REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 156 OF 2018

SHARON NZULA KYALO &

ALPHONCE MUTUA NDUNDA

(Suing as legal representatives of the estate of the late

STEPHEN KYALO NDUNDA-DECEASED.....APPELLANTS

-VERSUS-

BENCHMARK DISTRIBUTORS LTD.....RESPONDENT

[An appeal from the Judgment of Hon. E.W. Wambugu (Ag. Senior

Resident Magistrate) delivered on 16.5.2018 in Civil Case No. 209

of 2016 before the Senior Principal Magistrate's Court at Kithimani]

BETWEEN

SHARON NZULA KYALO &

ALPHONCE MUTUA NDUNDA

(Suing as legal representatives of the estate of the late

STEPHEN KYALO NDUNDA-DECEASED.....PLAINTIFF

-VERSUS-

BENCHMARK DISTRIBUTORS LTD.....DEFENDANT

JUDGEMENT

1. According to the pleadings in the trial court, the deceased was 30 years old when he died as a result of a road accident and an action was brought in the Senor Principal Magistrates Court at Kithimani through his wife and father, as legal representatives against the respondent for damages under the Fatal Accidents Act and the Law Reform Act and special damages of Kshs 84,020/- due to negligence.

2. It was pleaded that the deceased died from a road traffic accident that occurred on the 23.12.2014 where the deceased was a passenger in vehicle KBK 196J that was being driven along Matuu- Thika Road and in which the driver of KBK 203J caused the metal rod that was used to tow vehicle KBK 196J to break and as a result KBK 196J lost control and it veered off the road and plunged into a stream whereof the deceased sustained fatal injuries. The appellant pleaded negligence and that the deceased's estate suffered special damages of Kshs 84,020/-. It was pleaded that at the time of the death of the deceased, he was a businessman who enjoyed a happy life and he earned approximately Kshs 30,000/- per month that he used to maintain his dependents who were his wife, 2 daughters and one son hence the deceased's life expectancy was cut short by the said death.

3. The respondent denied negligence and its particulars, denied liability for the accident and pleaded that the driver was working without authority as he had strict instructions not to carry passengers. It was pleaded that the deceased was an unlawful passenger and was not liable for the acts of the deceased driver as he was on a frolic of his own. It was pointed out that the body of the suit vehicle bore express instructions not to carry unauthorized passengers. The court was urged to dismiss the suit

4. The suit proceeded for hearing where the appellant testified and the evidence of Pw2 and Pw3 in **PMCC 118 of 2015** were adopted as evidence. The evidence of Dw1 and Dw2 in the same case were adopted as the respondent's evidence and the respective case were closed.

5. Parties filed submissions and the court delivered judgement on **16.5.2018** in which Hon. E.W. Wambugu dismissed the suit for want of proof of liability. She found that she would have awarded special damages for funeral expenses of Kshs 30,000/- ; loss of dependency under the Fatal Accidents Act of Kshs 1,940,000/- after using a dependency ratio of 2/3, a multiplicand of 9,700/- and a multiplier of 25.

6. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal dated 29.11.2018 and filed on 30.11.2018 out of time and without the requisite leave that challenged the finding on liability. Counsel prayed that the appeal be allowed; that the judgement of the trial court delivered on 16.5.2018 be set aside and that judgement be entered in favour of the appellants; that the court assess damages payable to the appellants; that the costs of the appeal be provided for.

7. Directions were given that the appeal be canvassed vide written submissions. Learned counsel for the appellant framed 2 issues for consideration being on quantum and liability. On the issue of liability, it was submitted that the accident occurred as per the evidence of Pw2 and that the evidence of Pw1 confirmed that the deceased died as a result of the accident. It was submitted that in Dw1 confirming that he was the driver of the suit vehicle, the respondent was vicariously liable for the accident. Reliance was placed on the case of **Muwonge v A.G of Uganda (1967) EA 17 and Rose v Plenty & Another (1976) 1 All ER 97.** It was submitted that the deceased driver had been driving at an unreasonable high speed and he failed to maintain the vehicle at its lawful lane. It was the strong argument of counsel that the appellant met their evidential burden and the court was urged to find that the respondent was vicariously liable for the accident. On the issue of quantum, reliance was placed on the case of **Jacob Ayiga Maruja & Francis Karani v Simeon Obayo (2005) eKLR** where it was found that documentary evidence was not the only proof of earning. It was proposed that for loss of expectation of life, an award of Kshs 100,000/- be made; for pain and suffering Kshs 50,000/-; for loss of dependency Kshs 6,000,000/- after using a multiplier of 25 years, dependency ratio of 2/3, multiplicand of 30,000/-. Reliance was placed on the case of **George Moga v Nairobi Womens Hospital & 3 Others (2015) eKLR.**

8. Learned counsel for the respondent agreed with the findings of the trial court and urged this court to uphold the finding of the trial court and dismiss the appeal. It was submitted that the principle of vicarious liability did not apply to the case as the deceased was an unauthorized passenger and a notice on the door was tendered as evidence (Dexh6), which notice was to the effect that "no unauthorized goods of passengers". Counsel in placing reliance on the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2014) eKLR** urged the court to exercise its discretion in the award of costs.

9. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment of the trial court. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

10. The evidence in the trial court was as follows. The evidence of Pw2 in PMCC 118 of 2015 was adopted as the evidence of Pw1 who was stated to be Cpl Stephen Kuria of Matuu Police station. The evidence was to the effect that a report was received of an accident that occurred on 23.12.2014 and upon arrival at the scene it was established that Danson Kabue was driving vehicle KBK 196J that was towing motor vehicle KBK 203J when Kabue lost control of the vehicle he was driving and the 2 vehicles plunged in a river. It was stated that the deceased was a passenger in the vehicle KBK 203J and he sustained fatal injuries whereupon an abstract was issued.

11. The evidence of Pw3 in PMCC 118 of 2015 was adopted as the evidence of Pw2 who was stated to be John Chege Nganga. The evidence was to the effect that he was given a lift in the vehicle KBK 196J that was being towed by KBK 203J after it developed mechanical problems. He stated that upon reaching Kwa Majani area, the driver of KBK 203J crossed to the opposite lane in the process of overtaking a trailer and he tried to get back to his lane after applying emergency brakes and in the process the metal rod that was towing KBK 196J broke and the 2 vehicles lost control and KBK 196J fell in a stream whereas KBK 203J fell on a rock. He stated that he was injured and was treated and discharged.

12. Pw3 was Sharon Nzula Kyalo who testified that she received a call informing her of the accident and she obtained letters of administration in respect of the deceased. She told the court that the deceased was a mason earning Kshs 30,000/- per month; he had 3 children aged 7, 6 and 2 years. That was the close of the appellant's case.

13. The evidence of DW1 in PMCC 118 of 2015 was adopted as the evidence of Dw1 who was stated to be Stephen Mugweru Kiambati. The evidence was to the effect that he was employed by the defendant as a driver and on 22.12.2014 he was sent to deliver a motor vehicle since the Kitui branch's motor vehicle KBK 196J had a mechanical problem and was to be towed to Nairobi for repairs. He stated that on 23.12.2014 he assigned Danson Kabue to Kitui to tow the faulty motor vehicle and was given the vehicle KBK 203J to use to tow the faulty vehicle but however he gave his friend John Chege Nganga a lift. He stated that upon reaching Matuu, the deceased hiked a lift aboard the vehicle KBK 203J and at Majani Area, Kabue swerved the vehicle to avoid a lorry but due to the force, his vehicle disengaged from the faulty vehicle that plunged into a river and this vehicle landed on the river bank. It was stated that both vehicles were damaged; that both vehicles had warning signs (Dexh6) that prohibited the drivers from carrying unauthorized passengers as per the fleet management policy (Dexh5).

14. The evidence of DW1 in PMCC 118 of 2015 was adopted as the evidence of Dw1 who was stated to be Leonard Wachira Njagi, the operations manager of the respondent. He testified that the respondent is a distributor of BAT cigarettes and not a licensed PSV carrier hence their vehicles do not carry passengers. He testified that Kabue was given a vehicle KBK 203J to tow a faulty vehicle KBK 196J that had been driven by Mugweru. He stated that he received a call that the 2 vehicles were involved in an accident and learnt that the deceased had been given a lift contrary to the company policy and rules. He testified that he did not know the deceased and that the fleet management policy

prohibited giving lifts to unauthorized passengers. The respondent closed its case.

15. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Pw2 and the cause may be inferred from the evidence of Pw2 as corroborated by the evidence of Pw1 that was neither challenged nor controverted.

16. Having considered the pleadings and the evidence on record, the following issues are to be determined.

a) ***Whether the respondent is liable for the acts of its driver.***

b) ***Whether the court may interfere with the finding of quantum of the trial court.***

17. The answer to any of the above issue will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact.

18. It is undisputed that the respondent was a cigarette distributor and that the suit vehicle was not a passenger service vehicle as per the evidence of Dw1 and corroborated by Dw2 as well as the exhibits Dexh 5 and 6. In order for the respondent to be held vicariously liable for the acts of its driver, there must be a particular relationship of employer and employee and the tort committed must be preferable to the employment relationship. In the case of **Stevenson, Jordan and Harrison Ltd v McDonald and Evans (1952) 1 TLR,** Lord Denning held that;

> ***"the justification of imposing vicarious liability is that the employer is in control of the behaviour of his employee. As the employer obtains a benefit from the employee's work, he should also bear the costs of accidents arising out of it"***

19. An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see **Muwonge v. Attorney-General [1967] EA 17**)

20. In **Shighadai v Kenya Power & Lighting Company Ltd & Another [1988] KLR 682** the court, found that the respondent's driver acted contrary to the respondent's instructions by carrying unauthorized passengers including the appellant, and that the appellant put himself at risk by boarding the respondent's vehicle that was neither a public service vehicle, nor had any passenger seat.

21. In this case, what came out from the evidence was that the driver of the vehicle KBK 203J gave a lift to the deceased. The respondent's witness stated that the driver had no authority to carry passengers and he presented the notice displayed on the vehicle to warn third parties. It was apparent that the suit vehicles were not intended for passengers but for cigarettes. When a driver is on a frolic of his own, the issue ceases to be one of negligence but becomes one of his own liability for which his employer cannot be held accountable; and that the respondent was not vicariously liable for the acts of his driver committed without instructions and outside the scope of his or the respondent's ordinary business. Indeed, both the deceased and one of the witnesses had hiked a lift in the ill- fated vehicles and that they are deemed to have seen the notice of disclaimer prominently displayed on the body of the vehicles and hence the doctrine of volenti non fit injuria must apply. The appellant should have pursued the driver for redress and not the driver's employer. In fact it was an obvious fact that the two vehicles were engaged in a rescue mission whereby one of them which was faulty was being towed and it was thus risky for anybody to attempt to board them in that state. I therefore agree with the findings of the trial court and dismiss the appeal for want of merit.

22. My finding notwithstanding, I will go ahead and make an assessment on quantum. In the instant case, the appellant's claim for damages for loss was set out in the plaint and he also particularized Kshs 84,020/- as the special damages.

23. In respect of loss of dependency it is necessary to consider what kind of life the deceased would have enjoyed had be not been killed. The evidence of Pw3 is to the effect that the deceased was a mason who earned Kshs 30,000/- but there was no evidence. In line with the multiplier approach, the damages would be by multiplicand and the result reduced by 2/3 because as at the deceased's death he was married and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.

24. The deceased was aged 30 years when he met his death and the life expectancy as per statistics given by the World Bank was 66.7 years. The multiplicand would be the expected monthly earnings of a skilled artisan. I shall take the retirement age that would be 55 years meaning that the working life of the deceased would be 25 years on average. In the professional field, the average earnings of the deceased as per the minimum wage for an unskilled artisan in 2014 as per the time of death was Kshs 9,780.95/- in Nairobi (See **THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2013**. The calculation for loss of dependency is thus; 25x2/3x 9,780.95/-x12= Kshs 1,940,000/-.

25. By way of comparison, the award of the trial court was not far from my finding hence had the appeal succeeded and been lodged within time, I would have upheld the finding of the trial court on quantum for loss of dependency. I would have awarded Kshs 20,000/- for pain and suffering and Kshs 100,000/- for loss of expectation of life. The amounts for special damages proposed by the trial court remain undisturbed.

26. The upshot of the foregoing is that the appeal is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 23rd day of February, 2021.

D. K. Kemei

Judge