REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 105 OF 2013

JAMES WANJIRU MUTURI..1ST APPELLANT

KENYA POWER & LIGHTING CO. LTD ....2ND APPELLANT

VERSUS

SAMUEL IRUNGU NGUGI GEORGE NGIGI KINUTHIA (Suing as Legal Representatives of the Estate of STEPHEN MUTURI KINUTHIA DECEASED)....................... RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate J.M. Mwaniki dated 19th Day of June, 2013 in Nakuru Chief Magistrate's Court Civil Case No. 1133 of 2011)

JUDGMENT

1. The respondents are the legal representatives of the Estate of one Stephen Muturi Kinuthia deceased who was fatally injured by motor vehicle registration No. KBC 663F on the 1st June 2011, but died while under treatment on the 10th August 2011.

The accident was along the Nakuru-Nyahururu road and the vehicle was being driven by the 1st Appellant who was also the registered owner.

The deceased is alleged to have been walking off the road along the said road when the vehicle KVC 663F is alleged to have veered off the road and knocked him down causing him sustain serious injuries from which he died nine days later.

2. The Respondents blamed the driver of the vehicle for negligence that were pleaded in the plaint and claimed damages under the **Law Reform Act** as well as under the **Fatal Accidents Act.** Particulars thereof were stated.

The appellants denied liability and in turn blamed the deceased stating that he jumped onto the path of the vehicle therefore the cause of the accident that claimed his life, to together with another unknown vehicle stated to have contributed to the accident.

3. In his judgment, the trial court made findings that the 1st appellant being the driver of the said vehicle was wholly to blame. He assessed general damages under both heads at Kshs.1,020,000/= and special damages at Kshs.84,600/= plus costs.

4. The appeal before me is thus against the trial courts findings on both liability and *quantum* of damages.

The appellants fault the trial Magistrate in grounds 1-5 that the evidence tendered was not sufficient to hold the 1st appellant wholly to blame and that the appellants evidence was not considered thus arrived at erroneous findings, both on liability and in assessment of damages.

It is urged that the said judgment be set aside and/or contributory negligence apportioned between the deceased and the driver and damages be reviewed downwards.

5. Parties filed written submissions.

6. This is the first appellate court. I am under duty to re-consider and re-evaluate the evidence tendered with a view to reaching my own findings and conclusions noting that I neither saw nor heard the witnesses testify.

See **Makario Makonye Monyancha -vs- Heelen Nyangena (2014) e KLR.**

I have stated the pleadings of both parties and background of the case on paragraphs 1 and 2 of this judgment.

7. **The Respondent's case**

PW1 the legal representative of the deceased's estate and wife of deceased was not an eye witness to the accident. Her evidence was that at the scene of accident, she saw blood stains off the road and the motor vehicle was rested off the grass on the road as one faces Subukia direction. She produced as exhibits the death certificate and motor vehicle search records. It was her evidence that the deceased was a farmer and used to make Kshs.15,000/= per month that he used to support the family of five children and herself. She therefore sought compensation from the driver and owner of the vehicle.

PW2 was an eye witness to the accident. His evidence was that he was a *"boda boda."* rider and at the right side facing Nakuru while waiting for a passenger that he saw the accident vehicle from Nyahururu direction and the deceased who was walking off the left side of the road facing Nakuru, that the vehicle veered off the road and knocked the deceased, that it stopped 30 metres ahead after which he called the OCS Subukia police station and the deceased brother. He blamed the driver of the vehicle for overspeeding, veering off the road, and knocking down the deceased.

On cross examination, he stated that there was only one vehicle on the road, and that the deceased was not crossing the road but walking 3-5 metres off the road and that he recorded a statement at the police station.

8. **Appellants case.**

The 1st defendant testified as DW1. He was the driver of the accident vehicle and testified that he was an employee of the 2nd Defendant, Kenya Power and Lighting Company Limited and was driving from Nyahururu towards Nakuru, that at Subukia he saw a vehicle ahead swerve to the left side and in turn he swerved to avoid it, and was about to overtake when he saw a person trying to cross the road, that the person hit his vehicle on the left side mirror and he fell down. It was his evidence that the person was on the middle of the road and both vehicles stopped. He blamed the deceased for causing the accident.

Upon cross examination, he stated that he was trying to overtake motor vehicle registration No. KBN 910N and so had increased speed as they were going uphill, that there were signs on the road that allowed him to overtake. He stated that he applied brakes and the deceased hit his left side mirror.

