REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 122 OF 2010

KISIMA FARM LIMITED……..……..…….1ST APPELLANT

PETER MURIUKI MBAYA……..…..……...……2ND APPELLANT

MICHAEL C.A DYER……..……..3RD APPELLANT

Versus

RUTH NCEKEI M'TURUCHIU …….....…….……..1st RESPONDENT

EDWARD KUBANIA M'TURUCHU…….....……2ND RESPONDENT

(Administrators of the Estate of Daniel Kinoti M'Turuchiu (Deceased)

NAHASHON MBARE WERU……..…….....……..…….3RD RESPONDENT

DANIEL MAITHIMA WERU……...……...……4TH RESPONDENT

JUDGMENT

[1] In the Amended Plaint filed in the lower court on 5th May 2009 the Respondents claimed against the Appellants inter alia Special and General Damages under the Fatal Accidents Act and the Law Reform Act. After hearing the case, the Learned Trial Magistrate on 11th September 2010, awarded the Respondents Kshs 712,115 being Special and General Damages. The Appellants being dissatisfied with the judgment and decree of the Learned Trial Magistrate filed this appeal on 14th October 2010, setting out the following grounds of appeal;

1. **THAT the Learned Trial Magistrate erred in law and fact in finding that the first defendant was liable where no evidence was tendered by the plaintiffs in support of their claim as against the first appellant herein.**
2. **THAT the Learned Trial Magistrate erred in fact in failing to find that the third respondent herein was wholly or substantially to blame for the accident.**
3. **THAT the Leaned Trial Magistrate erred in fact in finding the second appellant herein 100% liable despite overwhelming evidence against such a finding or where no such evidence was tendered.**
4. **THAT the Learned Trial Magistrate erred in law in failing to consider the appellant's submissions on the issue of liability.**
5. **THAT the Learned Trial Magistrate erred in fact and in law in adopting the multiplier of Kshs 10,000 as the deceased's earning when the said sum had not been proved and**

where no evidence was tendered on the deceased's earnings.

[2] On 29th October 2015, it was agreed, and the court directed that the Appeal be canvassed by way of written submissions. Parties filed their respective submissions and are discussed below.

Appellants' submissions

[3] The Appellants submitted that the 1st and the 2nd Respondents neither witnessed the accident nor called an eye witness so as to prove their alleged particulars of negligence. The Appellants urged further, that PW3 (police officer) did not also witness the accident and that his testimony was based on the findings contained in the police file. The Appellants made further submissions; (1) that their witness was an investigator, he visited the scene and confirmed the point of impact as stated by PW3; and (2) that according to DW1's analysis, it is the third Respondent who lost control of his vehicle while negotiating a corner hence, the accident.

[4] The Appellants also challenged quantum of damages by contending that the Learned Trial Magistrate erred in her assessment of damages for loss of dependency in that she adopted a multiplier of Kshs.10, 000 when no evidence was led to support the figure. They supported that proposition by citing the case of **NYERI HCCA NO.120 OF 2003 GEORGE NDERITU NDUMIA & ANOTHER vs. NYAMBURA GITONGA (2006) eKLR.** On grounds 2 and 3 of the Cross Appeal, two submissions were made. First, that the proposed sum of Kshs 18,000 was not supported by any evidence. Second, that there was nothing wrong in deducting the award under Law Reform Act from the award under the Fatal Accidents Act as failing to do so would amount to double compensation. Consequently the Appellants urged the court to allow the Appeal but dismiss the Cross Appeal.

Respondents' submissions

[5] On the other hand, the 1st and 2nd Respondents submitted that the Trial Magistrate properly found the 2nd Appellant liable based on the evidence on record. They argued that the evidence of the 3rd Respondent and the eye witness PW5 was very clear and showed the person responsible for the accident. According to the Respondents, the witness narrated to the court the sequence of events and established that the accident occurred as a result of the negligence or carelessness on part of the 2nd Appellant. They also asserted that the traffic police investigations found the 2nd Appellant to be the author of the accident in question. The Respondents dismissed as hearsay and unreliable the evidence by the only witness of the Appellants, an investigator from real insurance, for he did not witness the accident happening. The Respondent said more; that the Appellants did not even call the 2nd Appellant who was the driver of their vehicle in order to exonerate himself from blame. They concluded, therefore, that the Trial Magistrate analyzed the evidence properly and rightly found the 2nd Appellant liable and so held the 1st and 3rd Appellants vicariously liable for the accident.

