REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 805 of 2007

OBADIAH MWANGI GICHIA…..…………………1ST APPELLANT
MBURU MWANGI…….…………………………...2ND APPELLANT

VERSUS

MICHAEL NDUATI MWANGI (As the administrator and personal representative of the Estate of the late SAMUEL MWANGI NDUATI)……....………………RESPONDENT

(Being an appeal for the judgment and decree of Hon. M.A. Odero, Ag. Chief Magistrate, in Milimani CMCC No.2785 of 2005 delivered on 19th September, 2007)

J U D G M E N T

1. This is an appeal arising from a suit which was filed in the Chief Magistrate's Court at Nairobi, by Michael Nduati Mwangi (hereinafter referred to as the respondent). He had sued Obadiah Mwangi Gichia and Mburu Mwangi (hereinafter referred to as the 1st and 2nd appellants respectively). The respondent had brought the suit in his capacity as the administrator and personal representative of the Estate of the Late Samuel Mwangi Nduati (hereinafter referred to as the deceased).

2. The respondent sought special and general damages under the Law Reform Act and the Fatal Accidents Act, arising from the death of the deceased. The deceased died as a result of injuries suffered by him in an accident involving the 1st appellant's motor vehicle registration No.KZU 602 (hereinafter referred to as the said vehicle). The respondent maintained that the accident was caused by the negligence of the 2nd appellant who was driving the said vehicle.

3. The appellants filed a joint defence in which they contended that the respondent had no *locus standi* to bring the suit. The appellants further denied that the deceased was a lawful passenger in the said motor vehicle. They denied all the particulars of negligence alleged against the 2nd appellant, or that the accident occurred on the date or in the manner or at the venue alleged. Further, the appellants relied on the doctrine of *volenti non fit injuria*, contending that if the deceased was injured, he was the author of his own misfortune.

4. During the trial in the lower court, the respondent and P.C. Eric Munyao, an officer based at Kiambu Police Station testified in support of the respondent's case. Their evidence was briefly that the deceased was the respondent's first born child. He was educated up to class eight and trained as a mechanic. At the material time he was operating a business of selling vegetables. He was not married but used to assist the respondent, his mother Hanna Nyokabi Nduati and his younger siblings. On 2nd July, 2004, the deceased was travelling in the said vehicle which he had hired to transport his vegetable to Kiambu Market. The respondent knew the owner

and driver of the said vehicle whom he identified as 1st and 2nd appellant respectively.

5. P.C Erick Munyao testified that a report of an accident involving the said vehicle which occurred along Kiambu/Banana road on 2nd July, 2004, was reported at Kiambu Police Station. The accident was investigated by PC Ngumbiru of Kiambu Police Station, who visited the scene. His report indicated that the accident was a fatal road accident in which two people including the deceased died. According to the police investigations the accident was caused by the driver losing control of the said vehicle as a result of a left front tyre burst.

6. Upon receiving information concerning the accident, the respondent proceeded to Kiambu Police Station. He thereafter proceeded to the City Mortuary where he found the body of the deceased. The respondent testified that he incurred a sum of Kshs.17,707/= in funeral expenses. The respondent produced a record kept by the deceased of his business which showed that the deceased used to earn on average a sum of Kshs.500/= per day. The respondent explained that the deceased lived in the same compound with his parents and used most of his income to support his parents.

7. Patrick Mburu Mwangi, the 2nd appellant was the one who testified for the defence. He explained that on the material day at about 9.00 p.m., he was driving the said vehicle from Kinangop to Kiambu. The lorry was carrying potatoes and carrots for the deceased and someone else. When he left Kinangop for Kiambu he was in the company of his two turn-boys Njenga and Gachoka who were seated in the front. There was nobody in the back of the lorry. While at Kanunga area, the vehicle got a tyre burst and he stopped. He realized that the deceased was riding at the back of the lorry. Since it was not legal to carry people at the back of the lorry, he warned the deceased not to board the lorry again. He went to a petrol station where he changed the tyre and then proceeded with his journey. While at Banana, the vehicle had a front tyre burst, lost control and overturned.

8. The 2nd appellant explained that he was driving at a moderate speed of about 50km/ph. He stated that when the vehicle overturned, he realized that there were people seated at the back of the lorry, and sacks of vegetables which were in the lorry had fallen over them when the vehicle overturned. He maintained that he did not know of the presence of the deceased in the vehicle nor had he permitted him to ride in the back of the lorry.

9. In her judgment, the trial magistrate found that motor vehicle KZU 064 was owned by the 1st appellant and was being driven by the 2nd appellant at the time of the accident. The trial magistrate found that the deceased and his companion contributed to their own misfortune by riding on the back of an open vehicle loaded with goods. The trial magistrate further found that the 2nd appellant was not totally ignorant of the presence of the two persons in the rear of the vehicle. He noted that the 2nd appellant had informed the court that when he stopped at a petrol station, in order to repair the 1st tyre burst, he noticed the deceased and another at the back of the canter. The trial magistrate found that the said vehicle overturned due to a tyre burst and that the tyre burst was the 2nd one on the same night.

10. The court therefore concluded that the said vehicle was in a bad state of repair and maintenance and it was negligent of the 2nd appellant to put the vehicle on the road or in any way drive it carrying passengers. The court found the appellant negligent in failing to ensure that the vehicle was roadworthy.

11. The trial magistrate therefore apportioned liability at 50-50 as between the appellants and the deceased. The trial magistrate put the deceased’s monthly income at Kshs.6,000/= and adopted a multiplier of 30 taking into account the deceased’s age of 24. The trial magistrate further adopted a dependency ration of $^1/_3$. She therefore awarded damages for loss of dependency at Kshs.720,000/=, pain and suffering Kshs.10,000/= and loss of life expectancy at Kshs.100,000/=. Having taken into account the element of contribution, the trial magistrate gave final judgment in favour of the respondent in terms of Kshs.424,580/= together with costs and interest.

12. Being aggrieved by that judgment the appellant has lodged this appeal raising 10 grounds as follows: -

(i) The learned trial magistrate erred in law and fact in assessing liability at 50% as against the appellants despite the fact that the deceased Samuel Mwangi Nduati was wholly to blame for the accident.

(ii) The learned magistrate erred in law and in fact in attributing 50% liability to the appellants despite clear uncontested evidence that no negligence whatsoever was attributable to the appellants.

(iii) The learned trial magistrate erred in law and in fact when she failed to take into account or give appropriate credence to the uncontested evidence of the 2nd appellant with regard to the occurrence of the accident in issue.

(iv) The learned trial magistrate erred in law and in fact when she failed to appreciate and/or apply the doctrine of *volenti non fit injuria* as it applied to the deceased herein.

(v) The learned trial magistrate erred in law and in fact when she failed to appreciate that the deceased had sneaked onto the appellant's lorry without the knowledge/consent of the 2nd appellant and in clear violation of Traffic Laws and as such the appellant had no duty of care towards him at all.

(vi) The learned trial magistrate erred in law and in fact in failing to apply proper legal principles regarding negligence and thus arrived at a bad decision.

(vii) The learned trial magistrate erred in law and in fact when she failed to appreciate and/or apply the provisions of Order VI Rule 9 of the Civil Procedure Rules with regard to pleading and hence arrived at a bad decision.

(viii) The learned trial magistrate erred in law and in fact when she assessed damages without due regard to established principles of law and hence arrived at the wrong decision.

(ix) The learned trial magistrate erred in law and in fact when she failed to consider that the documents that the respondent produced in support of his case were "doctored" or tailor made by him for the purpose of misleading the court.

(x) The learned trial magistrate erred in law and in fact when she awarded the plaintiff a sum that was not supported by evidence before her.

13. Following an agreement by the parties' counsel, written submissions were duly exchanged and filed. The court is now requested to deliver its judgment based on those submissions.

14. For the appellants, it was submitted that there was no dispute that the deceased was riding at the back of an open vehicle. It was submitted that the evidence of the 2nd appellant that he noticed the deceased and his colleague in the vehicle when the 2nd appellant stopped the vehicle after the first tyre burst, was not controverted. Nor was the 2nd appellant's evidence that he asked the deceased and his colleague to leave and warned them not to get back into the vehicle. To the contrary, the evidence was corroborated by the respondent's witness, the police officer.

15. It was noted that the deceased's action of climbing onto the back of a vehicle loaded with goods was a traffic offence and therefore the trial magistrate should not have proceeded to assign negligence to the 2nd appellant as it was a clear case of *volenti non fit injuria*. Reliance was placed on the case of ***Murgian Transporters (K) Ltd vs John Katoga Mulozi & another, Civil appeal No.132 of 1997***, where the Court of Appeal held that a driver who proceeded to drive a vehicle even after learning that it had defective brakes, voluntarily courted injury and was not awarded any compensation. It was submitted that the 2nd appellant could not have had any duty of care towards the deceased as he was not aware of the deceased's presence in the motor vehicle.

16. It was argued that the trial magistrate's conclusion that the motor vehicle was unroadworthy because of the two

tyre bursts was not tenable. It was pointed out that the tyre burst could be as a result of many factors including its own structural defect, road surface or objects on the road surface, or any other extraneous factors completely outside the control of the driver or the owner of the motor vehicle. In this regard, counsel for the appellants relied on ***Kago vs Njenga Civil Appeal No.1 of 1979*** where the Court of Appeal held that unless there was evidence to show that the tyre was worn or otherwise improperly maintained, a tyre burst leading to loss of control was an inevitable accident upon which there was no basis to infer any negligence on the driver.

17. It was maintained that the deceased died as a result of the load of vegetables falling on them. Therefore their death was a direct consequence of their own action in undertaking the risk of sitting at the back of the vehicle where there were goods. It was further contended that once the defence of *volenti non fit injuria* was tendered by the appellant, the respondent was under a duty to reply in terms of Order VI Rule 9 of the Civil Procedure Rules. The consequence of the respondent failing to reply to the defence was that the respondent was deemed to have admitted the defence. ***Machakos High Court Civil Case No.96 of 2000 Isaac Maina Gikonyo vs Malde Transporters Ltd***, was cited for that proposition.

18. With regard to the quantum of damages, it was submitted that there was no basis for the trial magistrate's findings on the earnings of the deceased. It was maintained that the book which was produced by the respondent to show the deceased's income, contained information compiled from other documents which were not produced. It was argued that the evidence was doctored and of no probative value as the record was compiled after the death of the deceased.

19. It was contended that the trial magistrate had no basis for awarding the sum of Kshs.720,000/= as loss of dependency or awarding special damages of Kshs.19,160/= while the claim in the plaint was for Kshs.17,700/=. The apportionment of liability at 50% was also criticized.

20. For the respondent, it was pointed out that the 2nd appellant testified that the deceased and his companion were known to him and that they were both with his vehicle when he left Kinangop. It was noted that the 2nd appellant did in fact concede on cross-examination that he knew the deceased, and that he was carrying carrots and peas for him. It was maintained that the 2nd appellant must have known and allowed the deceased to ride in the lorry to go to the market to sell his vegetables, which the 2nd appellant was transporting.

21. It was noted that the trial magistrate was right in finding that the vehicle was defective and that defect resulted in the tyre burst which led to the death of the deceased. It was submitted that the trial magistrate had taken into account that the deceased had committed a traffic offence by riding at the back of a lorry hence the apportionment of liability at 50-50%. The court was urged not to interfere with the trial magistrate's discretion.

22. In regard to the trial magistrate's finding on deceased's income, it was pointed out that the appellant never objected to the production of the record of the deceased's business. It was noted that the trial magistrate made her finding after scrutiny of the documents and testing the veracity and demeanour of the witnesses. It was submitted that the earnings were fair and consistent with the earnings of a vegetable vendor.

23. With regard to Order VI Rule 9(1) of the Civil Procedure Rules, it was noted that issues of fact (not law), were not deemed to be admitted but were enjoined as an issue under Rule 10. This operated as a denial of the averment. The enjoinder of issues further operated as a denial of every allegation of fact. It was pointed out that it was an established principle of law, that an appellate court would not interfere with the trial courts finding and discretion, even if the appellate judge considers that he would have arrived at a different verdict. In support of these submissions, counsel for the respondent relied on the following cases: **-**

- ***Civil Appeal No.46 of 1996, Haji Ahmed Sheikh T/A Hasa Hauliers vs Highway Carriers Ltd.***

- ***Civil Appeal No.181 of 1994 Njagi Kanyunguti alias Kalingi Kanyunguti & others vs David Njeru Njogu.***
- ***Mariga vs Musila [1984] KLR 251***

24. In response to the respondent's submissions, counsel for the appellant reiterated the position that when the 2nd appellant left Kinangop, he was not aware that there were passengers at the back of the lorry. He reiterated further that the 2nd appellant ordered the deceased out at Kinungi, but apparently the deceased failed to comply. Counsel for the appellant maintained that there was no evidence that the subject vehicle was defective. Finally it was submitted for the appellant that the trial court had acted on wrong principles and therefore in line with the case of ***Mariga vs Musila*** (supra), its decision and award ought to be interfered with.
25. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial court, the submissions made and the judgment of the lower court. I have also considered the memorandum of appeal, the contending submissions against and in support of the appeal, and the authorities cited. It is not disputed that the deceased died as a result of an accident involving the 1st appellant's motor vehicle. It is further not disputed that the 1st appellant's vehicle was at the material time being driven by the 2nd appellant who was transporting sacks of vegetables.
26. The main issue before the trial magistrate was whether the accident was caused by the negligence of the appellants or whether the appellants owed the deceased any duty of care. While it is not disputed that the deceased was riding at the back of the 1st appellant's vehicle at the time of the accident, the question was whether the deceased was doing so with the knowledge and consent of the 2nd appellant who was driving the vehicle, or whether the deceased did so without the knowledge of the 2nd appellant, and whether the 2nd appellant specifically instructed the deceased not to ride at the back of the vehicle.
27. From the evidence, it is clear that the deceased and his companion were known to the 2nd appellant and that the 2nd appellant was carrying vegetables belonging to the deceased. If the 2nd appellant was carrying vegetables belonging to the deceased, which were being taken to the market for sale, is it possible that the deceased and his colleague were not to be carried in the same vehicle?
28. Although the 2nd appellant denied that he was aware of the presence of the deceased in his vehicle, the circumstances are such that the inference by the trial magistrate that the 2nd appellant allowed the deceased and his colleague to ride at the back of his vehicle cannot be faulted. Given that the vegetables were being transported at such a late hour, it is unlikely that the deceased would have remained behind.
29. I concur with the trial magistrate's finding that the deceased and his companion rode at the back of the 1st appellant's vehicle, with the full knowledge and permission of the 2nd appellant. In so doing, both the 2nd appellant and the deceased were in breach of the Traffic Act. I concur with the appellants that the deceased having voluntarily agreed to ride at the back of the vehicle with the goods, he was not only in breach of the traffic rules but also voluntarily undertook the risk associated thereto. To that extent the appellant's defence of *volenti non fit injuria*, partly succeeded as the deceased was contributorily negligent.
30. Equally, the 2nd appellant being in control of the motor vehicle, he was under a duty to the deceased and his companion to safely drive the vehicle. While it is not disputed that the vehicle overturned as a result of a tyre burst, the appellants did not plead or call any evidence to show that the accident was inevitable. There was no evidence that there were any factors such as weather or road surface which could have affected the tyres. The reason for the vehicle losing control was the tyre burst. In the absence of any exculpating evidence, the presumption by the trial magistrate that the reason for the vehicle having two tyre bursts in quick succession was

poor maintenance cannot be faulted.

31. The excuse by the appellant that it was the goods which injured the deceased and not the accident cannot hold. Even assuming that it was actually the sacks of vegetables which fell on the deceased, the sacks would not have done so if the vehicle did not lose control and overturn. I find that in the circumstances of this accident, the trial magistrate was right in holding both the appellants and the deceased negligent. I would therefore uphold the trial magistrate's apportionment of liability.

32. With regard to the quantum of damages, the trial magistrate having assessed the damages adopted Kshs.6,000/= as the deceased's monthly income. This was contrary to the amount of Kshs.5,000/= which was specifically pleaded in paragraph 6 of the plaint. The magistrate's finding was also inconsistent with the evidence of the respondent that the deceased's monthly average income was Kshs.5000/=. The multiplier of 30 adopted by the trial magistrate was reasonable given the deceased's age as was the dependency ratio of $^{1}/_{3}$. I find that the damages awarded in respect of loss of dependency was wrongly based on an exaggerated average monthly income. The correct award ought to have been as follows: 5000 x 12 x 30 x $^{1}/_{3}$ = Kshs.600,000/=. With regard to special damages, the respondent specifically prayed in the plaint for damages of Kshs.17,700/=. There was no application for amendment. The award of Kshs.19,160 was therefore uncalled for as the same was not specifically pleaded. As regards the award in respect of pain and suffering, and loss of life expectancy the same were reasonable and I find no reason to interfere.

33. The upshot of the above is that I find no merit in the appeal on the issue of liability but allow the appeal on quantum of damages to the extent of setting aside the awards made by the trial magistrate and substituting thereof the following:

-	Loss of dependency	-	Kshs.600,000/=
-	Loss of life expectancy	-	Kshs.100,000/=
-	Pain and suffering	-	Kshs.10,000/=
-	Special damages	-	Kshs.17,700/=
	Total	-	Kshs.727,700/=

34. Accordingly, taking into account the apportionment of liability judgment for the respondent shall be Kshs.363,850/=. To that extent only does the appeal succeed.

Dated and delivered this 1st day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Njuguna for the appellant

Advocate for the respondent absent

Eric - Court clerk