IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 312 OF 2009

BETWEEN

PREMIER DIARY LIMITED …...1st APPELLANT

AND

AMARJIT SINGH SAGOO ....1st RESPONDENT

KURSHBIKAUR HARTJEET SINGH

CHANDHA (Suing as the legal administrator of the Estate of

HARJEET SINGH CHARAN SINGH CHANDHA.............2nd RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Kisumu (Warsame, J) dated 18th September 2007

in

KISUMU HCCC No. 61 OF 2001

****

JUDGEMENT OF THE COURT

By a Plaint filed on 21st February, 2001 at the High Court of Kenya, Kisumu, the 2nd Respondent Kurshbikaur Harjeet Singh Chandha (the plaintiff) suing as legal administratrix of the estate of the late Harjeet Singh Charan Singh Chandha (deceased) sued the appellant Premier Diary Limited (the 2nd defendant) and the 1st respondent Amarjit Singh Sagoo (the 1st defendant) arising from a road traffic accident which occurred on 30th April, 1999 along Kenyatta Avenue, Kericho, which resulted in the death of the deceased. That plaint was amended once. The Plaintiff made various averments in the Plaint and prayed for special and general damages and costs of the suit. The defendants filed separate statements of defence denying occurrence of the accident and liability. The first defendant went further – he attributed negligence for the accident to the deceased and gave various particulars of negligence.

The suit was heard by Warsame, J (as he then was), who in a considered judgement delivered on 18th September, 2007 found the first defendant liable for the accident; the second defendant vicariously

liable for the acts or omissions of its agent or servant the first defendant and awarded damages to the estate under the following heads:

a) **Loss of expectation of life - Kshs. 100,000/=**

b) Pain and suffering - Kshs. 75,000/=

c) Funeral expenses - Kshs. 150,000/=

d) Loss of Earnings under the

Fatal Accidents Act - Kshs.6,480,000/=

Plus costs of the suit and interest thereof.

This judgement did not find favour with the second defendant and this provoked this appeal.

It is the duty of this court, on a first appeal like this one, to reconsider the whole matter and re-evaluate the same to reach our own conclusions always remembering however, that we did not hear the parties or observe their demeanour, an advantage only the trial Judge had. Sir Kenneth O'Connor sitting at the predecessor of this Court spoke on this issue very well when he said in **Peters v Sunday Post Limited [1985] EA 424:**

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses ….. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...**"

See also the judgement of this Court differently constituted in **Ephantus Mwangi & Another v Wambugu (1983/84) 2 KCA 100**

We must therefore give a fresh and complete look at the matter in the High Court to establish whether it was given the treatment the law required and whether the complaints raised by the appellant, and which shall appear later in this judgement, have basis that would lead to our interfering with the findings of the learned Judge.

In the attempt to establish liability the plaintiff relied on evidence given before the learned Judge and also evidence in traffic proceedings emanating from the said accident where the first defendant was charged before a traffic court with the offence of causing death by dangerous driving.

First the proceedings before the learned Judge.

Beatrice wa Biscon ((PW4) (Beatrice) testified that on the material day he was standing at a shop called "Chai Supermarket" near the main Kenyatta Avenue in Kericho town. Let him tell us in his own words how events unfolded:

> **"...I saw an Asian man of Singh origin coming from that road. He came and wanted to branch to a road heading K. C. C. When he was still at Chai Supermarket he stood aside as there was a water (sic) behind him. He wanted (probably waited) for the vehicle to pass. I only heard a sound of somebody being knocked. When the vehicle passed I saw the Asian man on the ground....."**

The said traffic proceedings were before the Principal Magistrates' Court at Kericho being Traffic Case No. 1991 of 1999. The evidence given to that court in so far as was material to the civil case, was by the same Beatrice who testified as eye-witness who saw the deceased hit by a motor vehicle while

standing on the side of the road. She testified that it was the side of the motor vehicle – a pick-up truck – that hit the deceased throwing him into a pool of water. The driver of that motor vehicle did not stop until some 30 metres away when he was stopped by members of the public who alerted him of the accident that had just taken place apparently without his knowledge.

The prosecution also called Dr. Ahomo Erick Joseph Oketch who performed a postmortem on the body of the deceased and concluded that the cause of death was due to cardiopulmonary arrest due to severe head injuries after a road traffic accident.

Dr. Walter Agayi Ondonde and Duncan Ogada Abuodha were also called by the prosecution as eye witnesses to the accident and more or less repeated what Beatrice had told the traffic court.

Chief Inspector Echesa Litabalia, the Base Commander in charge of traffic, Kericho, visited the accident scene and took measurements which he produced in the traffic court. He testified that the road was 22 feet wide and the point of impact was one foot four inches inside the road.

Having been put on his defence in the traffic case the first defendant described his manner of driving on the material day. He stated that he did not see the deceased at all and only stopped his truck upon being warned by members of the public that he had hit someone.

The traffic court reviewed evidence before it and came to the conclusion that the first defendant caused the accident. It thus convicted the first defendant and sentenced him accordingly. The first defendant filed an appeal being Criminal Appeal No. 155 of 2000 at the High Court of Kenya, Nakuru, against the said conviction and sentence. In a judgement delivered on 23rd June, 2000 the appeal against conviction failed but the sentence was reduced.

Before the High Court in the civil matter leading to this appeal the first defendant denied that he hit the deceased claiming that the deceased had fallen into a pot-hole on the road.

For the 2nd defendant, Jared Bwana Arita (Jared), an insurance investigator, was called before the learned Judge. His evidence in essence as far as the issue of liability goes was that he had recorded a statement from the first defendant which he produced in court as part of the evidence.

That was in totality the material placed before the learned Judge on the issue of liability. The learned Judge reviewed the same and submissions made by the counsel for the parties and made the following findings in the said judgement:

> **"1. That the 1st defendant was convicted by the trial court for dangerous driving and causing the death of the deceased.**
>
> **2. That conviction was upheld by the High court.**
>
> **3. That the 1st defendant did not challenge the decision of the High Court in upholding his conviction. It therefore means there is concurrent finding of conviction of the 1st defendant for the offence of dangerous driving and causing the death of the deceased herein.**
>
> **4 In my view that is a prima facie case of culpability on the part of the 1st defendant which remains unchallenged.**
>
> **5. That the evidence given by PW4 remains unchallenged.**
>
> **6. It means the circumstances and facts as narrated by PW4 is correct that the 1st defendant was negligent in the way he handled the subject motor vehicle at the time of the accident.**

7. No amount of negligence can be attributed to the deceased or by extension to the plaintiff...."

This is an appropriate stage of this judgement for us to examine the complaints made by the appellant in the appeal before us as we re-evaluate the holdings of the learned Judge on the above findings and all other findings relevant to this appeal.

In the Memorandum of Appeal the appellant takes 25 grounds of appeal most of which are divided into various sub-paragraphs. The main complaints are however as follows: that the judgement was made in error; that the learned Judge was wrong in holding that the evidence of PW4 was unchallenged, when, according to the appellant, such evidence was contradicted by other evidence; that the Judge erred in finding negligence in full against the appellant and the first respondent; that the learned Judge ignored evidence before him; that the Judge was in error in not holding the deceased partly or fully liable; that the Judge erred in finding vicarious liability; that the learned Judge erred in finding authority to drive on the part of the 1st respondent when such authority was limited; that there was no authority to drive the truck at the material time; that the Judge ignored the ratio decidendi in **Joseph Cosmas Khayugila v Gigi & Co. Ltd & Anor [1987] 2 KAR 93**; that the learned Judge erred in awarding Kshs. 150,000/= for funeral expenses without particular proof to support pleading; that the learned Judge erred in accepting the evidence of PW3; that there was no proof of income; that the learned Judge erred in holding that the deceased was sole bread winner of his family and that the learned Judge erred in awarding the damages we have already adverted to.

We can only hope we have done some justice in the attempt to set out in summary the various grounds taken by the appellant in the Memorandum of Appeal.

The appeal came up for hearing before us on 3rd October, 2013 and was urged by learned Counsel for the appellant Mr. W. Amoko. Learned counsel for the first respondent was Mr. W. Gichaba while the learned counsel for the second respondent was Mr. J. Kibet. All the counsel gave detailed submissions showing that they had prepared well for the appeal. We are grateful to counsel for this.

Mr. Amoko attacked the learned Judges findings on liability submitting also that the Judge ignored the appellants pleading on contributory negligence. According to counsel Section 47 A of the Evidence Act was inapplicable in the matter because the trial magistrate in the traffic court was not concerned with contributory negligence. Counsel submitted that the Judge should not have believed the evidence of Beatrice and should have held the deceased 50% to blame for the accident.

On the finding of vicarious liability counsel for the appellant submitted that the learned Judge was wrong because the letter produced in evidence limited the scope of authority on driving of the appellants motor vehicles while under repair and that the motor vehicle was being driven in effect on a frolic of the 2nd respondent when the accident occurred.

On award of damages counsel for the appellant submitted that special damages must be specifically pleaded and strictly proved. He reminded us that although the fact that funerals cost money was a matter that had gained public notoriety how much each funeral cost was a matter for specific proof. Counsel faulted the learned judge for finding that there was loss of dependency submitting that an award could not be made where there was no actual pecuniary loss. Same fault was found for the finding that there was proof of the deceaseds' income.

Learned counsel for the first respondent supported the appeal in respect of findings on liability, contributory negligence and award of damages. Like the appellant, counsel faulted the judges findings on these aspects of the appeal and urged that the appeal be allowed. There was however a parting of ways between the first respondent and the appellant when it came to findings of the learned Judge on vicarious liability. Mr. Kibet submitted that the Judge had made correct findings on this aspect of the matter because there was evidence by the first respondent that he was using the motor vehicle for the intended purpose when the same was involved in an accident.

Learned counsel for the second respondent opposed the appeal submitting on the issue of liability, that the first respondent had not challenged liability as no cross appeal had been filed. According to counsel the appellant could not wear the shoes of the first respondent to advance the course of the first respondent. According to counsel the appellant did not take out a Notice to Co-Defendant as required by the relevant provisions of the Civil Procedure Act and was therefore estopped from raising the issue at the appeal stage.

On findings of vicarious liability, counsel for the second respondent submitted that the learned judge reached correct findings based on the evidence that was placed before the court.

On award of damages learned counsel for the second respondent submitted that the learned judge was entitled to make the findings he did based on the evidence.

We have carefully considered the facts of the case, the able submissions by counsel and the law.

On the issue of liability it was alleged in the amended plaint that the deceased was standing outside Chai Supermarket along Kenyatta Avenue in Kericho town when the motor vehicle KAH 934C was driven with negligence hitting the deceased with fatal results. Various particulars of negligence were set out attributing negligence to the defendants.

The first respondent in its statement of defence denied all the allegations in the Plaint.

The second respondent also filed a statement of defence where negligence was attributed to the deceased with various particulars of negligence being set out.

We have already in this judgement set out in brief the evidence given before the trial court and the evidence given in the traffic proceedings. Of some importance was the evidence of eye-witnesses Beatrice, Dr. Walter Agayi Ondonde and Duncan Ogada Abuodha. Also that of Chief Inspector of Police Echesa Litabila who visited the scene, took appropriate measurements and testified accordingly on the same.

When the first respondent was put on his defence by the trial magistrate in the traffic court he denied the offence but also testified as follows:

> **"There were many pedestrians on the road. I was driving consciously. I did not see ARJIT SINGH CHADHA. I know the late ARJIT SINGH. After I passed Chai Supermarket I heard people shouting that someone had fallen down …."**

And before the learned Judge the first respondent stated as part of his defence:

> **".. On my way back, there was a very big pot hole which has been there for a long time. I tried to avoid the pot hole, just going about 10 metres then I was informed that somebody had fallen down. I was driving on a road inside Kericho Town.**
>
> **The pot hole was on the left hand side of the driver and I swerved to the right side of the road. I was driving on the left side of the road and the pot hole was (on) the left side for (sic) the road...**
>
> **After I swerved, I drove for client (sic) 10 metres and I then heard people shouting that somebody had fallen down.."**

The learned Judge made findings on liability which we have already adverted to in this judgement.

The first respondent was, as already seen, tried and convicted of a traffic offence directly relevant to the issue of liability. His appeal on that issue was dismissed.

Section 47 A of the Evidence Act Chapter 80 Laws of Kenya on "proof of guilt" provides that:

> **"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

To fortify his submission that the learned Judge erred in finding negligence on the part of the first respondent, counsel for the appellant cited a decision of this Court differently constituted in **Patrick Mutie Kimau & Another v Judy Wambui Ndurumo Civil Appeal No. 254 of 1996 (ur)**. The facts of that case were that an accident occurred near a bus stage in Eastleigh, Nairobi, when a pedestrian apparently walked in front of a stationary bus and was hit by the rear of a lorry which was in the middle lane of a 3 lane road. It was found on appeal that the pedestrian had caused the accident by ignoring all relevant provisions of the Highway Code. Therefore the appellant was not liable for the accident. That case is clearly distinguishable from the facts of the case leading to this appeal. Here, unlike there, it was established through eye-witnesses that the deceased stopped to allow the motor vehicle to pass and the accident occurred when the first appellant swerved to avoid a pothole on the road. It was during that manourve that the deceased was hit by the side of the truck.

The first respondent did not in essence deny occurrence of the accident. He alleged that the deceased fell into a pot hole on the road but this defence could not hold in light of the evidence of the eye witnesses. The picture that emerges is that of a driver who drove without due care or attention and in the process hit the deceased without knowing at all the events that had unfolded. The 1st respondent would have continued driving had members of the public not alerted him that he had hit the deceased. The deceased died as a direct result of this accident that was wholly caused by the first respondent. A court of competent jurisdiction convicted the first appellant of the traffic charge. We can find no fault with the learned Judges' finding that the first respondent caused the accident.

The appellant faulted the learned judge for not finding contributory negligence on the part of the deceased. But in view of what we have said particularly in a case where the first respondent as driver was not even aware that he had hit the deceased how can it be said that the deceased contributed to the accident? The eye-witness account was that the deceased had stopped on the side of the road to let the first respondents' truck pass. The evidence of the first respondent was that he swerved to avoid a big pothole. It is evident therefore that it was in the process of swerving to avoid the pot hole that the deceased was hit by the side of the truck.

In the circumstances of the case that was before the learned Judge contributory negligence could not be attributed to the deceased at all. We can find no fault with he judges finding on this issue.

The next issue we have to deal with is vicarious liability. Learned counsel for the appellant submitted that the motor vehicle subject of the accident was being driven out of the scope of authority.

The evidence of the first respondent tendered before the learned Judge on this aspect was that:

> **"... 30.4.1999 I was driving a motor vehicle registration KAH 934 C an Isuzu Pick-up. The vehicle belong (sic) to the 2nd defendant. The vehicle had a body repair and we usually did their works on their vehicles. We were servicing the vehicles of the 2nd defendant from 1997. I have a letter from the 2nd defendant indicating that we repair and test drive their motor vehicles. I wish (sic) as D1 (2). I was supposed to do a repair on the body of the said motor vehicle. I then drove to one of the hardware shops, to show the type iron sheet required to repair the said motor vehicle. The hardware shop needed to see the kind of material needed to repair the said motor vehicle. The said hardware shop had only one piece and I then drove back to the workshop..."**

And in cross examination the first respondent stated:

"... I drove the said motor vehicle to town to buy the materials needed to repair the car. I had instructions to drive the said motor vehicle from Garage to town..."

The letter that defined the contractual relationship between the appellant and the first respondent was tendered in evidence. The letter is to the following effect:

" Premier Dairy Ltd Premier

P. O. Box 1522, Kericho, KENYA Producers of quality products

Tel (254) 0361 -72235/7/8/9, Pilot – 72626

Fax (254) 0361 -72233

SAGOO MOTORS SERVICES

P. O. BOX 1296

KERICHO

11.07.1997

Dear Sir,

RE: APPOINTMENT TO CARRY OUT BREAKDOWN SERVICES & REPAIRS

This is to inform you that, as per our telephone conversation and several meetings with you, we hereby appoint your company, Sagoo Motor Services to carry out breakdown services and repair vehicles at mutually agreed prices and test drive all vehicles to ensure that they are in good working condition after repairs.

Yours faithfully,

P. B. Patel.

For the position that the appellant was not vicariously liable for the acts or omissions of the 1st respondent, learned counsel for the appellant relied on the holding by the House of Lords in **Morgans v Launchbury & others [1972] 2 All ER 606** where it was held that in order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was one in which the owner had an interest or concern, was not sufficient to establish vicarious liability.

Counsel also cited **Joseph Cosmas Khayugila v Gigi & Co Ltd & Anor (1987) 2 KAR 93** for the same proposition. In fact this was taken as a ground of appeal where it is said that the learned judge ignored this authority which was binding on him. The facts in **Joseph Khayugila** were that the motor vehicle subject of the accident was owned by the company which consisted of two brothers. It was usually driven by an employee who was a son of one of the brothers. The motor vehicle required to be panel beaten and sprayed. The work was minimal and, to save money, the son did not take the car to the dealer but gave it to the second brother who offered to do the job during his spare time. The car was delivered to this second brother at 11:00 a.m. on a Saturday by the driver who gave specific instructions that the car could only be driven into and out of the garage. The driver arranged to collect the car at 5:00 p.m. the

following day. On that Saturday at 9:00 p.m. the second respondent drove the car from the garage and knocked and injured the appellant, a pedestrian. The only issue in the High Court was the liability of the firm for the negligent driving of the second respondent. The trial judge found that liability had not been established. It was held that the second respondent was not the servant of the first respondent nor was he at the material time acting on the owners behalf as his agent. It was held further that to establish the existence of the agency relationship it was necessary to show that the owner was using the car at the owners request express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The **Joseph Khayugila** case is clearly different in all material respects from the facts which the learned judge had to confront in the present case. In the **Joseph Khayugila** case there was an express instruction that the motor vehicle could only be driven by the second respondent into and out of a garage. The accident occurred in the night when the car was being driven by the second respondent against the express instructions given in the matter.

In the case before the learned Judge there was not only the letter of authority from the appellant to the first respondent which authorized repairs but the letter also authorized the first respondent to test-drive the motor vehicle after repairs. There was also the almost unchallenged evidence of the first respondent that the accident occurred when the motor vehicle was employed in the task of going to collect iron sheets necessary for the repair work that was to be undertaken.

The learned Judge reviewed the evidence placed before him and held that the motor vehicle was driven by the 1st respondent with the appellants authority and within the scope of authority donated by the contract. As can clearly be seen, the letter of authority set out in full above authorised the first respondent to repair the appellants motor vehicles. The appellant also authorised the first respondent to test drive motor vehicles delivered to the first respondent for repair.

The evidence before the learned judge was that the first respondent drove the motor vehicle on the material day from the garage to a hardware shop to procure iron sheets necessary for the repair job that was to be undertaken by the first respondent on the appellants motor vehicle. The business to which the motor vehicle was then employed was covered by the scope of authority donated by the appellant to the first respondent.

We agree with learned counsel for the first and the second respondents that the learned judge cannot be faulted on the findings on the issue of vicarious liability.

