IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 9 OF 2004

BETWEEN

KENYA HORTICULTURAL EXPORTERS LTD. ……..APPELLANT

AND

JULIUS MUNGUTI MAWEU ……...…….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Nambuye, J.) dated 27th June, 2003

in

H.C.C.C. NO. 75 OF 1997)

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JUDGMENT OF THE COURT

Kenya Horticultural Exporters Ltd, the appellant, brought this appeal challenging the decision of the superior court, given on 27th June, 2003, in which Nambuye J gave judgment in favour of ***Julius Munguti Maweu***, the respondent, for a sum of Kshs. 1,416,328/= as damages under the Law Reform Act Cap 26.and the Fatal Accident Act Cap 32 both of the Laws of Kenya. The appellant challenges the decision on both liability and quantum of damages. Although the appellant has set out seven grounds of appeal, at the hearing of the appeal it became apparent that there are three broad grounds, namely:

(1) Whether there was a basis or proper basis for holding the appellant vicariously liable for the negligence if any, of the driver of its vehicle Reg. No. KXI 424, which was involved in the accident giving rise to this case and which at the material time of that accident was not being driven for the employer's direct benefit.

(2) Whether the aforesaid accident occurred as a result of negligence on the part of the appellant's driver.

(3) Whether the multiplier of 18 years on the head of loss of dependency was reasonable in the circumstances of this case when the deceased's mother for whose benefit the award was made was about

70 years old.

By his plaint dated 6th May, 1997, the respondent, as the administrator of the estate of ***Laban Kioko Munguti*** (the deceased), impleaded the appellant for damages, special and general, following the death of the deceased in an accident involving motor vehicle registration No. KXZ 424. The respondent averred in that plaint that the accident was caused by the negligence of the driver of that vehicle who was then a manager employed by the appellant. The deceased along with ***Augustine Mutuku Maundu*** (Maundu) were passengers in the vehicle at the time of the accident. The driver was ***Dominic Mbithi***, who as stated earlier was then employed by the appellant as a farm manager.

On 10th October, 1995 Dominic Mbithi, the deceased and Maundu left in the above car at about 10 a.m. and went for sight seeing in Kyulu Hills, Satanic Lava Musima Springs, Kilaguni Lodge, among other places. On their way back the car rolled, and in the course of it the deceased was fatally injured. Evidence was tendered to the effect that the accident occurred because the appellant's driver tried to negotiate a road bend at high speed. The deceased and Maundu did not pay for the ride, nor did they have the express authority of the appellant to ride in the vehicle.

The direct cause of the accident could not be immediately established. An inquest was conducted to establish the cause of death. It was established that after the accident it was noted that the rear right side tyre had a burst but there was no clear evidence as to how the accident happened.

The accident motor vehicle was an open pick up. All its three occupants were in the driver's cabin at the time of the accident. One of the issues which was raised at the trial, and which is an issue before us is whether on the material date and time of the accident, the driver was acting in the course of his employment with the appellant. The appellant did not call any evidence on its behalf during the trial. Mr. Masika for the appellant in this appeal who was also representing the appellant at the trial, notified the court that his client would not offer any evidence. In the event there was no evidence to explain whether its driver had any restrictions in using the accident vehicle. The only evidence we have on record on that aspect was given by Maundu. His evidence, as is material was as follows:

"We left Mtito Andei at 10 a.m. The accident was at some minutes to six. We went to Kyulu Hills, Satanic Lava. We were seeing melting stone, Musima Springs. We were sight seeing. He made the accident on 9th in the evening at 4.00 p.m. The vehicle is owned by Kenya Horticultural Exporters. I know Mbithi was working with this company. He was a farm manager. It is on the Eastern side of Mtito Andei 5 Km. I cannot recall which day it was. It was Moi day. It was a holiday and he was not on duty.

We did not hire the vehicle. We had a free ride. He was the farm manager... I think he had authority because he was the manager. If he had no authority we would not have used it."

In her judgment Nambuye J held that the cause of the accident was both a tyre burst and overspeeding. It was her view that the appellant was duty bound to call evidence to explain circumstances under which its farm manager was allocated the accident vehicle, whether there were any restrictions or limitations on its use, whether he was unauthorized to carry passengers, and whether the public was forewarned against being lifted in the said vehicle. The appellant having not tendered any evidence the learned trial Judge concluded that the inference to be drawn was that:

"The defendant had authorized the said Dominic to have use of the vehicle both for official and personal use. This is supported by the fact that the defendant for unexplained reasons abandoned 3rd party proceedings against the said driver. Permission for personal use included inviting in of his friends into the said vehicle. Once invited in both the employer who had permitted his employee to have personal use of the vehicle and the said employee assume the duty of care over those passengers to ensure their safe conduct while in the said vehicle."

The trial Judge found the appellant 100% to blame for the accident.

The deceased was unmarried. He was a teacher at Enguli Secondary School, and as at the date of his death he had been promoted to be a head master and was placed at Job Group L with a basic salary of ?4097 - ?6012 per annum, which with Medical and House allowance came to Kshs.14,335.20 per month. Other than his mother, ***Loice Mitobe Paul***, who as at the date of trial, namely, February 2002, was aged 70 years the deceased did not have any other dependant. It follows that as at the date of the accident she was about 63 years old.

Following the deceased's death the respondent, who was the deceased's elder brother, arranged his burial, and later obtained a death certificate and a police abstract of the accident. The expenses he incurred, which totalled Kshs. 35,100/= was claimed as special damages.

The deceased's mother testified. Her evidence, which was supported by that of the respondent, was that she suffers from a mental illness for which she had been attending treatment. The deceased was footing the bills and also the cost of her upkeep. Her husband had died, and so the deceased was responsible for her welfare. She had lost his support upon his death. There was no evidence given as to how much of his income, the deceased spent on his mother. The trial Judge assessed it at 50%, and upon computation she arrived at Kshs.6233/= per month or Kshs.1,346,328/= on the basis of a multiplier of 18. She then awarded that sum on the head of loss of dependency. The trial Judge awarded Kshs.60,000 for loss of expectation of life and Kshs.10,000 for pain and suffering.

In the appeal before us Mr. Masika submitted that on the material before the trial Judge there was no basis for holding the appellant vicariously liable for the accident. Its driver was on a frolic of his own. The evidence is clear that he was not on duty as it was a public holiday, and the accident occurred in a National Park to where the said driver, Maundu and the deceased had gone for sight seeing. Besides, he said the evidence as to the cause of the accident was unclear and consequently there was no basis upon which liability could be found against the appellant. It was his view that the burden lay on the respondent to show the accident motor vehicle could also be used for social purposes by the appellant's driver.

As regards damages, Mr. Masika did not think the deceased's mother was entitled to a multiplier of 18 years in regard to her advanced years. In his view, subject to liability, a multiplier of 5 years was reasonable.

In answer, Mr. Makundi for the respondent submitted that the evidence and the circumstances of this case showed that the appellant's driver was to blame, and that he had unrestricted authority to use the accident motor vehicle. He did not think that it was the respondent's duty to call evidence on whether or not the appellant's driver had any restrictions in the use of the vehicle.

On the question of loss of dependency Mr. Makundi submitted that the accident having occurred about 15 years ago, and considering that the deceased's mother is still alive, the multiplier of 18 years is proper.

This is a first appeal. On the authority of among other decisions **Selle v Associated Motor Boat Company Ltd. [1968] EA 123** this Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court we neither saw nor heard the witnesses.

The facts in the appeal are not in dispute. There is no doubt whatsoever, that the appellant's driver was using the accident motor vehicle with his employer's authority. He was its farm manager. Whether or not he had authority to use it for social purposes is a question of fact. This was a matter particularly within the knowledge of his employer which was the appellant herein. ***Section 112*** of the Evidence Act, Cap 80 Laws of Kenya places that burden squarely on the appellant. The section reads as follows:

"112. In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

The appellant gave the accident vehicle for use by its driver. If there any conditions imposed

thereof only itself knew them and it was obliged to call evidence on it. The trial Judge must have had the foregoing provisions when she held that failure by the appellant to testify was a factor which would lead to an inference of absence of restrictions.

As regards the cause of the accident, there is evidence on record by Maundu that the driver was over speeding and that at some stage he cautioned him to no avail. He negotiated a bend at high speed. That evidence clearly showed the driver was to blame for the accident. It is immaterial that there could have been a tyre burst. If the burst arose while the motor vehicle was being driven at high speed, that can be inferred from the evidence. The accident vehicle was found after the accident with a burst tyre. We find no basis for interfering with the superior court judgment on liability.

As regards, damages, we have been asked to interfere with the sum awarded on loss of dependency and more specifically on the multiplier employed.

In **Kemfro Africa Ltd t/a Meru Express Service**, **Gathogo Karimi v. A.M. Lubia and Another [1982 – 88] 1 KAR 727**, Kneller JA, as he then was, rendered himself, as material, as follows:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v Mnayoka [1961] EA, 705 at p. 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto [1970] EA 414, 418, 419. This Court follows the same principles."

From the foregoing quotation it is quite clear that in assessing damages, a judge exercises discretionary jurisdiction and such jurisdiction is always to be exercised on the basis of sound legal principles and the evidence. The main complaint raised in the appeal before us on damages is that an unreasonably high multiplier was used. What were the circumstances of the case? The deceased died on 10th October, 1995. It is from that date that his mother lost dependency on him. As at the date of trial over seven years had elapsed. Judgment by the superior court was delivered 8 years after death. So at least a multiplier of 8 could be used. But the deceased's mother is still alive. What it means is that the learned trial Judge allowed another 9 or so years after judgment. The learned Judge was able to see the deceased's mother when she testified. She was satisfied that the deceased's mother was strong enough and that she could live for a further 9 or so years thereafter everything being equal. We find no basis for interfering with the multiplier. The trial Judge was entitled to and had ample evidence before her to come to that figure.

An issue was raised concerning the multiplicand and Mr. Masika expressed the view that it is not usual, in the ordinary course of human affairs for someone to spend half of his income on his mother, more so when he has siblings who are also employed. The deceased was unmarried. He had a sickly mother, who by the nature of her illness was on regular medication. It may be that the respondent was chipping in to support their mother. The facts of this case are unique. The deceased's mother was a mental patient and needed special attention. The trial Judge was right in concluding that the deceased was probably spending half of his net salary on her. We find no proper basis for interfering with her decision.

All in all we have said enough to show that this appeal is without merit. In the result we order that it be and it is hereby dismissed with costs.

Dated and delivered at Nairobi this 26th day of March,.2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR