



**THE REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT NYERI.**

**CIVIL APPEAL NO. 13 OF 2014.**

**VICTOR WARUI ..... 1<sup>ST</sup> APPELLANT.**

**PAUL WERU THUMBI .....2<sup>ND</sup> APPELLANT.**

**VERSUS**

**PETER KARIMI GIKOROI.....1<sup>ST</sup> RESPONDENT.**

**DAVID MUNENE KARIMI ..... 2<sup>ND</sup> RESPONDENT.**

*(An appeal from the judgment of Hon. S. Ngungi – PM, in Nyeri CMCC No. 95 of 2013.)*

**J U D G M E N T.**

1. The 1<sup>st</sup> appellant, Victor Warui and the 2<sup>nd</sup> appellant Paul Weru Thumbi being dissatisfied with the judgment delivered on 28/2/2014 in Nyeri CMCC No. 95 of 2013 filed a memorandum of appeal raising the following grounds:-
  - i. *The learned magistrate erred in law in finding the appellants 90% liable or wrongly apportioning liability to the parties herein.*
  - ii. *The learned Magistrate erred in law and fact in finding the appellant's liable at all.*
  - iii. *The learned magistrate erred in law and in fact in disregarding the appellant's evidence and for failure to find the deceased 100% liable for the accident of 31/8/2012.*
  - iv. *The learned magistrate erred in law and in fact for failing to find that the deceased was 100% liable for trying to board a moving motor vehicle KAG 211N.*
  - v. *The learned magistrate erred in law and in fact in finding that the respondents were entitled to Ksh. 1,665,999.20 and damages, this being excessive and having not been proved in the circumstances.*
  - vi. *The learned magistrate erred in law and in fact for not dismissing the respondent's suit for failure to prove its claim.*
  - vii. *The learned magistrate erred in law and in fact in awarding and accessing (sic) extremely excessive and aggravated quantum of damages to the respondents without any basis.*
  - viii. *The learned magistrate erred in law and in fact by not considering written submissions made*

*and case law filed by the appellants.*

2. The appellants prayed that:-

- i. *The appeal be allowed and an order be made to the extent that the appellants are not liable to the respondents for (sic) judgment entered in Nyeri CMCC 95 of 2013;*
- ii. *Liability was not proved against the appellants;*
- iii. *The judgment and orders made by the learned magistrate on liability and quantum be set aside;*
- iv. *The costs of appeal be granted to the appellants.*

3. The appeal was disposed by way of written submissions filed by the law firm of Lesinko Njoroge & Gathogo for the appellants and M/s Kinyua Kiama & Co. for the respondents.

4. As this is a first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusion.

In Kiruga vs. Kiruga & Another (1988) KLR 348, the Court of Appeal observed that:-

***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.***

***An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution”.***

5. In the lower court, the deceased’s father, PW1 gave evidence that his son was 27 years old and had custody of his son who was attending St. Hellen Junior School. According to him, his son used to earn Ksh. 15,000/= per month.

However, according to PW2 (the deceased’s brother), the deceased used to earn Ksh. 3,000/= per month.

6. PW3 who witnessed the accident testified that on 31<sup>st</sup> August, 2012 at 4.30 PM while walking along Kimahuri-Kairi road, where there is a slope, he spotted a tractor going in the same direction at a high speed. There was a young man behind them walking from Kimahuri towards Kairi. He was ahead of the tractor. Whilst PW3 was on the left side off the road, the young man was on the right side off the road.

He testified that the tractor had a trailer and it swerved to the young man off the road and hit him. The young man was ahead and did not see it. The trailer veered off the road when it hit a pot hole. PW3 said that the young man fell and was trapped upon by the wheel of the trailer. The tractor stopped and people alighted. The young man told them his name. PW3 blamed the driver of the tractor for the accident as his tractor was overloaded and was being driven at a high speed yet there was a slope and the road had pot holes.

7. On cross examination, PW3 testified that the trailer hit the deceased from behind and he fell on the road after he was hit. The deceased was hit by the left front side of the trailer.

8. PW3 denied that the deceased did not get hit as he tried to board the tractor as it was going down a slope. He reiterated that the deceased was off the road.