The last issue for our determination is the award of damages. Counsel for the appellant submitted that special damages must be specifically pleaded and strictly proved and therefore submitted that the learned judge erred in awarding Kshs. 150,000/= for funeral expenses without proof of such an expenditure. Counsel conceded that families do spend money when they lose their relatives and have to conduct funerals but submitted that specific expenditure incurred by each family in such respect was not a matter of public notoriety thus proof was still necessary. Support was sought from this courts judgement in **Coast Bus Service Limited v Sisco E. Mirunga Ndanyi Civil Appeal No. 192 of 1992 (ur)** to fortify the proposition that the learned Judge erred in awarding the said sum which was not proved specifically as pleaded.

It was not surprising that learned counsel for the first respondent did not take a position in relation to this aspect of the matter relating to award of damages.

Learned counsel for the second respondent did not find any fault with the way the learned judge addressed the issue relating to award for funeral expenses. Counsel submitted that evidence was placed before the learned judge to show that the deceased was cremated according to the deceaseds' custom but that receipts could not be procured or retained for every item relating to a funeral or cremation.

A sum of Kshs. 400,000/= was pleaded in the amended plaint as funeral expenses.

With the above as the material placed before him in respect of the claim for funeral expenses the learned judge addressed the issue thus in the judgement:

> **“.... The plaintiff did not avail any documentary evidence to show the sum of Kshs. 400,000/= was expended. Nevertheless I think that this court is entitled to conclude that considerable amounts of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety. I think to expect the relatives to keep the receipts of every expenditure incurred, is to underestimate the pain and loss of a loved one. Where a party cannot show the amount of expenses incurred the court would weigh the scales of justice in order to address the pertinent issues involved in the matter.**
>
> **From the evidence available, the deceased was a fairly rich businessman and I think the relatives used considerable amount of money to give him a good and decent send off. Such expenses needless to mention includes attending to the needs of mourners and other incidental expenses. I therefore award a sum of Kshs. 150,00/= as funeral expenses, as a prudent and reasonable amount to have been used as funeral expenditure ...”**

The legal position as submitted by counsel for the appellant and as seen in **Coast Bus Service Limited** (supra) that special damages must be pleaded and proved is a correct proposition of the law. We agree with it entirely. The question in this appeal is whether the learned judge disregarded or misapplied this position when he made the award on funeral expenses, a special damage claim, which was pleaded in the plaint but not strictly proved by the second respondent by production of receipts for the expenses incurred when the deceased was cremated.

Learned Counsel for the appellant conceded that it was a matter of public notoriety that families expend money to inter the remains of their dead relatives. Counsel did not go further to propose a formula on how such families are to recover such expenses when it is also a matter of public notoriety that no receipts are kept by bereaved families for such expenses.

We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.

The next line of attack by the learned counsel for the appellant was the award of damages for loss of earnings under the Fatal Accidents Act. Counsel submitted that no actual loss had been proved and that, in any event, proof of the deceased income was through an unqualified person. This position gained the support of counsel for the first appellant.

Learned counsel for the second respondent submitted that returns on personal income assessment made for the deceased was proof enough of earnings to enable the learned judge have a basis for calculating what was a reasonable award on this head. Counsel submitted further that there was evidence of actual loss by the estate of the deceased evidenced by the fact that some businesses had closed down after the death of the deceased.

Apart from the evidence of the deceaseds' widow (PW1) and the deceaseds' daughter (PW2) who testified inter alia on the events following the death of the deceased there was the evidence of an accountant (PW3 Joshua Bichanga) who testified on the income of the deceased. This witness produced documents to prove that the deceased had been paying tax to Kenya Revenue Authority prior to his

death. Tax matters were dealt with by the accounting firm where PW3 worked.

