HIGH COURT OF KENYA

AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 101 OF 2017

CONSOLIDATED WITH CIVIL APPEAL NO. 104 OF 2017

BETWEEN

LOCHAB TRANSPORTERS LIMITED..APPELLANT

AND

ARISON OBARA OBARA & WINNIE MORAA OBARA suing as administrators of the estate of

DOMINIC MOGAKA (DECEASED)...1ST RESPONDENT

BOARD OF DIRECTORS- JEREMY ACADEMY..2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.D. N. Musyoka, PM

dated 20th June 2017 at Kikuyu Magistrates Court in Civil Case No. 334 of 2013)

JUDGMENT

1. All the parties to this appeal are dissatisfied with the judgment of the trial court and have either appeal or cross-appealed. For ease of reference I shall refer to the parties in the respective capacities before the trial court. The 1st respondent were the plaintiffs suing on behalf of the deceased who was a passenger in motor vehicle registration number KWY 956 Mitsubishi School Bus ("the Minibus") owned by the 2nd respondent, as defendant, in the suit. It was involved in an accident on 4th July 2012 along the Nairobi-Naivasha road with a Trailer registration number CE269A/ZC5851 ("the Trailer") owned by the appellant as the third party before the subordinate court.

2. The trial court heard the matter and determined liability in favour of the plaintiffs but apportioned liability at 60:40 against the defendant. The plaintiffs were awarded the following damages:

Loss of dependency Kshs. 800,000.00

Pain and Suffering   Kshs. 50,000.00

Loss of expectation of life   Kshs. 100,000.00

Funeral Expenses Kshs. 100,000.00

3. The plaintiffs are dissatisfied with the trial court's finding on damages while the defendant and third party contest both liability and quantum of damages. I shall deal with the issue of liability first.

4. The fact that an accident took place and that the deceased died is not in dispute. Since the appellant was a passenger in the defendant's motor vehicle, he was not to blame for the accident, at any rate neither of the parties blamed him. The issue for determination was apportionment of liability between the defendant and third party. Apportionment of liability is a question of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to re-appraise the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123, 126**). In order to proceed with this task, it is necessary to summarise the evidence on this point.

5. Japheth Doctor Ateka (PW 1) recalled that on the morning of 4th July 2012 at about 5.30 – 6.00am, he was at Muguga along the Nairobi – Naivasha road when he saw a Trailer and Minibus coming from Naivasha direction. He heard a loud bang and went to the scene. The Trailer stopped and the driver went to the Minibus to find out what the problem was. The driver of the Minibus was still inside. The Trailer driver assisted him to come out of the vehicle. The other passenger could not be assisted as he was in between the two vehicles. When cross-examined by counsel for the defendant, PW 1 stated that he could not see very well because it was misty and that he heard the bang before he went to the scene. He also stated that both vehicles were in motion and that the minibus which was behind hit the trailer when cross-examined by counsel for the 3rd party. He further stated that both vehicles had lights on. When re-examined, he stated that both vehicles were in motion before hitting one another and that it was the bang that drew him near.

6. Enen Munyua Gichui (DW 1) testified that he lived near the road. While asleep on the material day, he heard some noise and on waking up, he found the Trailer in his homestead. He could not explain why it was in his homestead.

7. The driver of the Minibus, Njeru Kabera (DW 2), recalled that on the material morning, he was carrying a student and the deceased. He testified that he was driving slowly as it was foggy. On reaching Kichuri stage, he found the stalled trailer on the road. He did not see any warning signs that it had stalled. He swerved to avoid it and on the left, he hit the trailer and was injured. He and the student he was carrying were injured while the deceased died. He was charged with causing death by dangerous driving but he was acquitted. When he was cross-examined, he testified that the deceased was sitting on the left seat. He stated that the trailer did not have hazard lights on. He confirmed that the Trailer did not move on impact.

8. The Trailer driver, Joseph Muratha Gatonye, testified that he was heading from Naivasha to Nairobi. As it was foggy and he could not see far, he told the court that all his lights were on and he was driving slowly. While driving, he heard a bang and the cry of a child. He stopped and went and removed the driver and the child. He told the court that the other vehicle was to blame as he drove between lanes and was driving at a high speed. When cross-examined, he stated that when he stopped to assist the distressed passengers, he did not engage the parking brakes so the Trailer went into a home. He added the Minibus was not in its lane otherwise it would have hit the Trailer directly in the rear.

9. After setting out this evidence, the trial magistrate held as follows:

The condition of the weather that morning were not favourable for driving. However, each party was supposed to be more careful and now that it was foggy and visibility was not clear. I therefore blame both the defendant and the 3rd party for the accident that killed the deceased. I hereby apportion the blame at 60:40% as for the plaintiffs and the third party respectively.

10. The defendant's case was that the 3rd party was fully liable for as its driver had left a stagnant trailer on the road without any warning signs contrary to **section 53** of the ***Traffic Act*** ***(Chapter 403 of the Laws of Kenya)*** which requires that vehicles should not remain on the road as to cause obstruction without placing appropriate warning triangles to warn oncoming traffic. Counsel for the 3rd party submitted that the trial magistrate did not consider all the evidence, particularly the evidence of DW 1 in apportioning liability. In his view, the evidence clearly showed that DW 1 could not have caused the accident. He submitted that it could only have been caused by the acts and or omissions of the 3rd party which should be held 100% liable.

11. The 3rd party's case was that neither the plaintiffs nor defendant established that it was liable for or caused the accident. It contended that it is the defendant that failed to observe the provisions of the ***Traffic Act*** and the ***Highway Code*** by failing to keep a safe distance between the Minibus and Trailer and that DW 1 must have been driving at a very high speed given the prevailing weather conditions. Counsel for the 3rd party submitted that the testimony of PW 1 and PW 2 corroborates the fact that the Trailer

was in motion, its lights were on and that it was being driven at a slow pace. The 3rd party contended that the fact DW 1 was acquitted does not absolve him from liability in civil cases. The 3rd party urged that the defendant ought to bear full liability.

12. It is clear from the conclusions reached in the judgment, the trial magistrate did not analyse the facts to determine who was to blame. It is true that the weather prevailing at the time of the accident was not favourable to any party driving a vehicle. At this point, I would point out that the fact that DW 1 was acquitted of a traffic offence did not absolve him of civil liability.

13. The issue of liability turns on whether the Trailer was stationary or not. If the Trailer was stationary, the driver was required, under **section 53** of the ***Traffic Act***, to provide warning signs including warning triangles at a reasonable distance to warn oncoming traffic. On the other hand, even if the Trailer was stationary, the driver of the Minibus had a duty to drive with due care and attention including maintaining a safe distance in order to avoid the accident.

14. The Trailer driver's version that he was driving when he was hit was supported by the testimony of PW 1 who was at the scene and who testified that he saw the Trailer and Minibus moving together in the same direction before he heard the bang. On his part, DW 1, told the court that the Trailer was stationary. I find that the circumstantial evidence supports the 3rd party. PW 1 saw the Trailer driver stop and alight from the Trailer in order to assist the distressed driver and passengers in the Minibus. DW 1 confirmed that the fact that the Trailer went off the road into a homestead was not attributable to the collision. I accept the explanation by the 3rd party driver that this was a result of the fact that he did not engage parking brake as he had to rush to assist the distressed passengers. This confirms that had the Trailer been stationary for some time, it would not have moved off the road as the driver would have had adequate time to secure the Trailer.

15. From the totality of evidence, I find that the Trailer was not stationary and that it is the Minibus that hit the Trailer from the rear. The irresistible inference is that that DW 1 was driving too fast, failed to maintain a reasonable distance with the Trailer ahead of him and having regard to the weather conditions, failed to control the Minibus causing him to hit the Trailer from the rear. In these circumstances, I do not see what the driver of the Trailer could have done to avoid the accident. The 3rd party was not liable at all. I therefore find and that the trial magistrate erred in the manner liability was apportioned and for reasons I have set out, I find the defendant 100% liable.

16. I now turn to the issue of damages. In the memorandum of appeal dated 18th July 2017, the plaintiffs contend that the trial magistrate erred in awarding Kshs. 800,000.00 for loss of dependency under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The position taken by the defendant in its memorandum of appeal is that the award for general and special damages was excessive while the 3rd party in the memorandum of appeal dated 11th July 2017 did not specifically challenge the quantum of damages.

17. According to the plaint, the deceased was aged 20 years. He was in good health and was working as a caretaker for the defendant earning about Kshs. 12,000.00 per month which he used to support his 24-year-old wife and 1-year-old child. The deceased's father, Harrison Obera Obera (PW 2) told the court that the deceased used to earn Kshs. 8,000.00 and he would send him Kshs. 2,000.00. The deceased's wife, Winnie Moraa Obera (PW 3) recalled she had 1 child with the deceased and he was earning Kshs. 12,000.00 which he was using to support his family. Charles Njuguna Waigi (DW 2) testified that the deceased was working for the defendant as a child attendant and at the time of his death he was on probation and was earning Kshs. 5,500.00.

18. The plaintiffs complained that in arriving at the sum of Kshs. 800,000.00 the trial magistrate erred in awarding a multiplier of 20 years given that at the time, the deceased was only 20 years old. He urged that he would be expected to lead a productive life of upto 60 to 70 years. In his view, the multiplier of 20 years was too low and did not take into account the age of the deceased. As regards the multiplicand, counsel for the plaintiff submitted that the trial magistrate ignored the evidence which showed that the deceased was actually earning Kshs. 8,000.00 per month and that his salary would be set to increase in line with scheduled wage increases under **section 44** of the ***Employment Act*** which mandates the Wages Order to review and determine wages.

19. Counsel for the defendant urged that based on the evidence and law, the trial magistrate came to the correct decision in awarding the multiplier as it was based on the age of the deceased together with the vagaries and vicissitudes of life. He pointed out that the income of the deceased was proved and there was no reason for the trial magistrate to have recourse to any assumptions, like application of the ***Regulation of Wages Order*** made from time to time under **section 44** of the ***Employment Act***, in order to determine the income. The defendant complained that the trial magistrate ignored the fact that the defendant had contributed to Kshs. 35,000/- for funeral arrangements for which it should be given credit.

20. As I stated earlier counsel for the appellant in its memorandum of appeal challenged the finding on quantum only. Its other grounds were that, *"the trial magistrate erred in law and in fact and misdirected himself in failing to consider the submissions by the appellant together with authorities ……"* and that, *"the learned trial magistrate wholly erred in law and fact in arriving at his said decision."* I find that the manner the memorandum was drawn was vague and did not comply with **Order 41 rule 1(2)** of the ***Civil Procedure Rules*** which states that, *"The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively"*. The appellant's duty is to specifically plead what aspect of the judgment rather than make generalised allegations and hope to fill the gap by making submissions covering whatever aspects of the judgment it chooses at the time. I shall therefore limit myself to the submissions made by the plaintiff and defendant.

21. In dealing with the issue of quantum of damages, the applicable principle is that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see ***Butt v Khan*** **[1981] KLR 349***)*.

22. As regards the multiplier, the Court of Appeal in ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another*** **NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. Likewise in ***Roger Dainty v Mwinyi Omar Haji & Another*** **MSA CA Civil Appeal No. 59 of 2004 [2004]eKLR**, the Court to Appeal observed that;

To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.

23. In arriving at the multiplier, the court should consider the circumstances and conditions of life of the deceased could have lived, keeping in mind that the standard of life, the life expectancy in Kenya has reduced over the years and the period of expected dependancy.

24. The trial magistrate considered that the deceased would work until he was 55 and taking into account imponderables, he found a multipler of 20 years was reasonable. I have considered that the facts, although it is possible that the deceased would probably work until 55 years, there was also a possibility that he would also work until he was 60 years old. In ***Yh Wholesalers Limited and Another v Joseph Kimani Kamau and Another*** **NRB HCCA No. 454 of 205 [2017] eKLR**, the deceased was a nurse and was aged 21 years. He would probably have worked until he was 60 years. The court applied a multiplier of 30 years. **In *Ruth Wangechi Gichuhi v Andrew Mangeri Luande* NRB HCCC No. 576 of 2007 [2011] eKLR, the court applied a multiplier of 30 years for the deceased who was aged 22 years.** In light of what the possibility that the deceased would probably work until he was 60 year, I find the multiplier of 20 years on too low. I would award a mulitplier of 26 year.

25. The multiplicand represents the income available to the deceased dependants. In this case the appellant was employed by the defendant where he was earning a salary of Kshs. 5000.00. The defendant who had employed the deceased presented evidence to show the income from deceased. Although the plaintiffs pleaded that the deceased was earning Kshs. 12,000.00 per month. It is not clear from the testimony of PW 1 and PW 3 that he had other additional income amounting to Kshs. 12,000,00 as alleged.

26. I also agree that where the plaintiffs proved that the deceased was earning a specific amount, that amount was supported by specific evidence and in view of the finding I have made on the issues I also find that there is no need to fall back to the ***Regulation of Wages Order***. I find support for this proposition in ***Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another*** **Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J., stated, *"In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005 …"* In rejecting this submission, I also note that plaintiffs did not call into aid these statutory provisions in the submissions before the trial court.

27. Before I conclude I agree with counsel for plaintiff that in all likehood, the deceased would have received an increased income over time but this is take into account by the fact that the dependants received an accelerated lump sum payment, which the deceased would not have received had he survived. It is expected it would be invested and yield further income over time. In the circumstances, I am unable to depart for the mulitplicand applied by the trial magistrate.

28. The final issue on quantum is whether the defendant as the deceased employer is entitled to a credit of Kshs. 35,000.00 on

account of the fact that it contributed to funeral expenses. This is answered by the following observation by Reid LJ., in ***Parry v Cleaver* [1970] A.C. 1** that:

It would be revolting to the ordinary man's sense of justice and therefore contrary to public policy that the sufferer should have his damages reduced so he could gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer.

29. In other words, a person who makes a voluntary, charitable or gratuitous contibution to the deceased's funeral or medical expenses, should not expect a refund or credit from the damages. Another reason I reject that claim is that it is in the nature of a special damage claim which was not pleaded as a set off in the statement of defence.

30. I allow the appellant's appeal to the extent that I set aside the trial court's finding on apportionment of liability and substitute the same with a finding that 2nd respondent is 100% liable for the accident and that the claim against the 3rd party be dismissed. The 2nd respondent shall bear the costs of the appellant's appeal.

31. The appeal by the 1st respondent on quantum of damages allowed to the extent that I set aside the multiplier of 20 years and substitute the same with 26 years. The total claim for loss of dependancy under the ***Fatal Accident Act*** shall be Kshs. 1,040,000.00 made up as follows; **Kshs. 5,000.00 X 12 X 26 X 2/3**. The said amount shall accrue interest at court rates from the date of filing suit until payment in full. The 2nd respondent shall bear half the costs of the 1st respondent's appeal.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and **DELIVERED** at **KIAMBU** this 10th day of **JANUARY** 2020.

R. N. SITATI

JUDGE

Mr Khamala instructed by the MNM Advocates LLP for the appellant.

Mr Omangi instructed by Omangi and Associates Advocates for the 1st respondent.

Mr Okech instructed by Mwaura and Wachira Advocates for the 2nd respondent.

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