9. DW1, Victor Warui Weru, the 1<sup>st</sup> appellant, gave evidence that he was driving tractor No. KAG

- 211N along Kairi road on 31/8/2012 on the right side of the road as one faces Kimahuri from Kairi. On board was Patrick Thumbi and John Kabiru. Patrick told him to stop the tractor which he did. DW1 spotted a young boy rush towards the tractor. He went for the mudguard so that he could board the tractor but missed it and touched the rear tyre and he fell. DW1, testified that the tyre didn't hit him, that the deceased just fell on the right side of the road as one faces Kimahuri. DW1 stated that after the deceased fell, he stopped and made a call to the 2<sup>nd</sup> appellant, Paul Weru Thumbi, the owner of the tractor. He denied that the deceased was hit by the trailer or that he was off the road when he was hit and pulled to the road.
10. DW2, Patrick Thumbi Weru, who was on board the tractor stated that while at Kairi shopping centre, he looked back and saw someone trying to board the tractor by holding the mudguard. He told the driver to stop but by then the young man had missed the mudguard and held the rear tyre of the tractor and fell down. DW2 was on the left side of the tractor. The man fell on the road on the right side, the driver's side. He was not hit by the road but by the tyre.
  11. On cross examination, he said that it was not true the trailer was connected to the tractor as there is a space between the connector. The rear tyre hit the man and he was pulled to the right.
  12. DW3, a loader was also on the tractor. At Kairi shopping centre, he heard DW2 asking the driver to stop. They alighted and saw a man had been hit and was on the road. He was hit by the driver's side on the right side. He fell on the road. On cross-examination he stated that he did not indicate in his statement that he saw Daniel try to board the tractor.
  13. The learned magistrate after considering the evidence adduced made a finding of liability at the ratio of 90% for the defendant and 10% for the plaintiff. The learned magistrate awarded damages under the heading of pain and suffering at Ksh. 10,000/=, loss of expectation for life at Ksh. 120,000/=, loss of dependency at Ksh. 1,611,288/= which came to 1,567,159/20 less the 10% contribution. The magistrate also made an award of Ksh. 98,840/= as special damages. The total award was Ksh. 1,665,999.20.
  14. The appellants in their written submissions challenged the decision of the learned magistrate in respect to multiplicand by the use of Ksh. 8,757/= as the deceased's monthly earning, as PW2 had testified that the deceased's monthly earnings was Ksh. 3,000/=. The appellants were also dissatisfied with the apportionment of liability at the ratio of 90:10 in favour of the plaintiff/respondents, who according to evidence adduced by the 1<sup>st</sup> appellant and his witnesses, was the one who attempted to board a moving tractor, but missed and slipped, thereby being hit by the big rear tyre of the tractor.
  15. The appellants drew the court's attention to the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123, Kemjio Africa Ltd t/a Mens Express & Another VS. A.M. Lubia & Another [1982 – 88] 1 KAR 727, Peter M. Kariuki Vs. Attorney General CA Civil Appeal No. 79 of 2012 [2014] e KLR and Bashir Ahmed – Butt vs. Uwais. Ahmed Khan [1982-88] KAR 5 and the case of Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCC No. 1638 of 1988 (UR)**
  16. The respondents in their written submissions indicated that the trial court was right in entering liability at 90% against the appellants (defendants). They submitted that the 2<sup>nd</sup> defendant/2<sup>nd</sup> appellant in the matter was an interested party whose evidence could tilt in his own favour, unlike that of the plaintiff's (respondents') eyewitness, PW3, who had no personal interest in the outcome of the suit.
  17. The respondents further submitted that the deceased was the bread winner as he was survived by a son and the dependency ratio of 2/3 was applicable. The respondents also submitted that the deceased used to earn a salary of Ksh. 15,000/= as a farm hand which evidence was adduced by his father PW1. The respondents referred to the amount recorded Ksh. 3,000/= as monthly income in the proceedings in the lower court as a typing error and sought to clarify that in his evidence,

PW1 gave the deceased's daily earnings as Ksh. 300/= and that is how the court invoked the minimum wages regulations and the rate of Ksh. 8,757/= per month which was in force then.

18. The respondents urged this court to dismiss the appeal on quantum with costs to the respondents. I have evaluated the evidence adduced at the lower court and I am satisfied that the learned magistrate arrived at the proper finding by apportioning liability at 90% against the appellants and 10% against the respondents.
19. A thorough analysis of the evidence of the respondents/plaintiffs shows that the deceased was lawfully walking off the road when he was hit from behind and fatally injured by a trailer being drawn by the 2<sup>nd</sup> respondent's tractor. PW3 was an independent witness who was walking some distance behind the deceased. PW3 was on the left side off the road and the deceased was on the right side off the road. He stated that the trailer veered off the road when it hit a pothole. The deceased fell and was trapped by the wheel of the trailer. It was then that the tractor stopped. Contrary to the evidence adduced by the appellants'/defendants' witnesses, PW3 was categorical that the deceased did not get hit as he tried to board the tractor as it was going down the slope.
20. The evidence of DW1, DW2 and DW3 who were on board the tractor does not ring true. DW1, the driver of the tractor testified that it was DW2 who told him to stop. DW1 stated that he saw a young boy rush to the tractor, went for the mudguard so that he could board the tractor but he missed it and touched the rear tyre and he fell, and that the tyre didn't hit him, but that the deceased fell on the road as one faces Kamahuri. He denied that the deceased was off the road when he was hit by the trailer and pulled to the road.
21. **Patrick Thumbi Weru (DW2)**, who alerted DW1 to stop the tractor on the hand testified that while at Kairi shopping Centre, he looked back and saw someone trying to board the tractor by holding the mudguard and he told the driver to stop but by then the young man had missed the mudguard and held the rear tyre of the tractor and fell down. He stated that the deceased was not hit by the road but by the tyre and he was pulled to the right.
22. It is apparent from the evidence of DW3 that he did not witness the accident as in his evidence he said that he heard DW2 asking the DW1 to stop and they alighted and saw that a man had been hit. He further stated that he did not indicate that he saw the deceased trying to board the tractor. DW3's evidence adds no value to that of DW1 and DW2.
23. A close analysis of the evidence of the two witnesses shows that they contradicted each other, whereas DW1 said that the deceased was hit by the road DW2 stated that the deceased was hit by the tyre. From the circumstances of this case, and going by the evidence of PW3, it was not possible for DW1 and DW2 to witness how the accident happened, as by the time it happened, the tractor had passed the deceased herein.
24. This court does not believe the evidence of DW1 and DW2 that the deceased fell and died while trying to board the tractor. This court is satisfied on a balance of probability that the deceased was hit by the trailer which veered off the road after hitting a pot hole. The said trailer was being drawn by the tractor. As the owner of the tractor, the 2<sup>nd</sup> appellant is vicariously liable for the acts and/or omissions of his agent and/or servant, the 1<sup>st</sup> appellant. I therefore uphold the Magistrate's apportionment of liability at 90% against the appellants and 10% against the respondents.
25. This court has perused the hand written proceedings of the lower court and established that PW2 testified that the deceased was earning Ksh. 300/= daily and not Ksh. 3,000/= monthly. As submitted by the learned counsel for the respondents, there was a typing error to that effect. PW1, the deceased's father testified that the deceased used to earn Ksh. 15,000/= monthly. This was therefore at variance with the evidence of PW2 and that is how the court adopted a monthly salary of Ksh. 8,757 as per legal notice No. 196 of 30/8/2013 issued by the Minister for Labour. The said Ksh. 8,757/= was the minimum wages applicable at the time of the deceased's death.

26. This court however finds that the copy of the deceased's death certificate on record shows that the deceased died on 31/8/2012, the learned magistrate therefore should have relied on the minimum wages applicable then to compute the loss of dependency.

27. In the case of **Beatrice Wangui Tahiru vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988 (UR)** Justice Ringera stated as follows:-

*“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning, life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and the dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”*

28. It is the finding of this court that the applicable legal Notice as at the time of the deceased's death was legal Notice No. 70 of 2012 published on 2<sup>nd</sup> July, 2012 under the Labour Institutions Act. The said legal Notice contained the regulation of Wages (Agricultural Industry) Amendment order, 2012. The order came into operation on 1<sup>st</sup> May, 2012. The deceased was a farm hand. The minimum consolidated wage for an unskilled employee in the agricultural sector was Ksh. 4,258.20 per month. In the circumstances, the court will be guided by Legal Notice No. 70 of 2012 to compute the loss of dependency as follows:-

**Ksh. 4,258.20 x 12 x 23 x 2/3 = Ksh. 783,508.80.**

29. This being the case, this court varies the award made by the lower court and makes the following award:-

|                                  |                         |
|----------------------------------|-------------------------|
| i. Special damages               | Ksh. 98,840/=           |
| ii. Pain and suffering           | Ksh. 10,000/=.          |
| iii. Loss of expectation of life | Ksh. 120,000/=          |
| iv. Loss of dependency           | <u>Ksh. 783,508.80.</u> |
| <br>                             |                         |
| Total                            | Ksh. 923,348.80.        |
| <br>                             |                         |
| Less 10% contribution            | <u>Ksh. 92,334.88.</u>  |
| <br>                             |                         |
| Grand total                      | Ksh. 831,013.92.        |

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30. The appeal succeeds to that extent. I award the costs of the appeal and the suit in the lower court to the respondents. Interest will apply at court rates until payment in full.

**DATED and SIGNED at KAKAMEGA on this 28<sup>th</sup> day of September 2015.**

**NJOKI MWANGI.**

**JUDGE.**

**DELIVERED, DATED and SIGNED at NYERI on this 13<sup>th</sup> day of October 2015.**

**J. MATIVO.**

**JUDGE.**

**In the presence of:-**

.....1<sup>st</sup> Appellant

..... 2<sup>nd</sup> Appellant

..... 1<sup>st</sup> Respondent

..... 2<sup>nd</sup> Respondent

.....Court Assistant