In **Allan Njuguna t/a Mwireri Mbao Stores v Veronica Nyambura Karuga & others Civil Appeal No. 165 of 1993 (ur)** the issue of liability having been settled by consent the only issue for the trial courts determination was assessment of damages payable to the estate. An accountant was called who testified not only that he was the one who prepared the deceaseds' income tax returns but also that the returns filed with tax authorities did not reflect the true income of the deceased. The trial judge awarded damages to the estate based on the false returns holding inter alia that **"... the deceased like most businessmen evaded heavy taxation which his income obviously attracted …."** That holding was faulted on appeal, the court holding that it could not sanction an unlawful act which amounted to criminal conduct under tax laws and use the unlawful act to benefit the wrong doer or those claiming through him.

The accountant in the **Allan Njuguna** case freely admitted to have doctored tax returns of the deceased person to "assist" the deceased to pay less taxes than his income required. Was that the case before the learned judge? .

The witness PW3 Bichangi testified on how the tax records of the deceased were prepared, maintained and tax returns made. The returns were for the deceased person and were not altered as was the case in the **Allan Njugun**a case.

PW1 and PW2 testified at length on the various economic activities of the deceased before he died and the effect the deceaseds' death had on the businesses which he used to run.

In the course of the judgement the learned judge found that:

> **".... In my opinion the deceased was providing for his family and was engaged in a fairly good and prosperous business. According to PW1, the deceased would bring home for the support of the family a sum of Kshs. 300,000/= to 400,000/=. The evidence of PW2 and PW3 greatly support or corroborate the evidence of PW2 (sic) as to the financial income of the deceased. Taken into consideration that PW2 was a medical student at the University at the time of the death of her father, I think it is safe to conclude that the deceased was considerably wealthy by any standard. There is ample and uncontroverted evidence showing that the deceased was paying over Shs. 500,000/= as tuition fees for his daughter who was doing a Bachelor of Pharmacy at the University of Nairobi. There is also evidence to show that he was responsible for all expenditure incurred by PW2. PW2 was staying in a rented flat for Kshs. 25,000/= per month.**
>
> **According to PW2, her brother Jaskamal Singh was a student at United States International University studying International business management. And it was her father who was paying fees and other incidental expenses amounting to over Shs. 80,000/= per semester. She produced documents to that effect as P15 (a) to P15 (d). There is evidence to show that Jasmakal Singh Chandha who was pursuing a degree course at U.S.I.U. could not complete his studies due to the death of his father. It is alleged that he was forced to leave his degree course to attend to the family business. In my humble view that is insurmountable and immeasurable loss, solely attributed to the accident that was caused by the motor vehicle driven by the 1st defendant and owned by the 2nd defendant.**
>
> **All in all and taking into consideration all the relevant factors, I am satisfied the family of the deceased were deprived of their sole breadwinner. I am also convinced that the deceased was engaged in a substantial business and was in a position to shoulder the upkeep of his family. On lost years, there is no dispute that the deceased was aged 43 years at the time of his death. Mr. Gichaba Advocate submitted that since the deceased was in private business, I should consider a multiplier of 17 years and a monthly earnings of Kshs. 200,000/=. On my part, I think a sum of Kshs. 60,000/=**

would be reasonable taking into consideration all the circumstances of the case. I also consider la (sic) multiplier of 12 years is quite reasonable. I therefore enter judgment as hereunder;

Shs. 60,000/= x ¾ x 12 x 12 =

6,480,000/=."

We are of the respectful opinion that the learned judge applied correct legal principles on the material before him in making the award which he made and did not commit error in law or at all.

We have carefully considered all aspects and complaints raised by the appellant in this appeal. We have found that the first respondent did cause the accident, the deceased did not in any way contribute to the accident and that the appellant is vicariously liable for the acts of the first respondent. We have also not found any fault in the way the learned judge dealt with award of damages. The appeal has no merit and is accordingly dismissed. We award costs to the respondents in this appeal and award costs of the court below to the second respondent.

Dated and Delivered at Kisumu this 22nd day of November 2013

J. W. ONYANGO OTIENO

…..............................

JUDGE OF APPEAL

F. AZANGALALA

....

JUDGE OF APPEAL

S. ole KANTAI

…..............................

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR