REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO. 21 OF 2019

SIMBA AFRICA LIMITED.....1ST APPELLANT

JOSEPH MUTHUI.....2ND APPELLANT

-VERSUS-

ROSE MUTANU MUSYONI (*Suing as the legal Representative of the*

Estate of **JOSEPH MULILA (DECEASED).....RESPONDENT**

(Being an appeal from the Judgement of Hon. J. Munguti-PM vide Kitui CM's Court Civil Case No. 526 of 2016

J U D G E M E N T

1. This is an appeal that arose from the judgement of Hon. J. Munguti –Principal Magistrate vide Kitui Chief Magistrate's court Civil Case No. 526 of 2016.

2. In that suit, the Respondent herein, Rose Mutanu Musyoni, suing as legal representative and the administratrix of the estate of the late Joseph Joseph Mulila (deceased), had sued the appellants jointly and severally for ''breach of statutory duty and/or express and/or implied provisions in the contract of employment'' which according to her caused the deceased, who was her late husband, to drive a tractor Registration No. KTCB 636M and plunged into a river/culvert and overturned sustaining fatal injuries from which he died. The Respondent relied on the doctrine of *res ipsa loquitor* and vicarious liability in the suit.

3. The appellants on their part denied liability stating that they could not be blamed with what was within control of the deceased and relied on the doctrine of *volenti non fit injuria*. They also blamed the deceased for failing to take adequate measures for own security and exposing himself to risks.

4. The trial court upon evaluating the evidence tendered found that the appellants was largely to blame because the son of the 2nd appellant had forced the deceased to cross the flooded river when it was dangerous to do so. The trial court found the appellant 80% to blame and apportion 20% liability to the deceased for failing to heed to his own safety.

5. On quantum, the trial court found that the deceased earned Kshs. 11,000 per month and so loss of dependency was calculated as follows: -

i. 11,000 x 15 x 12 x 2/3 = 1,320,000

It also made the following other awards.

ii. Pain and suffering- 100,000

iii. Loss of expectation of life – 100,000

iv. Special damages- 23,700

Total Kshs. 1,543,700

Less 20% contribution 308,740

Total Kshs. **1,234,900**

Plus, costs and interests.

6. The appellants felt aggrieved by the judgement of the trial court filed this appeal and raised the following grounds. That the learned Magistrate erred in both law and fact;

a) By failing to appreciate that the Respondent had failed to prove that the Appellant was negligent for causing the accident yet it's the Appellant who had proved in evidence that the Respondent was the sole author if his own misfortune.

b) In failing to find that the cause of the accident was beyond control of the Appellants and therefore no negligence could be visited on the Appellants.

c) In finding that the Appellant was wholly liable for the occurrence of the alleged accident by failing to consider the Defence evidence tendered to find the deceased liable

d) By making a finding on that the Appellant was wholly liable and placed it at 80% in favour of the Respondent while the evidence on record clearly demonstrated that the Respondent was solely liable for the occurrence or in the alternative ought to have borne the higher percentage on liability.

e) By awarding the Respondent a sum of Kshs one million four hundred and sixty-four thousand and seventy sixe (Kshs 1,320,000/-) in general damages in particular loss of dependency, Kshs 100,000/- for loss of expectation of life and Kshs 100,000/- for pain and suffering which award was manifestly excessive considering the evidence tendered in court.

f) In using a multiplicand and multiplier that were not applicable in the circumstances.

g) Failed to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

h) In assuming the income of the deceased to be Kshs 11,000/- when there was no proof of earnings on record

i) For using a multiplier of 15 years without taking into account comparable authorities and disregarding the defendants' submissions on record

j) By making an award under both the Law Reform Act and the Fatal Accident's Act without deducting the former from the other

k) By arriving at his decision based on the wrong principals in law governing the burden of proof of negligence and liability as well as the assessment of quantum of damages in that he failed to consider the pertinent issues of law and facts raised by the Appellant's counsel during the cross examination of the Respondent's witnesses.

7. In their written submissions dated 28th May 2021, the appellant reiterate that the respondent failed to prove negligence against them. They submit that the 2nd appellant had taken reasonable steps to ensure that the deceased was safe. According to them, the doctrine of Res Ipsa Loquitor do not apply. They contend that the doctrine of ''*volenti non fit injuria* was more applicable in the circumstances.

8. They have placed reliance on the case of **Statpack Indutsries vs James Mbithi Munyao (2005) eKLR** in the matter, the appellate court overturned the decision of the trial court which awarded an employee damages after finding that he had proved negligence against his employer. In the matter, the employee while operating a machine at work got into accident which resulted in his arm getting crushed. He blamed his employer for negligence stating that his employer had provided him with a dust coat instead of an overall. That while he was operating the machine, buttons from the dust coat interfered with drive shaft switch of the machine which resulted in the accident. The court found that there was no logic in the trial court's finding that the dust coat caused the accident. While allowing the appeal, the appellate court made reference to the case of ***Woods vs Durable Suites Ltd (1953) 2 AER 391)*** where the court stated that while there is an obligation of an employer to ensure employee's safety, they are not required to watch the employee constantly.