[6] The Respondents also submitted in support of the Cross Appeal, that the Learned Trial Magistrate clearly erred in deducting one award from the other instead of taking into account the total award in the first instance. It was further contended that the multiplicand of Kshs 10,000 preferred by the Learned Trial Magistrate was too low and that the same should be enhanced to at least Kshs 18,000 as the plaintiff had tendered evidence to show that the deceased was earning about Kshs 50,000 and that he would give his mother Kshs 5,000 to Kshs 10,000 per month and care for his son and pay for siblings' school fees and upkeep. On the basis of the foregoing submissions, the 1st and 2nd Respondents urged the court to enhance the multiplicand to Kshs 18,000 as prayed in the Cross Appeal as it is supported by evidence.

[7] The 3rd and 4th Respondents also submitted and fully associating themselves with the submissions of the 1st and 2nd Respondent. They, however, added that the Trial Magistrate

considered the evidence tendered as well as the submission by the parties, thus, it was a well-reasoned finding to treat the evidence by DW1 as hearsay and not direct evidence. It was further contended that the Appellants did not call any eye witness to controvert the evidence of DW2 and 3. To them, the evidence by DW1 was mere hearsay. They were of the view that the Appellants should have called the 2nd Appellant and his alleged passenger to controvert the evidence given by DW2 and 3. In the circumstances, they urged that the Trial Magistrate was bound to believe the evidence of DW2.

[8] On quantum, the 3rd and 4th Respondents stated that they were leaving it to court save to add that since the Appellants are liable, they should pay damages awarded jointly and severally as was held by the Trial Magistrate.

DETERMINATION

[9] I am obligated to, and I will analyze the evidence on record and reach my own conclusions but I should bear in mind that this court neither saw nor heard the witnesses testify. **See SELLE vs. ASSOCIATED MOTOR BOAT COMPANY (1968) EA 123.**

Of liability

[10] It is not in dispute that an accident occurred on 11th March 2008 involving motor vehicle registration numbers KAA 813 J and KAB 572Z along Meru Nanyuki road as a result of which the deceased sustained fatal injuries. Nonetheless, it would appear to me that one of the main bones of contention in grounds 1-4 of Appeal is: Who is responsible for the accident.

[11] PW1, a private investigator testified in support of the 1st 2nd and 5th Appellants that he received instructions on 18th March 2008 from the 1st Appellants insurers whereupon he proceeded to the scene and Subuiga Police Station, and recorded statements of the driver of motor vehicle KAA 813J and his passenger on 31st March 2008. He then filed his report thereto on 21st April 2008. According to his report the accident occurred because motor vehicle registration number KAB 572Z was being driven at high speed and in a zigzag manner. The said vehicle then lost control upon taking a bend and cut across the road thereby crushing into the left side of motor vehicle registration number KAA 813J. At the time, on seeing motor vehicle KAB 572Z approaching in a zigzag manner, the driver of KAA 813J slowed down to a near halt and moved to the extreme left to the verge of the road.

[12] DW 2, the 3rd Respondent testified that he was driving motor vehicle KAB 572Z at a speed of about 70 to 80 kilometers per hour. He was ascending towards Nanyuki. About 5 to 6 meters ahead, there was a turn to his left. There was also an oncoming motor vehicle registration number KAA 913J which was descending. Then, all over sudden and without any indication motor vehicle registration number KAA 813J turned towards the junction on the left of DW2. DW2 realized that the distance was too near and so to avoid a head-on collision, he decided to swerve to the right where the other vehicle was coming from. He said that motor vehicle KAA 813J was big and had occupied the entire road. He stated that the said vehicle did not, however, complete the turning as it moved back to its side, thus, the left side of Motor vehicle KAA 813 and his vehicle collided. DW2 blamed the driver of motor vehicle registration number KAA 913J for the accident because; the driver did not indicate or give hand sign that he wanted to turn as he was supposed to do; he did not check before turning; he did not stop to ensure the road was clear or to give way; and he abruptly turned back to his side of the road without notice.

