REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 83 OF 2011

CONSOLIDATED WITH CIVIL APPEAL NO. 84 OF 2011

1. **DEL MONTE (K) LIMITED**
2. **KENYA ROAD TRANSPORTERS.....APPELLANTS**

VERSUS

ANASTASIA KANINI KITHU (suing as Administratix for and on behalf of the estate of

ERIC WILFRED GREY NJERU (Deceased)**.....RESPONDENT**

(Appeal from the original judgment and decree of Hon. Mr. Gitonga (S.P.M.) in Thika CMCC No. 1155 of 2005 delivered on 28st November, 2013)

JUDGMENT

1. The Respondent sued the Appellants seeking recovery of damages arising out of a road traffic accident which occurred along Thika-Oloi-tip-tip road occasioning the demise of Eric Wilfred Grey Njeru (the deceased). It was the Respondent's case that on 3rd February, 1988 the deceased was travelling aboard the 1st Appellant motor vehicle registration number KWH 834 when the said vehicle was involved in a collision with the 2nd Appellant's motor vehicle registration number KSK 355/ZA 2661. It was alleged that the drivers of both vehicles were driving negligently and were both liable for the accident. The Respondent sought general damages and special damages of KShs. 55,635.00/=.
2. The Respondent who was the deceased wife never witnessed the accident. She testified that she spent KShs. 30,000/= for burial arrangements but had no receipts to prove that she incurred that cost. She produced a death certificate (P. Exhibit 1) and police abstract (P. Exhibit 2) and stated that the police abstract shows that the motor vehicles were involved in an accident and the deceased name as the victim. She denied having received any settlement in relation to the accident. She stated that the deceased used to earn a gross salary of KShs. 5,428.12/=. She had six children with deceased. She stated that she was paid an amount she could not recall as the deceased's benefits.
3. PW2, Onville Guantai Mugambi a personnel clerk with the 1st Appellant testified that on the material day, the deceased boarded the 1st Appellant's motor vehicle and he boarded the next vehicle. The 1st Appellant's motor vehicle was ahead of that which he had boarded. On reaching near a bridge which was narrow the driver of the 1st Appellant's motor vehicle slowed down and moved off the road since the 2nd Appellant's motor vehicle was oncoming. The 2nd Appellant's motor vehicle however swerved and its trailed hit the 1st Appellant's motor vehicle. He stated that the driver of the 1st Appellants motor vehicle too should shoulder liability since he did not

completely move off the road. He confirmed that the deceased used to earn KShs. 5,428.12/=. He stated that the 2nd Appellant's motor vehicle was being driven at a high speed that it passed a cyclist who was blown off. The Appellants closed their case without tendering any evidence. The trial court having heard the matter apportioned liability between the 1st Respondent and 2nd Respondent at the ratio of 40%:60% and entered judgment for the Respondent in the following terms:-

Loss of expectation of life KShs. 120,000/=

Pain and suffering KShs. 50,000/=

Loss of dependency KShs. 850,080/=

Special damages KShs. 25,535/=

subject to liability.

4. Being dissatisfied with the trial court's decision, the Appellants filed these appeals on the following grounds:-

1st Appellant's grounds

i. *The learned magistrate erred in law and in fact by holding that it was 40% liable for the said accident contrary to the evidence before the court.*
ii. *The learned magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the Appellant.*
iii. *The learned magistrate erred in law and in fact in awarding loss of expectation of life under the Law Reform Act, Chapter 26 Laws of Kenya at KShs. 120,000/= without taking into account that the Dependant under the Fatal Accidents Act, Chapter 32, Laws of Kenya and Law Reform Act, Chapter 26 Laws of Kenya were identical.*
iv. *The learned magistrate erred in law and in fact by awarding the sum of KShs. 850,080/= under the Fatal Accidents Act, Chapter 32,Laws of Kenya when the same was not proved.*
v. *The learned magistrate's award of damages(in particular considering the age of the deceased, the earnings of the deceased and all other factors) was inordinately high in that it was an erroneous estimate of the sums awarded without due regard being had to the relevant circumstances of the case and the comparable cases.*

2nd Appellant's grounds

i. *That the learned trial magistrate erred in law and in fact in failing to consider or have sufficient regard to the 2nd Appellant's written submissions that the suit was filed out of time and therefore was not properly before the court.*
ii. *That the learned trial magistrate erred in law and in fact in failing to take into account the fact that the Respondent had already received some settlement under the Workmen's Compensation Act as to represent an erroneous estimate.*
iii. *That the learned trial magistrate erred in law and in fact by holding the 2nd Appellant liable when there was evidence on record exonerating the 2nd Appellant's driver from all liability.*
iv. *That the learned trial magistrate erred in law and in fact by failing to consider the judicial authorities cited in the written submissions filed on behalf of the Appellants thus awarding KShs. 627,369/= in damages which is manifestly excessive as to represent an entirely erroneous estimate.*

5. From the above grounds, it is clear that the issues for determination are:-

a. Whether or not the suit was time barred;

b. Whether or not liability between the Appellants was judicially apportioned;
c. Whether or not the quantum of damages as awarded was done judicially; and
d. Whether or not the Respondent received settlement under the Workmen's Compensation Act.

Ownership of the vehicles was not contended.

6. This being a first appeal, it is this court's duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**).
7. This appeal was canvassed by way written submissions. It was the 1st Appellant's submissions that from the evidence of PW2, an inference could be drawn that its driver played no role in the causation of the accident since it is the 1st Appellant's motor vehicle that was hit by the 2nd Appellant's, that its driver was prudent by slowing down while approaching a narrow bridge and driving at a speed of about 15-20 km. It was submitted that the 2nd Appellant's ought to have been found 100% liable in the circumstances. The 2nd Appellant on its part contended that in the traffic case, the 1st Appellant's driver was found to be liable thereby the 2nd Appellant's driver was exonerated from liability.
8. It was also the 2nd Appellant's contention that the suit was time barred and that this was confirmed by the Plaintiff when he stated that there was a delay in filing the suit since his advocates were still negotiating. It was contended that an objection to filing a suit out of time can only be raised during trial which they did it did. The 2nd Appellant on this point relied on **Oruta & Another v. Nyamato CA No. 96 of 1984** and **Mary Wambui Kabugu v. Kenya Bus Services Limited CA No. 195 of 1995**. It was contended that the Respondent was granted leave under Section 27(2) of the Limitation of Actions Act without fulfilling the conditions therein rather leave was granted due to the reason that parties were negotiating.
9. The 2nd Appellant also contended that the trial court failed to take into account that the Respondent received compensation under the Workmen Compensation Act and submitted that KShs. 280,000/= so compensated should be deducted from the award.
10. On damages the 1st Appellant submitted that the award under the head pain and suffering for KShs. 50,000/=, loss of expectation of life for KShs. 120,000/=, multiplier of 22 years and multiplicand of KShs. 4,830/= was too high. That the dependency ratio was placed at 2/3 yet there was no evidence of dependency and submitted that dependency ratio of 1/3 should be applied.
11. On the issue of limitation of time, the Respondent submitted that its application was not challenged and that the decision and application not being part of the record cannot be challenged on appeal. It was contended that the payment stated by the 2nd Appellant were the deceased's benefits and have no bearing in this claim. It was contended that in apportioning liability, the trial court considered the evidence on record. On quantum it was submitted that the Respondent produced the deceased's latest pay slip which indicated his gross salary as KShs. 5,428.12/= and after the deductions it came down to KShs. 4,830/=.
12. The respondent was granted leave to file the suit out of time under **Section 28(2)** of the **Limitation of Actions Act** which provides as follows:-

'28(2) where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would be in the absence of any evidence to the contrary, be sufficient-

a. ***To establish that cause of action, apart from any defence under section 4(2); and***
b. ***To fulfill the requirements of section 27(2) in relation to that cause of action.'***

Section 27(2) of the **Limitation of Actions Act** provides,

' 27(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive

character which were at all times outside the knowledge (actual or constructive) of the plaintiff…' (Emphasis added).'

13. It follows therefore that before the court granted the *ex parte* leave to the respondent to file the suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired. In the instant case, the respondent argued that the reason for the delay was due to the ongoing negotiations between the parties. the aforesaid reasons does not constitute material facts which were not within the knowledge of the respondents as envisaged under **Section 27(2)** of the **Limitation of Actions Act**. In **Divecon Limited v. Shirinkhanu Sadrudin Samnani** (supra), this Court held,

' ..it would be convenient to now deal with the issue which had seemed settled, that a Judge can in a trial consider and accept or reject the exparte order granted by any other Judge for extension of time under the Act. This Court in the case of Yunes Oruta & another –vs- Samuel Nyamato- Civil Appeal No. 96 of 1984 unanimously followed the English Court of Appeal decision in Cozens –vs- North Devon Hospital Management Committee & another(1966) 2 ALL E.R 799 where it was held by the majority, Lord Denning,M.R. and Dankwerts, L.J (Salmon, L.J dissenting) that:

"Although it was a general principle in regard to exparte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act of 1963 to allow a defendant to apply, before the trial of the action, to set aside an exparte order obtained under section 2(1) giving leave for the purpose of section 1(1)(a).."

In Oruta, it was held that the issue of challenge to the granting of leave to file suit out of time, can only arise at the trial. Gachuhi, J.A in the leading judgment of this Court in Oruta, stated as follows:

"It will be up to the Judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted exparte"

14. In order to resolve that issue, the parties will have to lead evidence. Therefore, it is not an issue which can be resolved through a preliminary objection. In arriving at that conclusion, I have derived guidance from the unanimous decision by the Court of Appeal in **Muiruri v. Kimemia (2002) 2 KLR 677 at 682**, whereat the court cited with approval the following words of Sir Charles Newbold in **Mukisa Biscuit Manufacturing Co. LTD. v. West End Distributors LTD (1969) E.A. 696**, at page 701:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

15. Having come to the conclusion that it will be necessary for the parties to lead evidence on the issue. It is worth noting that the Appellants led no evidence with that regard. Also considering the provisions of Article 159 (2) (d) of the Constitution and the holding in **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

"**It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."**

16. On the issue of liability, it is worth noting that the Appellants failed to adduce any evidence to controvert the Respondent's case. The consequence of such failure has been vastly discussed. In

Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 Makhandia J held:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

17. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni j, stated:-

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

18. In the absence of evidence in rebuttal from the respondent, it follows that the Respondent proved his case on a balance of probability against both Appellants. Even if I were wrong on this point. It was PW2's uncontroverted evidence that the 1st Appellant's driver slowed down and gave way to the 2nd Appellant's driver who was driving fast that it veered toward the 1st Appellant's motor vehicle and hit it. Considering PW2's evidence that the 1st Appellant's driver did not fully move off the road, I find that he too was to shoulder liability but not as much as the 2nd Appellant's driver. In the circumstances, I find no fault in the trial court's decision on liability and uphold it.
19. On the award under the Law Reform Act and Fatal Accidents Act, I am of the view that great caution should be exercised. to ensure that the awards are not duplicated. In **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** the court stated as follows:

"…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 under the latter Act must be offset by the gain from the estate under the former Act…This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act'…anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya."

20. Section 2(5) of the Law Reforms Act, Cap 26, Laws of Kenya reiterate the above quoted provision. It stipulates:

"(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…"

21. In **Peres Wambui Kinuthia and another v.S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 of 2010 (UR)** Mabeya J held:-

"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.

Accordingly, what is required in order to avoid double compensation is for the court to have in mind and therefore take into account the award under the Law Reform Act when making an award under the Fatal Accidents Act. In my view this is the better way of construing Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act Cap 26 Laws of Kenya. Otherwise there will be no need of having to bring the suit under both statutes only for the award in one to be deducted from the award made in the other. Indeed, in the Kemfro Africa Ltd case (supra), the Court of Appeal declined to deduct KShs. 25,000/= that had been awarded under the Law Reform Act from the award of KShs. 150,000/= awarded under the Fatal Accidents Act Cap 32 Laws of Kenya on the basis that the trial court had taken into account the said award."

22. The trial court assessed the deceased's income at KShs. 4,830/=, which was the remaining amount after deductions. However, by the time the suit was filed, the deceased's children were adults which fact the trial court failed to consider. I therefore find that there was over compensation on the award under the Fatal Accident Act. Considering that the children were adult at the time of filing the suit, the applicable dependency ratio ought to have been 1/3. At the time of his death the deceased was aged 38 years. He would therefore have worked another 22 years before retiring. Considering the vicissitudes of life a multiplier of 18 years would in my view be reasonable.
23. There shall therefore be judgment for the Appellants as follows:-

a. Award under Law Reform Act

i. Pain and suffering KShs.50,000/=
ii. Loss of expectation of life KShs.120,000/=

b. Under Fatal Accidents Act

$4,830 \times 12 \times 18 \times {}^{1}/_{3} =$ KShs. 347,760/=

Total KShs.517, 760/=

Judgment is therefore entered in favour of the Respondent against the Appellants at the ratio of liability apportioned herein above. Since the appeal partially succeeded. each party shall bear its own costs.

Dated, Signed and Delivered in open court this 10th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Jan Mohamed for Delmonte

N/A Mereka for Respondent in 84/2011 and Appellant in 83

Kimani holding brief for Kiugu for 1st Respondent in 84/2011