IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.186 OF 2010

FRANCIS K. RIGHA.....APPELLANT

VERSUS

MARY NJERI (Suing as the legal representative of the Estate of

JAMES KARIUKI NGANGA.....RESPONDENT

JUDGMENT

The Respondent, Mary Njeri, instituted a suit in the lower court (Nakuru CMCC NO.1547 of 2007) seeking general and special damages for the loss occasioned on herself and the other dependants of the deceased (James Kariuki Nganga) who passed away on 25.1.2007 after he was fatally injured following a collision between motor vehicle KAT 232V and a cyclist. The respondent also sought to recover damages occasioned on the deceased's estate.

It was the respondent's case that on 20th January, 2007 the deceased was lawfully and carefully walking along MOLO-ELBURGON road when owing to the negligence on the part of the appellant, motor vehicle registration No.KAT 232V hit a cyclist, lost control and veerred off the road and hit the deceased.

Following the accident the deceased was rescued by good Samaritans and taken to Hospital. Unfortunately, the deceased succumbed to his injuries on 25.1.2007.

The respondent blamed the appellant for driving motor vehicle registration No. KAT 232V at a speed which was manifestly excessive, failing to keep a proper look out or to have regard to other road users, failing to apply brakes or slow down in order to avoid hitting the deceased; failing to exercise or maintain effective control of his motor vehicle, failing to warn the deceased of the impending danger, and failing to swerve or in any other way manage his motor vehicle in order to avoid hitting the deceased.

In support of her case, the respondent called four witnesses, herself included. P.W.1, Samwel Kinuthia Wangombe, informed the court that he witnessed the accident; That on that fateful day 20/1/2007, at about 3.30 p.m, he witnessed the defendant's motor vehicle hit a cyclist and two people who were off the road. He said that it was at a junction. A cyclist was trying to overtake a lorry, saw an oncoming vehicle and hesitated as a result of which the vehicle hit him and two pedestrians. He blamed the cyclist for the occurrence of the accident.

Both the cyclist and the motorist were moving towards Nakuru when the accident occurred. The cyclist was trying to overtake when the accident occurred.

With the help of good Samaritans he rescued the deceased, and took him to Molo District Hospital. He also contacted the members of the deceased's family using the cell phone number which the deceased

gave him.

He opined that the cyclist was to blame for the accident.

The deceased's wife, Mary Njeri Kariuki (P.W.2), got the report of the accident from her children and visited the deceased at Molo Hospital. The deceased informed her that he was waiting for a matatu when he was hit. They transferred the deceased to Nakuru Nursing Home and later on to Kijabe Hospital wehre the deceased succumbed to his injuries on the fourth day.

Before they removed the deceased's body for burial, they obtained a post mortem report (PEX 2) and a death certificate (PEX 1).

As a result of the accident herein and the resultant death of the deceased, the family incurred expenses: medical expenses, transport, post mortem coffin. PW2 produced a bundle of receipts with a total value of Kshs.114,815/= as PEX3.

Concerning what the deceased did for a living, she stated that he owned a saw milling business and also helped her in farming. With the income from his business, the deceased used to assist her in educating their children four of whom were still in school.

Owing to the deceased's demise, her work went down making her educate her children without the deceased's help.

Before filing this suit she obtained a limited grant of representation (PEX 7).

P.W.3, P.C Simon Wairumbi, confirmed the occurrence of the accident herein. Although he was not the investigating officer, he produced the Police Abstract issued in respect of the accident herein (PEX 5). He also produced the Police file (PEX 6). The findings in the police file were to the effect that the pedal cyclist was to blame for the occurrence of the accident.

Joseph Mbugua Kariuki (PW4), is one of the deceased's children.. He informed the trial magistrate that the deceased was a Saw Miller at Elburgon Town. He gave the name of the deceased's business as Kiptonga Saw Mills. He explained that he used to work closely with the deceased in the business. His duties included working as a cashier. He explained that the deceased operated a bank account where he deposited the proceeds from the business. He produced some deposit slips to prove that fact (PEX 7 (I-IV). Like P.W.2, he explained that the deceased used to pay utility bills from the proceeds of the business

As a result of the deceased's demise the business went down and eventually closed down. While conceding that there was a ban on logging, he maintained that the deceased used to support them which support they lost owing to his accelerated death.

The appellant through his statement of defence dated 20/3/2008 denied all allegations of negligence levelled against him and/or his authorized driver. In the alternative, he contended that if any accident occurred as alleged, the plaintiff (read the deceased) wholly or largely contributed to the occurrence of the accident.

The appellant blamed the deceased for, inter alia, failing to have due regard for his own safety, failing to stop when he saw the appellant's motor vehicle approaching, failing to heed the warning given by the appellant, walking in the middle of the road; engaging in unwarranted frolics on the road, and generally being absent minded.

In addition to the foregoing, the appellant relied on the doctrine of *Res ipsar loquitor*.

It is noteworthy that at the end of the respondent's case, the appellant did not call any witness. However, through his advocates he filed written submissions. In those submissions, he contended that the respondent's evidence was incapable of proving the allegations levelled against the appellant.

Upon considering the evidence adduced by the respondent, the trial magistrate observed:-

> **"I agree with the defendant's counsel that particulars of negligence are made and not proved. What the court does not understand is why a party lists out all possible acts of negligence in pleadings where some of them or most of them are not supported by the evidence. The court however finds that the deceased owed a duty of care to the plaintiff. Particulars of negligence were alleged against the deceased but totally there was no evidence to support the allegations. The court thus finds the defendant liable in the circumstances to the extent of 100%."**

On damages awardable to the deceased's dependant's and estate, the trial magistrate observed:-

> **"The deceased was not young, his exact earnings are not known. If he were in government employment, he would have had barely two years to retire. The plaintiff's family lost his contribution to their lives and even if logging had been stopped, the deceased would still have sought timber from any other service. He still supported the wife and the children who could not have supported themselves and who depended on him. I am satisfied that the plaintiff proved the case on a balance of probabilities that the defendant is liable to the plaintiff for the estate of the deceased.....Judgment is therefore entered for the Plaintiff against the defendant as follows:-**

1. Pain and Suffering	**Kshs. 40,000/=**
2. Loss of expectation of life	**Kshs. 100,000/=**
3. Special damages	**Kshs. 114,815/=**
4. Loss of dependancy	**Kshs. 1,000,000/=**
Total	**Kshs. 1, 254, 815/="**

Aggrieved by the judgment of the lower court the appellant brought this appeal challenging the decision of the lower court on seven (7) grounds which can be summarized as follows:-

(a) That the trial court did not comprehend evidence on liability;

(b) That the trial court failed to apply the principles of negligence;

(c) That the trial magistrate failed to consider the appellant's submissions on damages awardable to the respondent for loss of dependency and as a result arrived at an award that was excessive; and

d. That the judgment is unreasonable, untenable and contrary to law, principles of nelgigence and the facts of the case.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

From the evidence presented in this case and the submissions filed in respect thereof, it is common ground that on 20.1.2007 motor vehicle registration number KAT 232V owned by the appellant was involved in a road traffic accident. It is also common ground that the appellant hit a cyclist and two pedestrians who were off the road. The bone of contention is whether the appellant was responsible for the action or ommision which led to occurrence of the accident?

Whereas the respondent maintains that the appellant was responsible for the occurrence of the accident, the appellant maintains that the evidence adduced by the respondent's witnesses did not impute any liability on him. He argues that the evidence led by the respondent's witnesses absolved him from liability. In this regard, the appellant made reliance on the testimony of PW1 and P.W.3, who placed blame on a third party (the cyclist). Contending that none of the respondent's witnesses led evidence capable of proving the particulars of negligence levelled against him, the appellant submitted that the trial magistrate misapplied the evidence of P.W.1 to impute liability on him.

This claim is based on negligence. Blacks Law Dictionary 2nd Ed. Defines negligence as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. Negligence is a question of fact whereby the plaintiff has to adduce evidence to prove that the defendant was negligent, that he failed to that degree of care which was reasonable in all the circumstances of the case or that he failed to act as a reasonable man would have acted. Then if the defendant did 'owe a duty of care' we can call his negligence a breach of that duty (see Accident Compensation and the Law P.S. Atiyah 2nd Ed).

Contending that negligence as pleaded by the respondent does not automatically impute liability on him, the appellant has submitted that the respondent did not discharge the burden placed on her of proving the allegations levelled against the appellant. Maintaining that none of the particulars of negligence levelled against the appellant were proved, cited the decision in **Jane Mwikali** vs. **Akamba Public Service** HCC NO.79 of 1991 (unreported) in support of his argument that the respondent was legally obligated to prove all allegations of negligence levelled against him. In the **Mwikali's** case *(supra)* Mwera J., (as he then was) dismissed a suit because particulars of negligence were not proved.

Having read and considered the evidence adduced in the lower court, I find as a fact that the trial magistrate misdirected herself by holding the appellant liable for the damages occasioned on the respondent and the deceased's estate yet she was categorical that none of the particulars of negligence levelled against the appellant were proved. In this regard, I agree with the appellant that the trial magistrate failed to consider the exculpatory evidence of P.W.1 and P.W.3 both of whom blamed a third party for causing the accident hereto.

Notwithstanding the fact that no evidence was led to prove the particulars of negligence levelled against the appellant, negligence being a matter of law, the trial magistrate was by dint of Section 59 of the Evidence Act, entitled to take judicial notice of the fact that when motor vehicles are carefully driven or controlled they do not veer off the road and collide with passengers who are standing off the road. In discharging her role, under the foregoing section of the law, the trial magistrate was entitled to consider the circumstances under which the accident occurred and make a determination thereon. In making that determination, the trial magistrate was not obligated to strictly follow what the witnesses had said about the accident because that was the opinion of the witness. However, the trial court is duty bound to give reasons for any decision arrived at. In the circumstances of this case, the trial magistrate found that the appellant's driver had a duty to drive with care, to mind other road users expected to be on the road. In the circumstances of this case, she found the appellant to have been in breach of that duty.

In this case the collision that led to the death of the deceased was between the vehicle and the cyclist. The evidence of PW1 and PW3 is that the scene was a junction. It would have been expected that as a prudent driver, one would slow down when approaching a junction in the event that a person crossed the road, or a vehicle turned to go another direction. But it seems the appellant did not do so. He must have been in such a high speed that he was not able to slow down or stop to avoid the collision. In the plaint it was pleaded that the appellant drove at an excessive speed, failed to keep a proper look or have regard to other road users, failed to break or slow down, failed to swerve or in any way manage the vehicle. In my view, the circumstances under which the accident occurred clearly support the particulars of negligence listed in the plaint. The appellant owed other road users a duty of care. Had he driven at a reasonable speed when approaching the junction, this accident may have been avoided. The impact caused, is telling, that he was in very high speed. Although the trial magistrate arrived at the correct decision that the appellant owed a duty of care to other road users, she did not give any reasons for the decision. Infact that finding somewhat contradicted her earlier finding that the evidence did not support the particulars of

negligence. She needed to consider the evidence and circumstances of the case in their totality. Had the appellant been careful and driving at a reasonable speed, the impact may have been avoided or even if it had occurred, the collision with the cyclist might not have made the vehicle to veer off the road and hit pedestrians who were off the road.

The appellant filed a defence in which he blamed the deceased for the occurrence of the accident. At paragraph 7 of the defence, he pleaded inter alia:-

"a) failing to have regard for his safety on the road;

b) failing to stop when he saw motor vehicle KAT 232V approach;

c) failing to heed the warning from the driver who did this by hooting;

d) walking in the middle of the road;

e) engaging in unwarranted frolics while on the road;

f) crossing the road without observing the road."

Having so pleaded, it was the appellant's duty to lead evidence to prove that the deceased was negligent as alleged in the particulars listed above because the evidence of PW1 and PW3 did not lay any blame on the respondent. The respondent was not on the road but off the road. The appellant should also have demonstrated to the court what he did to avert the accident.

I agree with the submission by the respondent that the appellant, as the driver of a motor vehicle, owed a greater duty of care than the cyclist to look out for other road users. This is so because he had under his control a more lethal machine than the bicycle . See **Wambua** v. **Patel & another** (1986) 341 where the Apaloo J. (as he then was) quoted the observation of Chesoni J.A in Malele v.Karanju CA NO. 50 OF 1981 thus:-

> **"Isabella (meaning the driver) had under control a lethal machine when Washington (the pedestrian) had none and all things being equal, she was under an obligation to keep a greater look-out for other road users than Washington's."**

Although the appellant in his submissions has attributed liability on the cyclist, the appellant did not plead that the cyclist was to blame for the accident. He only alleged, without proof, that the deceased was the cause of the accident. Since the appellant is bound by his pleadings filed in the trial court, he cannot purport to rely on new grounds on appeal to defeat the respondent's case.

On the contention that the respondent should have sought 3rd party proceedings against the cyclist, since it is the appellant who is blaming the cyclist as the cause of the accident, it was his duty to join the cyclist as a party to claim contributory negligence and indemnity. He did not do so and cannot lay blame on the respondent. See **Bancivanga v Awino** (1986)KLR 269).

The upshot of the foregoing is that I agree with the trial court's finding on liability that the appellant was to blame for the accident and liability was properly determined at 100% as against the appellant.

Concerning the damages awarded to the respondent, the appellant has submitted that the trial magistrate misapplied the law governing the award of damages for loss of dependency. Contending that the trial magistrate considered extraneous circumstances in awarding damages to the deceased, the appellant has submitted that the court should have applied the principles enunciated in **Jesse Nyokabi** v. **Public Trustee** (1965) E.A 530. In that regard, it is submitted that the trial magistrate ought to have taken into account the deceased's advanced age and the fact that the deceased's business had already been affected

by a ban on logging.

The appellant contends that the trial magistrate ought to have used a multiplicand of Kshs.10,000/=, a multiplier of 3 years and a ratio 2/3 in calculating the respondent's entitlement under loss of dependency. If the court had calculated the respondent's entitlement as proposed by the appellant, it would have awarded of Kshs. 240,000/= as opposed to the Kshs.1,000,000/= which the trial court awarded.

The appellant has also taken issue with the Kshs. 114,815/= awarded by the trial court as special damages. Although a bundle of receipts with a total value of Kshs.114,815/= was produced by consent of the advocates for the parties, the appellant has submitted that there is no evidence to support the expenses of Kshs.2000/=, 11,5000/= and 5,000/= incurred in respect of photographs, feeding and post mortem respectively. The appellant contends that only those expenses that were pleaded and strictly proved as by law required should be awarded.

Regarding the award of damages it is trite law that an appellate court will not interfere with damages awarded by a trial court unless it is satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this, the amount was so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. See **Kemfro Africa Limited t/a Meru Express services** V. **Lubia & Another (No.2)** (1987)KLR 30.

In the instant case, the respondent had proposed a multiplicand of Kshs.20,000/=, and a multiplier of 11 years. The appellant, on the other hand, had proposed a multiplicand of Kshs.10,000/= and a multiplier of 3 years.

The trial magistrate did not follow the approach suggested by the parties. Instead, she awarded a global figure of Kshs. 1,000,000/=.

The approach used by the trial Magistrate was no doubt a departure from the procedure adopted in awarding damages for loss of dependency.

Except for children, where the trend has been to award a global figure, the practice where dependency is proved has been as submitted by the parties.

In this regard, the trial magistrate ought to have estimated the deceased's income (Multiplicand) and estimated the years the dependants lost their dependency (multiplier). The product of the Multiplicand and the Multiplier would then be subjected to deductions to cover what the deceased would have used to meet his own needs and other personal financial obligations. As the deceased's age was advanced (59 years old), and he was self employed, he may have been in active business till the age of 70. Due to contingencies of life, a multiplier of 6 years would have sufficed in the circumstances of this case. PW4 produced bank deposit slips as proof that the father carried on business of saw milling and his earnings. Though logging had been banned, as the trial court observed, the deceased may have procured timber from elsewhere. The deposit slips were for the year 2006. In my view, the deceased earned some money and a multiplicand of 20,000/- would not be unreasonable. If the court had adopted a multiplicand of Kshs.20,000/- as proposed by the respondent and a ratio of two third as is usually the norm where the deceased had a family; the court would have awarded Kshs. 960,000/= on account of lost dependency. (20,000 x 6 x 2/3 x 12 = 960,000. In view of the foregoing, I find and hold that the Kshs. 1,000,000/= that the trial court awarded was neither too high nor too low to warrant interference by this court and the court will not interfere with that sum.

As the award under the Law Reform Act, would devolve to the same beneficiaries, the trial magistrate ought to have deducted that award from the total award to avoid a situation whereby the respondent would benefit twice from the same wrong. In respect of loss of expectation to life, the deceased was 59 years old and his expectation of life was not as long. I would have made an award of Kshs.80,000/- and I will sustain the award of Kshs.40,000/- on pain and suffering.

As concerns the award of special damages, I find and hold that the trial magistrate was justified in

awarding the pleaded amount as a bundle of receipts totalling the pleaded amount was produced by consent of the parties. The disputed figures of Kshs.2000/-, 11,500/- and 5,000/- for expenses, food and photographs are not unreasonable. Besides the appellant having agreed to the production of receipts for the pleaded special damages without challenge cannot be heard to say that some of the pleaded damages were not proved as by law required. In the end, the respondent will have judgment as follows:-

Loss of dependency - 1,000,000.00

Special damages - 114,815.00

= 1,114,815.00

Less: Pain and suffering - 40,000.00

Loss of expectation to life - 80,000.00

TOTAL = 994,815.00

The respondent will also have costs of the appeal and ½ of the costs in the lower court.

DATED and DELIVERED this 11th day of July, 2014

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kisilah for the appellant

Ms Mugweru for the respondent

Kennedy – Court Clerk