the annextures.

23. I looked at the testimony of PW3 Antony Kinyua Mureithi. He said:

> ***"I do electrical wirings and building constructions. Richard Kariuki was our employee in 2007 in Nyeri in Aurora Services Ltd, my company. I am one of the directors in that company. I have certificate of incorporation, copy and original. I produce it. Certificate of Incorporation Exh.P10. He was a foreman. He was employed around August 2007; we gave him a letter of appointment. I wrote a letter for him. He was to be paid Kshs. 35,000/- per month. The Kshs. 5,000/- was house allowance. He worked for 2 months and some days".*** **(emphasis added)**

He was not certain on the date of employment; he was not certain on whether the deceased had received any pay. The was no evidence that the deceased had actually worked in his company. If he was to believed, the deceased was not a casual but a foreman. A payroll, an acknowledgement by the deceased of receiving salary. How is it possible that the witness, a director of a limited liability company would testify that that staff were paid cash, that they did not pay taxes, that the company kept no records? If the company could give a letter of employment, then it was only logical that it would maintain records of employees. Otherwise it may have just employed him verbally. I find that this evidence was not persuasive of the employment of the deceased by his company and the alleged earnings.

24. On the other hand, it cannot be said that the deceased was an unskilled labourer because the Kenya Power and Lighting Company Limited (KPLC) did give him a job regularly for about 2 years in 2003 and 2004 as an artisan mate assistant. Without any other reliable evidence his income would be pegged on what he earned at KPLC but considering the period of time it could have doubled to about Ksh.20,000. I say this having perused the Minimum wages regulations for 2007 for artisans, for graded artisans grade III between Ksh.8,818/- and Kshs.7,226/- (the other grades are missing in the document as filed by the appellant) and ungraded artisan between Ksh.7,012/- and Kshs.5,349/-. As is evident, KPLC paid above the minimum wage.

25. The Appellants also contested the trial Court's choice of multiplier of 22 years. In Francis Wainana Kirungu (Suing as personal representatives of the estate of John Karanja Wainaina) Deceased vsElijah Oketh Adeloh (2015) eKLR the Court reasoned that a multiplier of 35 years was reasonable for a promising young man who died at 28 like in the instant case. I find no reason to interfere with the trial Court's choice of a multiplier of 22 years taking into account vicissitudes of life.

26. The Appellants also submitted that the trial Court erred in not deducting damages under the Law Reform Act from those under Fatal Accidents Act due to duplicity of awards. There is no such requirement of deduction. In John Wamae vs. John Kituku Nziva & Another (2017) eKLR it was held: -

> "In my view, the requirement in the Law Reform Act is to "take into account" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency." In Peres Wambui Kinuthia & Another vs S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 OF 2010 (UR) it where he held that: -
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> "In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"

27. The upshot of the above is that the appeal succeeds in part. I set aside the decision of the trial magistrate and make the following orders;

i. On Liability at 70:30 in favour of the respondents

ii. On Damages: The deceased's income is pegged at Ksh.20,000/- with a multiplier of 22 years and dependency ratio of 2/3. =Ksh.2,464, 000/-

iii. The special damages remain undisturbed at Ksh 52,000 x70% = Ksh.36,400/-

iv. Pain and suffering at Ksh.10,000/-

v. Loss of expectation of life at Ksh.100,000/-

Total = Kshs.2,610,400/- plus costs and interest at court rates from the date of judgment in the lower court.

Dated, delivered and signed at Nyeri this 8th Day of February 2019

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Ombongi holding brief for Kiplagat for Appellant

Nyakio for Respondent

Mumbua T Matheka

Judge

8/2/19