9. They have also placed reliance on the case of **Catherine Wangechi Wariahe *(suing as the administrators of the estate of the late James Mwambiriro Njeri)* vs Meridian Hotel Limited (2016) eKLR.** The Plaintiffs in the suit sued for negligence following the death of their kin in the Defendant's premises. The deceased was swimming in the hotel's pool when he drowned. The Plaintiff's case was that the Defendant owed the deceased a duty of care as he had gone for swimming lessons at their premises. In its decision, the court found that the Plaintiff had failed to prove her case against the Defendant. The Court indicated that the Defendant had taken measures to ensure safety of the deceased as he was taking his swimming lessons without a swimming instructor with signs indicating the dangers of using the pool in the absence of a swimming instructor. On the part of the deceased, the court found that he had put himself in danger by going into the pool when the instructor was out for lunch break despite being warned against doing so.

10. The Appellant has also placed reliance on the case of ***Hysal***

Hardware Limited & Another vs Jones Kimuyu Julius (2017) eKLR in that matter the cause of action arose from a traffic road accident. The Respondent was given a lift by the driver of the Appellant's vehicle. The Respondent paid Kshs 200 for lift but the vehicle was involved in an accident before it reached its destination. The Appellants who were the owners of the motor-vehicle and employers of the driver were sued as the Respondent claimed that they were vicariously liable for the actions of their employee. The court held that the driver was acting

outside his employer's instructions by giving lifts to people while he was not operating a PSV. The court held that in such a situation, the driver ought to have been held personally liable for his actions.

11. On quantum, the Appellants fault the trial court for awarding damages to the Respondent. They submit that the trial court failed to take into account the vagaries, vicissitudes and uncertainties of life by using a multiplier of 15 years in the award of loss of dependency.

They have relied on ***Mildred Mumbi Kanake & Anor (suing***

as the legal representatives and administrators of the estate of Peter Mwangi Wacuiri (deceased) v Roberty Kariuki Nyaga (2019) eKLR and Leonard Gitobu Muriithi v Rhoda Wanja M'Nkanata (2020) eKLR . In the first case, the deceased was 51 at the time of his death and self-employed. The court upheld a multiplier of 9 years and relied on the retirement age of civil servant while making the determination. The Court took a similar reasoning in the second case where the deceased was also a civil servant.

12. The respondent has opposed this appeal vide written submissions dated 6th July 2021 done through learned counsel M/s Mulu and Co. Advocates. She submits that the appellant exposed the deceased to danger by forcing him to drive across Nzeu River when it was flooded.

13. She contends that the employer, the 2nd appellant herein was vicariously liable as the deceased died while he was in the course of his employment. In that respect, he relies on the case of ***P.A. Okello & MM Nsereko T/A Kaburu Olelo & Partners versus Stella Karimi Kobia & 2 Others [2012] Eklr***. In that decision the court of Appeal held that the owner of a vehicle can be held vicariously liable. In the case, the driver in question had been engaged by a 3rd Party the appellant who were working as consulting engineers for the 2nd Respondent Salama Construction Co. Ltd. The court held that the Salama construction Co. Ltd. was liable for the actions of the driver.

14. The Respondent has also relied on the decision in ***Muwonge versus Attorney General of Uganda EA 17*** where the court held that a master was liable for the actions of his servant when the same are committed in the course of his employment.

15. On quantum, the Respondent submits that the multiplicand of Kshs 11,000/- was a figure arrived by the Appellants herein hence it cannot be challenged.

On the multiplier, the Respondent submits that the 15 years used by the trial court was appropriate as the deceased worked in the private sector as such he could have continued up to the age of 65 years.

She further submits that there is no legal requirement that awards made under the Law Reform Act ought to be deducted from those made under the Fatal Accidents Act. She has placed reliance on two decisions in ***Crown Buss Services Ltd & 2 Others vs Jamila Nyongesa (legal representatives of Alvin Nanjala) deceased (2020) eKLR and Guyo Jillo & Anor vs Lilian Kinyua (2019) eKLR***. In both cases, it was held that a party entitled to sue under the Fatal Accidents Act can still get remedy under the ***Law Reform Act.***

16. This court has considered this appeal and the response made. This is a first appeal and the duty of the court as a first appellate court is to re-evaluate and review the evidence adduced at the trial court with a view to not only finding if the trial court's decision was well founded, but reach own conclusion. In ***Sell & Anor. versus Associated Motor Boat Co. Ltd. & Anor. (1968) EA 123*** the principle was well captured when the court pronounced itself as follows: -

> ***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."***

17. In this appeal two issues have cropped up namely: -

(i) Whether the trial court's finding on liability was well founded.

(ii) If the answer to the (i) above is positive whether the damages awarded was excessive.

18. (i) Whether the trial court's finding on liability was well founded.

The appellants and that the 2nd appellant had taken reasonable steps to ensure that the respondent was safe and blamed him for exposing himself to risk. The Respondent on the other hand, blames the 2nd appellant for exposing him to danger by forcing him to cross a flooded river. She holds that the 2nd appellant was vicariously liable.

19. The trial court was persuaded by the respondent's position and found that the 2nd appellant's son ''**is said to have ordered the deceased to cross the flooded river**.'' The trial court reasoned that because the unnamed son did not appear in court to deny that fact, the respondent's case in that respect had been proved.

20. This court has considered the respondent's pleadings at the trial court because under the provisions of ***Order 2 Rule 10*** a plaintiff is required to give particulars of his/her clam in order to accord the opposite part a chance to respondent/defend/contest the allegations made. ***Order 2 Rule 6 of Civil Procedure Rules*** *estoppes* a party from departing from his/her pleadings.

21. The respondents claim was founded on tort of negligence and there was an obligation on her part to specify the particulars of negligence

attributed to the appellants. According to the respondent, the particulars of negligence attributed to appellants as per plaint were as follows:-

i. Failure by the appellant to maintain the subject tractor in good condition.

ii. Failure to provide conducive environment for the deceased.

iii. Exposing the deceased to unsafe working environment.

iv. Causing the accident.

v. Breach of statutory duty of care.

vi. She also relied on doctrine of *res ipsa loquitor***.**

22. I will look at each of particulars visa viz the evidence tendered.

23. To begin with the first ground of failure to maintain the tractor in good condition, it is apparent going by the evidence tendered that none of the respondent's witnesses attributed the cause of the accident to the mechanical condition of the subject tractor. In fact, it was appellants case that the tractor was new at the time.

24. The other ground raised in the plaint was that the appellants had failed to provide safe working environment. Again on this ground the respondent failed to adduce evidence that the appellant had failed to provide safe working environment. The flooding of the river was more attributed to vagaries of weather rather than human cause. The appellant claimed that they had provided the deceased with a helmet but owing to how the accident occurred, a helmet even if it had been worn could not have saved the deceased.

25. The respondent had also pleaded that the appellant exposed the deceased to unsafe working environment. On this ground, the respondent led evidence from Kativa Muinde (PW3) to the effect that the second appellant's son forced the deceased to cross a flooded river. This is what he said in chief;

''Mwikya, the son of 2nd defendant ordered us to cross the flooded river.''

This is what swayed the trial court's mind in finding that the appellant was liable because the said son did not appear in court to controvert the claim. But was that finding well founded? In my view, that finding was erroneous for three reasons: -

i. The respondent did not plead in her plaint that she was blaming the 2nd appellant's son.

ii. The 2nd appellant son was not sued in his own capacity so as to place obligation upon him by law to controvert the Appellant's claim.

iii. The 2nd appellant as a father cannot be faulted for actions of his children or member of his family unless it can be shown that the said family member was an employee of the father. The father can only be held vicariously liable if it is proved that he had connections or exercised some control over the actions of his son as for example where the son is an employee. Vicarious liability strictly speaking arises in a work environment where one is exercising some responsibility of his subordinates or agents. An employer for example may be held vicariously liable for the actions of his employee. The same can be said of a father and his family members.

26. There was no proof that the 2nd appellant had employed his son to drive the ill-fated tractor. The evidence of PW3 shows that the son did not touch the tractor. There was no basis in my view to hold that the 2nd appellant's son was liable. As I have stated above, if he actually forced the driver to plunge into a flooded river, then the same should have been pleaded specifically besides suing him in person for giving dangerous or risky directions to the deceased.

27. On allegations of causing the accident, this court finds that the only evidence adduced in respect to this allegation is what I have delved on above. The evidence that the 2nd appellant's son forced the deceased to drive through the flooded river was wanting. The evidence tendered in my considered view did not meet the threshold particularly when the evidence of Francis Kitema Munyao (**PW2**) is considered.

According to **PW2** the persons to blame for the accident was the contractor who built the road and the deceased. The respondent's case in totality failed to prove that the accident was attributed to the actions of the 2nd appellant because the deceased had full control of the tractor. He was expected to take all reasonable steps to ensure his own safety first above everything else. Laying blame on the employer solely because an accident occurred where the driver of the ill-fated vessel died is insufficient. The respondent ought to have cited the specifics where negligence could be attributed to the 2nd appellant as the employer of the deceased driver.

28. On the question of breach of statutory breach, the respondent was under an obligation to cite with specificity the regulations or sections of statute breach by the appellants and show the connection between the breach and the occurrence of the accident.

29. The essentials of an action for breach of statutory duty are well illustrated in ''***Clerk & Lindsel on Torts 18th Ed at Paragraph 11-04 at Page 600*** where the author states;

i. ***The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.***

ii. ***It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.***

iii. ***As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage would have occurred in any event.***

iv. ***Finally, there is the question whether there are any defences available to the action."***

30. The respondent did not cite any statutory regulation that was breached. ***Section 6(1) –Occupation Safety and Health Act (Chapter 514 Laws of Kenya)*** provides as follows:

1) ***Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.***

2) ***Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—***

a) ***the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;***

b) ***arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;***

c) ***the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;***

d) ***the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;***

e) ***the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees' welfare at work;***

f) ***informing all persons employed of—***

i. ***any risks from new technologies; and***

ii. ***imminent danger; and***

iii. ***ensuring that every person employed participates in the application and review of safety and health measures."***

31. Flowing from the above, this court finds that from the pleadings and evidence tendered, the respondent did not prove that the cause of the accident was as a result of breach of statutory duty. She did not plead that there was any breach in respect to the above cited provisions. However, the duty of care by the 2nd appellant over his employer cannot of course be disregarded. He was required by law to ensure that the respondent was not overly exposed to risk or injury while carrying out his duties. But here is a situation where an employer sent out his driver and because of unforeseen circumstances, the driver encounters a river that is flooded perhaps due to some torrential rainfall. In such circumstances, the driver was certainly required to exercise some restrain for own safety. The 2nd appellant was not at the vicinity at the time to direct the driver on what to do.

32. On the doctrine of ***Res ipsa loquitor,*** the respondent was required to show that circumstances of the accident were such that inference of blame on the appellants was the only plausible thing in the circumstances.

33. In the case of ***Catherine Wangechi Wariah (Suing as the administrators of the estate of late James Mwambiriro Njeri) versus Meridian Hotel Ltd [2016] eKLR*** the court *inter alia* held;

The effect of properly invoking the maxim of *res ipsa loquitor* ***shifts the burden of proof to the Defendant to show that the accident did not occur due to its negligence. In law, the court can infer negligence from the circumstances of the case in which the accident occurred...In the book of Winfield and Jolowiz on tort 17th Edition the learned author wrote;***

"This had traditionally been described by the phrase *Res Ipsa Loquitor* ***the thing speaks for itself...its nature was admirably put by Morris L.J when he said that it;***

"Possesses no magic qualities, nor has it any virtue, order than that of brevity, merely because it is oppressed in latin. When used

on behalf of a plaintiff, it is generally a short way of saying;

I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the Defendant... there are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer....''

''There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in absence of explanation by the Defendants that the accident arose from want of care...''

34. The question posed in whether in view the circumstances obtaining in regard to the occurrence of the accident the doctrine of *Res ipsa* was applicable.

In my considered view, there were no reasonable evidence to blame the 2nd appellant for the flooded river and/or the decision of the deceased to take the risk of crossing it.

35. I am more inclined to accept the appellant's proposition that the doctrine of '*volenti non fit injuria'* is more applicable in respect to the action taken by the deceased. In the case of ***Catherine Wangechi Wariahe versus Meridian Hotel Ltd. (Supra)*** the court also considered this doctrine and stated thus;

The general principles applicable to this defence (Volenti Non Fit Injuria), were stated by the judicial committee in Letang vs Ottawa Electric Railway Company in the following terms quoted from the judgment of Wills J in Osborne vs the London and North Western Railway Company;

If the defendant desires to succeed on the ground that the maxim Volenti Non Fit Injuria is applicable, they must obtain a finding of fact that the Plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it...

Volenti Non Fit Injuria means that the Claimant voluntarily agrees to undertake the legal risk of harm at his expense. It must be shown that the Claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely and freedom of choice predicates only full knowledge of the circumstances on which the exercise of choice is conditioned do that he may be able to choose wisely but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will..."

It is quite apparent that the deceased in opting to cross the flooded river obviously did not act wisely or prudently and to that extent the doctrine of *volenti non fit injuria* is more applicable against the deceased.

36. From the foregoing this court finds that the trial court fell into error to find that the appellants were largely to blame for the accident.

I have given enough reasons as to why this court finds that the respondent's case against him in the face of the evidence & pleadings was not proved.

This court therefore, finds merit in this appeal on liability and after finding that liability was not proved, I do not find it necessary to go into aspects of quantum.

The long and short of this is that this appeal is allowed. The trial court's decision on liability and quantum is set aside in its entirety. In its place an **Order of dismissal** of respondent's suit is given. I will however make no order as to costs.

Dated, Signed and **Delivered** at **Kitui** this **22st day** of **February, 2022.**

HON. JUSTICE R. LIMO

JUDGE