REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 60 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 67 OF 2012)

(Appeal from Decree passed on 06/06/2012 in Murang'a PMCC No 603 of 2007 – E N J Osoro, SRM)

DUNCAN MUGO MIANO .....…...…….….....….....….APPELLANT

VERSUS

FRED MBURU NG'ANG'A…… RESPONDENT

J U D G M E N T

1. This is an appeal from the decree of the lower court by which judgment on liability was passed in favour of the plaintiff (Respondent) against the defendant (Appellant) in the ratio of 70% to 30%, and the following damages awarded –

Under the Law Reform Act:

(i) For pain and suffering - KShs 20,000/00

(ii) Loss of expectation of life - KShs 100,000/00

Under the Fatal Accident Act:

Loss of dependency - KShs 848,736/00

These sums were reduced by 30% contributory negligence, leaving the total sum awarded at KShs 678,115/20, plus costs and interest. No special damages were awarded.

2. The appeal is against both the finding on liability and quantum. The main thrust of the grounds of appeal on the issue of liability is that the Respondent did not prove to the required standard the Appellant's alleged negligence; and that the preponderance of the evidence before the court was that the Deceased who died in the accident, and in respect of whose death the claim was made, was wholly to blame for the accident.

3. I have considered the submissions of the parties both written and oral, including the various cases cited. I have also read through the testimonies of the witnesses in order to evaluate the evidence placed before the trial court and arrive at my own conclusions on the same. This is my duty as the first appellate court. But I have borne in mind that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact. I am also guided by the principle that an appellate court will not readily depart from a trial court's findings of fact, except where its assessment or apprehension of those facts is clearly

wrong, or not supported by the evidence placed before the court, or where the court acted on wrong principle in arriving at those findings.

4. There was no dispute that an accident occurred as pleaded involving a motor vehicle owned and driven by the Appellant, and the Deceased. The accident occurred at a trading centre called Sabasaba; the main Murang'a-Kenol road passes just by the trading centre.

5. The Respondent (who was the Deceased's father) called two witnesses in addition to testifying himself as PW1. He was not present when the accident occurred. PW2 testified that he had been with the Deceased and that they were about to bi-cycle to Murang'a Town. But the Deceased crossed the main road to talk to someone while he (PW2) remained on the other side of the road. PW2 then heard a loud bang and realized that the Deceased had been hit by a motor vehicle while he was straddling his bi-cycle off the road but not riding. The Deceased died at Murang'a as they were taking him to hospital.

6. PW3 was a police officer who was called to produce in evidence a police abstract on the accident. He testified that the preliminary finding indicated in the abstract was that the Deceased was wholly to blame for the accident, but that the accident was still pending under investigation. He did not testify as to how that preliminary finding was arrived at; he was not the investigating officer.

7. The Appellant testified on his own behalf. He stated that he was driving from Murang'a towards Kenol at an average speed of between 80 and 100 kilometres per hour. At Sabasaba trading centre a bi-cyclist suddenly emerged from a steep side road and rammed into his car at the front. He saw the cyclist from a very short distance and expected him to stop before joining the main road. He could not swerve to avoid him because there was an oncoming vehicle.

8. The trial court found that the collision between the Appellant's motor vehicle and the Deceased occurred as described by the Appellant. In other words, the trial court accepted that the Deceased suddenly emerged from a side road at Sabasaba trading centre into the path of the Appellant's motor vehicle which was on the main road. But the trial court also found that the Appellant's speed of between 80 and 100 kph in a zone with a speed limit of 50 kph was unreasonable and negligent. The court found that in the prevailing circumstances (including the fact that the Appellant was in control of a potentially lethal machine – the car),the Appellant bore the greater responsibility, and assigned to him 70% responsibility for the accident, and the Deceased to shoulder 30% contributory negligence.

9. It was of course the Respondent's burden to prove on a balance of probabilities that the accident was caused by the Appellant's negligence. The only real eye-witness to the accident was the Appellant. By his own word, he was driving at between 80 and 100 kph in an area where he should not have been driving at more than 50 kph. The available evidence showed clearly that he was unable to avoid the Deceased because he (Appellant) was driving at too high a speed in the circumstances. Those circumstances were that the road passed by a trading centre, and hence the speed limit of 50 kph, and that there were likely to be other road users about – including other motor vehicles, cyclists and pedestrians. As it happened, the presence of an oncoming vehicle and his own high speed would not permit the Appellant to take evasive action to avoid the Deceased.

10. I therefore find no fault at all with the learned trial magistrate's finding that though the Deceased precipitated the accident by emerging suddenly from a side road onto the main road, the Appellant bore the greater responsibility and should not have been driving at the speed that he was. The apportionment of liability at 70% to 30% against the Appellant was fully supported by the evidence placed before the court by the Appellant himself. I find no merit in the appeal in respect of liability.

11. As for quantum, the awards made under the ***Law Reform Act*** for pain and suffering and loss of expectation of expectation of life were conventional awards and are not excessive at all. The Deceased did not die at the scene of the accident and an award of KShs 20,000/00 for pain and suffering was just and fair. For loss of expectation of life, awards normally range between KShs 80,000/00 and KShs 120,000/00. An award of KShs 100,000/00 in respect of a young person who died aged about 22 years cannot be faulted.

12. Under the ***Fatal Accidents Act***, dependency is a statutory matter. **Section 4(1)** of the Act provides -

> **"4.** ***Action to be for benefit of family of deceased***
>
> **(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:**
>
> **Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person".**

There is no dispute that the Respondent was the father of the Deceased and therefore his dependant under the statute. No other proof of dependency was necessary.

13. It is also common ground that the Deceased did not have any provable income. But he was an active young man born into a large family of ten (10) children. His father (Respondent) testified that the Deceased was assisting him to feed and clothe the family. Many people in Kenya are not engaged in any formal employment or business, but they earn their own livelihoods whatever way they may. Indeed the informal sector is a very important sector in our economy. People engaged in income–generating activities in the informal sector will usually not keep books of account, etc. that can be used to prove income. But that is not to mean that they have no income at all!

14. I can find no fault with the learned trial magistrate's minimum-wage approach in assessing the Deceased's income. I also cannot find fault with her finding that the Deceased used about one-third of his income to assist the Respondent.

15. There is also the complaint regarding the multiplier of 28 years, considering that the Deceased was aged 22 years at the time of his death. An expectation of working to the age of 50 years took into account the vagaries and vicissitudes of life.

16. I find no merit at all in this appeal. The same is dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 16TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 17TH DAY OF JULY 2015