DW2 was PC Sanga Tonje, a police officer from Subukia police station. He visited the scene of accident with other police officers. He testified that he found the two vehicles at the scene. After investigation by recording witness statements, he established that motor vehicle KBC 663F was overtaking KBN 910N, that both were headed to Nakuru, that the deceased emerged from a bush into the road and driver of motor vehicle registration KBN 910N swerved to void the victim and as driver of

motor vehicle KBC 663F could not see him as he was at the middle of the road, he was knocked down by the side mirror. He then drew a sketch plan that he produced as an exhibit.

He further testified that he recommended an inquest which was opened as I**nquest No. 8 of 2012** at the Nyahururu Law courts.

Upon cross examination, he stated that the point of impact was at the middle of the road, and that it was raining.

It was his evidence that the appellants vehicle stopped six metres from the point of impact.

9. I have considered the evidence and submissions filed on behalf of both the the appellants and the respondents. The issues that arise for determination in my view on the matter of liability are:

> 1. *Whether the 1st Respondent was solely to blame for the accident*
>
> 2. *Whether the deceased contributed to the occurrence of the accident and if so, to what extent.*

10. The occurrence of the accident involving the appellants vehicle and the deceased are not in dispute. The appellants submit that the deceased dashed onto the road and to the path of the first defendant vehicle. Other than the 1st appellant and the investigating officer no other witnesses testified.

An eye witness PW2 who was on the opposite side of the road witnessed the accident. His story is complete opposite. That the deceased was walking along the road on the left side and that there were no other vehicles on the road contrary to what the 1st defendant testified. The investigating officer could not place blame on either of the two despite his evidence and so he ordered an inquest.

The results from the inquest were not brought to court. I have seen the sketch plan of the accident scene. The evidence of the investigating officer does support the sketch plan because if it did he would have had no difficulty in placing blame on either the deceased or the driver instead of ordering an inquest.

11. It is trite that the onus of proof is on the one who alleges. Both parties in this suit blame each other. Thus the onus is upon both parties to support their respective positions.

Negligence is the Omission to do something that a reasonable man guided upon considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. See **Salmond and Henston on the Law of Torts 19th Edition**.

12. Evaluation of the evidence of 1st appellant, does not demonstrate that he took any evasive action to avoid hitting the deceased. The position taken by the Investigating officer is not supportive of any action taken by 1st appellant as would a reasonable man do.

As much as I am aware that in Kenya,

> ***"there is yet no liability without fault in the legal system, a plaintiff must prove some negligence against the defendant were the claim is based on negligence."***

See **Kiema Mutuku -vs- Kenya Cargo Handling Services Ltd (1991) 2 KAR 258.**

13. The 1st appellant owed a duty of care to all road users and particularly the deceased as much as the deceased was under an obligation to take care of his personal safety. The evidence of the 1st appellant is that the deceased was hit by his vehicles left side mirror while at the middle of the road. That evidence may be supportive of the narration that the driver swerved to the left to avoid hitting the deceased and as

the deceased had also served to the left, then the impact could not possibly be at the middle of the road, but somewhere towards the left side of the road.

14. In its totality, it is not clear how this accident occurred. The two conflicting narrations do not agree and I cannot attempt to rewrite it.

In the case **Peters -vs- Sunday Post (1985) EA 424,** the court held that:

> ***"It is a strong thing for an appellate court to differ from the findings on a question of fact of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses ---. But the jurisdiction to review the evidence should be exercised with caution,it is not enough that the appellate court might itself come to a different conclusion---."***

15. Where the evidence adduced is not clear as to which party has caused an accident, and each blames the other by pleading contributory negligence, the court ought to consider the said evidence and determine which of the two parties contributed more to the accident by acts of omission or commission and assess the extent of contributory negligence between the parties.

In **Civil Appeal 608/2007 Julius Omollo Chanda & Joyce Menga -vs- Samson Nyaga Kinyua** the Court of Appeal, set aside the trial magistrates finding that when an accident occurs, and it is not clear who was to blame, then blame should should be apportioned equally. Circumstances of the accident were quite comparable to those in the present case. A pedestrian was crossing Waiyaki Way, saw a bus coming from a distance and the vehicle which overtook the bus came and hit him while he was crossing the road.

16. The trial magistrate in the present case believed wholly the evidence of PW2, the eye witness to come to the findings that he did. I however find that the magistrate failed to consider the totally conflicting evidence of presence of another vehicle that was being overtaken which changes the whole scenario.

I therefore come to the finding that both the 1st appellant and the deceased contributed to the occurrence of the accident.

I agree with the appellants submissions that the deceased contributed to the accident by trying to cross the road carelessly and recklessly without being careful of his own safety. On the other hand, I find that the 1st appellant took no evasive action, and on his admission was driving at a high speed in the circumstances. I find the 1st appellant to have contributed to the accident at 60% and the deceased at 40%.

17. ***Quantum* of damages**

The deceased was 55 years old as stated in the death certificate. He left behind a wife and five children two being minors. The trial court awarded Kshs.50,000/= for funeral expenses. The appellant states that sum was not proved by evidence.

It has been held in numerous decisions that reasonable funeral expenses ought to be allowed without proof and that a family while preparing a burial for its own is least concerned about keeping receipts. I do not find the sum of Kshs.50,000/= awarded as unreasonable by all standards. I uphold the same.

18. In assessment of damages for loss of dependency, the trial court adopted a multiplier of 15 years and an income of Kshs.9,000/=. The appellants state that there was no evidence to support the income and proposes Kshs.3,000/= as the minimum wages. Cited in support were authorities decided when the wages guidelines for small scale farmers and farm hands was Kshs.3,000/=. The appellants have not provided the court with wages guidelines for the period 2011. It is not enough to state. The deceased was

paying school fees for his one son in secondary school and the rest in primary school.

It is proposed that a multiplier of 3-5 years would be reasonable against an income of Kshs. 3,000/= per month.

In support several authorities were cited I have read them.

19. The deceased was not in formal employment. He was a farmer. He was not limited to work upto 60 years. In 2011 the official retirement age for formal employees was 60 years. At 55, the deceased had another 5 years to work but not in informal and self employment as I have stated. There are vicissitudes of life, and uncertainty that should be taken into account. I agree with the appellants that the multiplier of 15 years is erroneous as being too high. That would have taken the deceased to 70 years. I am persuaded to reduce the multiplier to 8 years.

20. I do not accept he proposition of Kshs.3,000/= as the monthly income. The Court of Appeal in **Hellen Waruguru Waweru -vs- Kiarie shoe Stores Ltd (2015) e KLR** rendered itself that proof of income is not the only way to ascertain the income of a person. Citing the case **Jacob Ayiga Maruja and Another -vs- Simeone Obayo C.A. 167 of 2002 (2005) e KLR** the observed and stated that it would be absurd if the only way to prove someone's profession or earning is by production of documents, that this could cause a lot of injustice to many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways where documentary evidence is not available.

21. I therefore find no merit in the submission by the appellants that the sum of Kshs.9,000/= was without basis. I do uphold the same.

Having stated as above, loss of dependency would be revised and varied in the following manner:

$$9000 \times 12 \times 8 \times {}^{2}/_{3}$$

= <u>**Kshs.576,000/=**</u>

22. Under the Law Reform Act, a sum of Kshs.200,000/= was awarded for pain and suffering and Kshs.100,000/= for loss of expectation of life. The appellant has submitted that the above sum of Kshs.300,000/= should be reduced from the ward on loss of dependency.

In the case **Hellen Waruguru** (Supra) as recent as October 2015 when the said decision was delivered, the Court of Appeal observed and stated that

> ***"Under Section 2(5) of the Law Reform Act, a party entitled to sue under the Fatal Accidents Act has the right to sue also under the Law Reform Act, in respect of the same death a and that the words "<u>to be taken into account" and to be deducted</u> are two different things ---"***

The court proceeded to state that:

> ***"It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss.***
>
> ***There is no requirement in law or otherwise for him to engage in a mathematical deduction."***

23. In the case, the Court of Appeal considered the low amount awarded under the Law Reform Act and failed to deduct it from the award under the Fatal Accident Act. I have carefully considered the above observations by the learned Judges of Appeal.

It is my considered view that it is not mandatory therefore, that an award under the Law Reform

Act should be deducted from an award under the Fatal Accidents Act, notwithstanding that the beneficiaries may be the same and more so when the award is low, and when it is evident that the trial court considered all the relevant factors to arrive at the award.

24. For those reasons, I shall not vary the said award.

25. In summary, I have varied the trial court's judgment only in terms of liability and the multiplier in assessment of loss of dependency as follows:

(a) Liability is apportioned a the ratio 40:60 in favour of the respondents.

(b) The multiplier is varied from 15 years to 8 years.

(c) Loss of dependency shall be calculated as follows:

9,000 X 12 X 8 X 2/3 = Kshs.576,000/=

Loss of expectation of life	**-**	**100,000/=**
Pain and suffering	**-**	**200,000/=**
Special damages	**-**	**50,000/=**
		926,000/=
60 % thereof	**-**	**555,600/=**

26. The appeal has partially succeeded. Costs are at the discretion of the court that ought to be exercised judiciously. Upon consideration of circumstances of the case.

27. I order that each party bears its costs of the appeal.

Dated, signed and delivered in court this 19th Day January of 2017.

J.N. MULWA

JUDGE