[13] DW3 who was driving immediately behind DW2 gave similar evidence to that of DW1. Save for DW1 who was a private investigator and who was not at the scene at the material time the Appellants did not call any other witness to rebut the evidence tendered by the Respondent's witnesses. Faced with the foregoing evidence, the Learned Trial Magistrate in finding the 1st 2nd and 5th appellants liable stated as follows:

> "…**though counsel for 1st, 2nd and 5th defendants submitted that DW1's evidence is evidence of an investigators as pointed out by counsel for the 3rd and 4th defendant and counsel for the plaintiff, the qualifications of DW1 as an expert witness are not stated. DW1 also conceded he went to the scene on 31st March 2008 after the accident took place on 11th March 2008 and compiled his report on 21st April 2010, only depended on what he was told by the driver and passenger of motor vehicle registration number KAA 813J and incomplete investigations by police and he was instructed by its client. His investigations therefore were one sided and he cannot therefore be considered to be an independent witness and his evidence is hearsay. The 2nd defendant and 5th defendant did not testify and there was no explanation. There is no eye witness evidence to controvert the evidence by DW2; I have no basis to discredit the evidence of DW 2 who is the 3rd defendant the evidence by DW1 being hearsay. There is no evidence in support of the 1st 2nd and 5th defendants' claim of negligence on part of the 3rd defendant and there is no basis for apportioning liability to both the 3rd and 4th defendants. I do accept the explanation by DW2 why he swerved to the lane for the vehicle KAA 813J. Consequently I do find liability in favour of the plaintiff as against the 2nd defendant at 100% and hold the 1st and 5th defendant vicariously liable"**

[14] Of importance, the 1st 2nd and 5th Appellants claimed contributory negligence and so they bore the legal burden of proof to proof. They were bound to proof their claim for negligence on the part of the 3rd Respondent on balance of probabilities. Their driver of the vehicle that was involved in the accident would have been most crucial witness as he would have given direct evidence on the events of the day which led to the accident in question. They did not call their driver to give his account of events at to what may have caused the accident. Their only witness was a private investigator; who, only stated that he was a private investigator and has been in business since 1998 without detailing his qualifications which makes him an expert witness. He was not even pronounced an expert witness. In fact he came to give evidence in support of the 1st, 2nd and 5th Appellants. He was not an eye witness to the accident and only arrived at the scene several days after the accident. From the evidence on record, I agree with the Trial Magistrate his evidence was of no probative value. The Respondents on the other hand called DW2 and 3 who were eye witnesses to the accident and gave clear and detailed account of the events of that day leading to the accident in question. Their evidence is credible and remained unshaken in cross examination. On failure to call evidence, I will borrow from the case of **LINUS NGANGA KIONGO & 3 OTHERS V TOWN COUNCIL OF KIKUYU (2012) eKLR** where Odunga J rendered himself thus:

> **"What are the consequences of a party failing to adduce evidence? In the case of MOTE KNITWEAR LIMITED V GOPITEX KNITWEAR MILLS LIMITED (MILIMANI) HCCC NO.384 OF 2002 Justice Lesiit, citing the case of AUTAR SINGH BAHRA AND ANOTHER V RAJU GOVINDJI HCCC NO. 548 OF 1998 stated:**
>
> > **"although the defendant has denied liability in an amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim must fail."**
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> **Again in the case of TRUST BANK LIMITED V PARAMOUNT UNIVERSAL BANK LIMITED & 2 OTHERS NAIROBI (MILIMAMI) HCCC NO. 1243 OF 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party, fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the**

plaintiff against them is uncontroverted and unchallenged."

In this case, the evidence was clear and there was no conjecture as to what happened. There were no obscure circumstances which would justify a finding or apportionment of liability among the parties. The evidence tendered by DW2 and 3 in the lower court was clear and remained uncontroverted. DW2 testified that motor vehicle KAA 813J attempted to turn from right to left. In doing so, and since the said vehicle was big, it cut across and occupied the entire road. He stated that the said vehicle did not, however, complete the turning as it moved back to its side, thus, the left side of Motor vehicle KAA 813 and his vehicle collided. DW2 blamed the driver of motor vehicle registration number KAA 913J for the accident because; the driver did not indicate or give hand sign that he wanted to turn as he was supposed to do; he did not check before turning; he did not stop to ensure the road was clear or to give way; and he abruptly turned back to his side of the road without notice. This evidence is robust and proves negligence on the part of the driver of motor vehicle KAA 813J. On this evidence, I find that the 1st, 2nd and 5th Appellants are 100% liable. In light thereof, I cannot fault the Learned trial Magistrate finding that the 1st, 2nd and 5th Appellants wholly liable. Consequently I find no merit in grounds 1, 2, 3 and 4 of Appeal and they must fail. I have settled the issue on liability. I now turn to quantum of damages.

Quantum of damages

[15] It has been claimed that the Learned Trial Magistrate erred in fact and in law in adopting a multiplier of Kshs 10,000 as the deceasd's earning when the said sum had not been proved and there was no evidence was tendered on the deceased's earnings. It was contended for the Appellants that the said sum of Kshs 10,000 was plucked from the air and that the reasons for believing the sum to be reasonable were not given by the court, thus, it should be set aside. In the cross appeal, the 1st and 2nd Respondent argued that, in fact the multiplicand of Kshs 10,000 which was adopted by the trial magistrate was far below the estimation of the deceased monthly earnings. Consequently the Respondents in their Cross Appeal urged the court to enhance the same to Kshs 18,000.

[16] It was not in dispute that the deceased was a mechanic. And so, the Learned Trial Magistrate considered a multiplicand of Kshs 10,000 to be reasonable in the circumstances. Quantum of damages is a matter of the discretion of the trial court. Accordingly, like all other discretions, the appellate court will only interfere with the exercise of discretion on quantum of damages only in circumstances set out in the case of **KENYA BUS SERVICES LIMITED VS. JANE KARAMBU GITUMA CIVIL APPEAL CASE NO 241 OF 2000** by the Court of Appeal when it stated thus:

> **"…in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."**

Needles to state what was said in the case of **MBOGO – Vs – SHAH & ANOTHER (1968) EA 93**, that:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

[17] I will apply the above test. In the circumstances of this case the Learned Trial Magistrate

considered a sum of Kshs 10,000 to be a reasonable multiplicand for a person who was working as a mechanic. But none of the parties in these appeals agree with the said estimation by the trial magistrate. The Respondents in the cross appeal argued that the plaintiff had proved that the deceased was earning about Kshs 50,000; anf, therefore, the court should enhance the multiplicand to Kshs 18,000. The Appellants on the other hand stated that the sum of Khs 10,000 adopted by the magistrate was plucked from the air since no evidence was led in support of the figure. Even though there was no exact monthly income of the deceased shown by way of documentary evidence, one thing was clear; that the deceased was a mechanic and he derived income therefrom. Ample evidence was adduced towards that end. Contrary to the Appellants assertions the law on this point is as was enunciated by the Court of Appeal in the case of ***JACOB AYIGA MARUJA & ANOTHER VS SIMEON OBAYO [2005] eKLR*** *that production of documents was not the only way to prove earnings when it stated as follows:*

> ***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. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail".***

[18] From the evidence available, and the applicable law the fact that the deceased was a mechanic is quite substantial consideration in assessment of damages. It is a factor which should guide the trial court in arriving at a multiplicand. There is no obscurity whatsoever that the deceased's profession was that of a mechanic. It was also not in doubt that he derived income from his said profession. I should say that, in the face of the evidence, applying a multiplier on the facts of the case is quite in order. Again, using the profession of the deceased as a basis for estimation of monthly earnings is also not an act of speculative arithmetic or in contravention of the law. In such case, a trial court will be entitled to use a figure it deems reasonable in the circumstances of the case. I say these things on the understanding that, there are no hard and fast rules in assessment of damages; a multiplier is merely a method of assessment of damages and its application will depend on facts of the case. As I stated, the deceased was a mechanic, owned a garage and a vehicle which he used as a taxi. See the purchase agreement for motor vehicle Number KAP 908 F dated 11th January 2008. The deceased, therefore, had known sources of income; in fact from the evidence reasonable income was knowable without much speculation. His age was also known to be 32 years and he also had dependants. In consideration of these facts the parties opted for the use of a multiplier- which is quite in order. Therefore, the arguments that the trial magistrate based her multiplier on nothing or ''plucked it from the air'' are totally indefensible. The Respondent had proposed a multiplier of Kshs. 18000 while the Appellant Kshs. 5,000. The trial magistrate considered Kshs. 10,000 to be most reasonable. The trial magistrate gave her reasons in discarding the evidence of certificate of insurance for it related to a different car altogether. Similarly, she discredited and rejected the evidence of the account as it bore no account number and branch. These were valid reasons to reject the said evidence. In sum, with regard to the multiplicand, there is nothing to suggest that the trial magistrate acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or she has misapprehended the facts, or for any reasons the multiplicand used produced award which was so inordinately high or low so as to represent a wholly erroneous estimate of the damages. The multiplier of Kshs. 10,000 adopted by the trial magistrate is quite reasonable in the circumstances of this case. I uphold it. Accordingly, the *grounds of appeal and cross appeal challenging the multiplier fail.* .

Double Compensation

[19] This issue attracted considerable canvassing by the parties. In the Cross Appeal, it was

urged forcefully that that the Learned Trial Magistrate erred in deducting one award from the other instead of taking into account the total award in the in the first instance. The Appellant on the other hand contended that there was nothing wrong in deducting the award under the Law Reform Act from the award under Fatal Accidents Act as failing to do so would have amounted to double compensation. I admit these arguments rekindle a debate which is still raging within the ranks of judicial officers. I will first cite the Court of Appeal in the case of **KEMFRO VS. (A. M. LUBIA) and OLIVE LUBIA (1982-1988) KAR 727 that:**

> ***"…the net benefit will be inherited by the same Dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act."***

I will then refer to section 2(5) of the Law Reform Act which provides:

> ***(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom."***

See very candid discourses on double compensation under the Fatal Accidents Act and the Law Reform Act in the case of **BENEDETA WANJIKU KIMANI vs. CHANGWON CHEBOI & ANO [2013] eKLR; OYUGI JUDITH & ANO vs. FREDRICK ODHIAMBO ONGONG & 3 OTHERS;** and **DAVID KAHURUKA GITAU & ANO vs. NANCY ANN WATHITHI GITAU & ANO [2016] eKLR** by Emukule J, Majanja J and Mativo J, respectively. The reasoning of the honourable judges is apt and to the point. I agree. But on my part, I must add that double compensation draws from the principle of *Double Recovery***.** According to the Black's Law dictionary, Double Recovery refers to;

a. **A judgment that erroneously awards damages twice for the same loss, based on two different theories of recovery;**
b. **Recovery by a party of more than the maximum recoverable loss that the party has sustained.**

Therefore, whereas this subject to me seems to be ''scary edge'' area of law and may cause considerable legal and practical difficulties, but I think much understanding is gained in the following. That, for double compensation to arise there must be an award of damages twice for the same loss, based on two different theories of recovery or a recovery by a party of more than the maximum recoverable loss that the party has sustained. Loss of expectation of life as well as pain and suffering are distinct remedies under the Law Reform Act and are awarded upon defined principles. Judicial practice has developed conventional figures for these awards and the latter will normally be nominal depending on whether the person died instantly or after some while. The biggest gain under the Fatal Accidents Act is loss of dependency which is also quite separate from the above two. Accordingly, any remedy awarded under one Act will be taken into account in the remedy awarded in the other Act, and you cannot award similar awards in both Acts. If the latter was to happen, there will be double compensation But, I see a misconception here on the part of the trial magistrate in equating ''taking into account'' to mean outright deduction of the remedies of loss of expectation of life as well as that of pain and suffering. The misconception is also carried over in the submissions by the Appellants. Taking into account of an award in one Act when assessing damages in the other does not necessarily mean deducting unless the court has awarded similar remedy in both Acts. Therefore, the trial magistrate erred when she deducted loss of expectation of life, and pain and suffering from the award she had given the estate. I, therefore, set aside the deduction she provided for award of pain and suffering, and loss of expectation of life. Accordingly, I find the Appellants appeal to be without merit I dismiss it. I also find that the 1st and 2nd Respondents Cross Appeal partly succeeds. The upshot of all the above analysis is this. I enter judgment for the Respondents as follows:

1. **Loss of dependency- Kshs 10,000 x20 x12 x1/3=……..Kshs 800,000**

2. **Pain and suffering……..Kshs 40,000**

3. **Loss of expectation of life …….……..Kshs 100,000**

4. **Special damages ……..Kshs 52,000**

TOTAL…… Kshs 992,000

[20] I also award costs of the suit and interest on this award. With regard to costs for the appeal and cross-appeal, I have considered the result of my decision, and I order that each party shall bear own costs of the Appeal and Cross-appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 10th day of March 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gikunda advocate for 1st and 2nd respondents

Mr. Thangicia advocate for Mbai advocate for appellants

Mr. Ringera advocate for Arithi advocate for 3rd and 4th respondents.

F. GIKONYO

JUDGE