REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 39 OF 2013

SIMON KIBET LANGAT.....APPELLANTS KUENE NAGEL LIMITED

VERSUS

MIRIAM WAIRIMU NGUGI(suing as the administrator of the estate of **DANIEL MWIRUTI NGUGI.....RESPONDENT**

(*Being an Appeal from the Judgment and decree of Honourable E. Riany, Resident Magistrate in Naivasha Principal Magistrate's court Civil case No.693 of 2009 delivered on 14th March 2013)*

JUDGMENT

1. This appeal arises from the judgment of the trial court where the appellants were found 100% liable in negligence following a traffic road accident along the Naivasha–Maai Mahiu Road on the 23rd April 2010 between the appellant's motor vehicle **Registration Number KAT 455 U** and the deceased pedestrian, then aged 14 years old. The legal representative of the estate of the deceased was awarded Kshs.870,000/= particularised as follows:

- **Pain and suffering - Kshs. 30,000/=**
- **Loss of expectation of life - Kshs.120,000/=**
- **Lost years - Kshs.720,000/=**

2. In the grounds of appeal that may be summarised into two, against liability and *quantum* the appellants urge this court to set aside the judgment, allow the appeal and re-assess general damages downwards to Kshs.300,000/= and find the deceased to have contributed to the accident and apportion liability accordingly.

3. The Respondent's evidence at the trial court was adduced by the Respondent, MW, mother of the deceased. She produced the Death Certificate and school report form for the third term 2009 for the deceased who was 14 years old and in class 7 at [Particulars Withheld] primary school. She told the court that her son aspired to be an Architect when he grew up. The Report form showed the pupil to be of average ability. She also produced the motor vehicle copy of records, police abstract and Letters of Administration.

4. On how the accident occurred, an eye witness Peter Mwangi testified as PW2. He stated that he did not know the deceased prior to the accident. He testified that he was standing at the bus stage along the subject road and saw the deceased with a donkey cart on the left side of the road while facing Naivasha general direction where the accident occurred, and where there were Zebra crossing signs. He stated that he saw the vehicle that was being driven at high speed went out of the road and hit the deceased, then it came back to the road and sped away without stopping, that

it was pursued by a small vehicle and was intercepted at Longonot. It was his evidence that the deceased did not die at the scene but on the way to hospital. He blamed the driver of the vehicle for carelessness. He re-affirmed that the deceased was not on the road.

5. The Appellants in their statement of defence had denied the Respondents claim in its entirety, and in the alternative pleaded contributory negligence on the part of the deceased.

Neither of the appellants testified but submissions were filed by their advocates.

The appellants in their submissions before this court are to the effect that parties had agreed on the issue of negligence. The Respondent also alluded to an agreement on liability but no terms are stated by either party.

The court has perused the proceedings as recorded in the court file. There is no where indicated that a consent judgment on liability was ever recorded by the parties.

The court will deal with the appeal on both issues of liability and *quantum*.

6. This being the first appellate court, it is to analyse and re-assess the evidence adduced before the trial court and come up with its own findings. It cannot substitute its own factual findings for that of a trial court unless there is no evidence to support the findings or unless the court was plainly wrong.

See **Kiruga -vs- Kiruga & Another (1988) e KLR and Selle -vs- Associated Motor Boat Co(1968) EA 123.**

I have stated the Respondent's case above. As no evidence was adduced by the Respondent's evidence remains uncontraverted. The exhibits produced by the respondent were not objected to. It is PW2 who was categorical that the deceased was hit while standing off the road. That evidence is not rebutted.

The appellant did not show in what manner the deceased contributed to the occurrence of the accident. I have considered the trial magistrate's judgment. I am persuaded that the Magistrate took into account the evidence as tendered and made its findings based on the said evidence. I have no reason to interfere with the factual findings of the said Magistrate. The appeal on liability is therefore found to be without merit and it is dismissed.

7. Assessment of damages is at the discretion of the court. An appellate court will only interfere with the *quantum* of damages where it is clear that the court did not take all the relevant factors into account, or left out some relevant factor, or if the ward is inordinately too high or low so as to represent a wholly erroneous estimate of the damages. See **Kemfro Africa Ltd t/a Meru Express Services Ltd -vs- Lubia & Another (1982-88) KAR 727.**

The deceased was a minor of 14 years old. The sum of Kshs.870,000/= collectively awarded as general damages under the **Law Reform Act and Fatal Accidents Act** is said to be too high. It is proposed by the appellants a reduction to Kshs.300,000/= as a global award, citing the cases **Moranga Abel Nyakenyanya -vs- Jackson Kichwen (1999)e KLR** where an award of Kshs.300,000/= was given for a deceased minor. It is also submitted that the award on loss of dependency of Kshs.720,000/= should not have been awarded as the same had not been pleaded.

8. The Respondent on its part relied on the case **Daniel Kuria Nganga -vs- Nairobi City Council NBI HCCC No. 362 of 2001.** The deceased was 14 years. He drowned in a pit of water left unattended. The judge awarded Kshs.2,148,867/30. The court in arriving at the sum relied on the case **Sheikh Mushtag Hassan -vs- Nathan Mwangi Kamau Transporters & Others (1982-88) 1 KAR** where Justice Nyarangi reiterated parents expectations that their children are the security and insurance of their aging parents, that the children's upbringing and education is of

pecuniary nature and cannot be redeemed including benefits that may have come to the parents, brothers and sisters, so much that the loss caused by death could not be adequately compensated in monetary terms. The court proceeded to award Kshs.1,500,000/= under the subhead, pain and suffering. For the 14 year minor, the court used a multiplier of 37 years and a dependency ratio of 1/3 against an income of Kshs.3,000/= arriving at the sum of Kshs.1,269,810/=.

9. On the present case, I am persuaded to use the global sum approach. For young minors, it is not very clear how a child may turn out to be when they mature despite good grades in school and high expectations of parents. Further, minors cannot be said to strictly have dependants. All children from all walks of life, given equal opportunities could become anything in future. It is not predictable. All said and done, children are an asset, and parents expectations are shattered when they loose their lives in whatever manner.

For those reasons, the global approach appeals more to me.

10. In the case **Kenya Breweries Ltd -vs- Saro (1981) e KLR 408,** the court held that the age of a child must be considered in assessment of damages. It is possible to asses abilities of an older child than of a younger child of say 7 years and below as opposed to one of 14 years and above. The court awarded Kshs.300,000/= for the minor who was 6 years old as a conventional sum. The deceased in the present case had already started showing his capabilities. He was no doubt working using a hand cart as evidence adduced showed.

Going by the global sums awarded by the courts and taking into account the age of the deceased, I find that the sum of Kshs.720,000/= awarded by the trial court not too high to call for this court's interference. The trial court used a different method of dependency ratio and expected working life and income in assessing the damages which is quite in order as that was in its discretion the method it preferred, and as used in many decisions where the court picks a multiplier and expected income and a multiplicand to calculate the lost years and/or loss of dependency.

The sum of Kshs.720,000/= is upheld as a fairly reasonable sum of loss of dependency.

11. The appellants fault the trial court for not discounting the awards under the Law Reform Act from the award under the Fatal Accidents Act. It is stated in the case **Kemfro Africa** that when the dependants are the same and an award under the Fatal Accidents Act is made, any award under the **Law Reform Act** should be discounted to avoid double compensation. I have considered the plaint. The dependants of the deceased minor are stated as his mother and the father. The mother of the minor is the respondent herein. To that extent, both awards would go to the two parents. To avoid double benefit, the sum of Kshs.150,000/= awarded under the Law Reform Act shall be discounted from the total sum of Kshs.870,000/= leaving a balance of Kshs.720,000/= under Fatal Accidents Act.

12. Upon the above findings, the court makes the following conclusion and determination.

1. That the appeal has some measure of merit and succeeds partially.

2. That the trial court's Judgment on liability shall remain undisturbed. It is upheld.

3. That the award of general damages is set aside and is substituted with an award of Kshs.720,000/= being damages for loss of dependency.

4. Each party shall bear its own costs of the appeal.

Dated, signed and delivered in open court this 5th day of May 2016

JANET MULWA

JUDGE