REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. 4 OF 2017

YUSUF ABDI.....1ST APPELLANT

MUHSIN EXPRESS.....2ND APPELLANT

VERSUS

ABIHAEL YAKO & MATHEW GUUYO HISEA

(Suing as the Legal Representative of the estate of MOSES GIJO MAGHERE)....RESPONDENTS

(Being an appeal from the Judgment of Hon. Macharia (PM)

delivered on 31st August, 2017 in Garsen PMCC No. 19 of 2015)

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka Advocates for the Appellants

Wambua Kilonzo Advocates for the Respondents

J U D G E M E N T

The appellants, herein, and the defendants in the trial Court being aggrieved with the Judgment on liability and assessment of quantum as decreed on 31.8.2017 has lodged an appeal to this appeals Court seeking the aforesaid Judgment to be set aside in its entirety. It is the appellants contention that the Learned trial Magistrate misdirected himself in finding that the appellants' driver, agent, servant or employee was to blame wholly for the accident. In the second limb, the appellants contend that the Learned trial Magistrate misapprehended the Law and the principles governing the award of general damages under the Fatal Accidents Act and Law Reform (Miscellaneous Act) and as such arrived at an excessive and manifestly too high and punitive award.

Background

In the plaint dated 14.7.2015, the respondent **Abihael Yako**, Administrator to the Estate of the deceased one **Moses Gijo Maghere** sued the appellants – **Yusuf Abdi** and **Muhsin Express** in tort of negligence subsequent injury, loss and damage in terms of the Fatal Accidents Act and the Law Reform Act of the Laws of Kenya. This factored on an accident that occurred on 1.9.2014 along Garsen – Malindi Road at Minjila Area in which the deceased was lawfully driving motor vehicle **Registration No. KTWA 675B**, whereas the 2nd appellant driver so negligently drove, managed and/or controlled motor vehicle **Registration No. KBP 963B** hitting it from the rear resulting whereof in the sustained fatal injuries to the deceased. It was the respondent averment that the accident was the result of a fault and breach of duty committed by the driver, agent and authorized employee of the 2nd appellant.

The appellants refuted all the averments of negligence and averred that the fact of the accident was as a result of the negligence on the part of the deceased. In view of the pleadings and denial of any particulars of negligence, the respondent had the burden to discharge to prove that the accident was due to the negligence of the appellants and not the deceased. The requirement of the Law is to proof the averments on a balance of probabilities.

Evidence at the trial

The administrator – **Abihael Yako**, on behalf of the Estate of the deceased testified that on 1.9.2014 due to the road traffic accident her

husband, the deceased passed on. She tendered the death certificate as **Exhibit 1** -, which showed that he died in that accident aged forty seven (47) years. She further demonstrated that the deceased was in active employment licensed to drive motor vehicles. That as the time the accident occurred he was driving KTWA 675B. following the death, the administrator told the Court that the Estate comprising of herself, and three children, have suffered loss and damage. She was therefore able to petition for grant of letters of administration to pursue the claim on behalf and for the benefit of the dependents against the appellants to be awarded compensation.

The next witness **(PW2) Mathew Guyo** essentially gave evidence in support of the statement made on oath by **(PW1)** as the co-administrator. **(PW3) – No. 60713 Senior Sgt. Keragu** attached to Garsen Police Station testified in regard to the nature of the investigations carried out and recommendations made to that effect on the accident involving the two vehicles.

He attributed the accident to the driver of motor vehicle **KBP 963B** which rammed behind the deceased Tuktuk **Registration No. KTWA 875B.** According to **(PW3)** at the time of the accident, the surrounding environment was clear of any impediment or obstruction, it was in broad daylight at 9.30 am, save that the bus was trying to overtake the Tuktuk, and wrongly so and supposedly failed to properly overtake without hitting the Tuktuk from the rear. That was how the collision occurred resulting in the death of the deceased deposed **(PW3).** On cross-examination, by the defence counsel the witness confirmed that he visited the scene and with the evidence gathered he is able to apportion blame for the accident.

The appellant witness **(DW1) – Kahindi Kazungu** testimony was essentially that the driver of Tuktuk was ahead of his motor vehicle that he started to overtake by horning but the driver of the Tuktuk left his lane and entered into the overtaking lane. That miscalculation of the driver of the Tuktuk occasioned the collision. He denied any acts of negligence or omission as alleged by the witness who visited the scene. In assessing the merits of the case, it is clear from the Judgment of the trial Court that the appellants' driver was critically to blame for the accident.

Determination

There are two distinct issues to this appeal, whether the trial Magistrate was right in rendering Judgment on liability in favor of the respondent at 100% liability. Secondly, whether the assessment of damages was an overreach and outside the principles governing such cases in the scope of our jurisprudence. In essence as reiterated in **Dr. Mustafa S. Rahim v Abdulla Q Khandalla CA NO. 13 of 1990.**

> ***"The first appeal Court task is to review the evidence a fresh however whilst the findings of the Lower Court would persuasive, this court is not bound by those findings. This Court has to make a conclusion on all facts before it and in particular the depositions by the witnesses."***

I further remind myself that the standard of proof in civil cases is that a balance of probabilities. On appeal the Court's jurisdiction is held to be:

> ***"A strong view that the appellate court is not bound to accept the trial court findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or if the impression based on the demeanor of witness is inconsistent with the evidence in the case generally."*** **(See Khoosit Hoh v Lim Thean Ton {1912} AC 323 Abdul Saif v Ali Mohamed Sholan {1955} EACA 270, 272)**

With that in mind let me address the issue on whether the appellant's driver was guilty of negligence.

The Law

It is trite that negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. (**See Anderson B in Blyth v Birminghton Water Works Co. {1856} 11 EX781 at pg 784).** In **Hay v Bourhill v Young {1943} AC 92**:

> ***"the driver of a motor vehicle owes the duty of care to other road users, what duty then was incumbent upon the appellants driver "The duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway….. proper care connotes avoidance of excessive speed, keeping a good look out, observing traffic rules and signals and so on. There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree. It is the duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid cause of damage to persons and other vehicles on or adjoining the road, it has been further stated that reasonable care means care which an ordinary helpful driver would have exercised under all the circumstances."***

This means as **Davies v Mann {1842} 10m W546**, the Court held that:

> ***"A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every, stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."***

Karisa v Solanki {1969} EA 318:

> ***"Again, a driver of a motor vehicle should usually drive on the road at a speed that will permit him to stop or deflect his course within the distance he can see clearly, though it is not conclusive proof of negligence to exceed that speed. But if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was keeping a sufficient look out or that he was driving too fast having regard to the limited look that could be kept"*** **(See the principles in**

Evans v Downer & Co. Ltd {1933} AC 149, Moms v Hultan Compasion {1946} KB 114).

Besides the above legal proposition in **Christopher Kisumbo v Byaruhunga & Another Civil Case No. 668/1990 {1995} KALR**:

> ***"The fact that the first defendant invoked the plaintiff on the left side of the road without any valid explanation or excuse, from the first defendant in itself is sufficient to constitute negligence. Vehicles do not normally collide or hit each other or other objects with some negligence on the part of the driver or drivers even when driven at high speeds…..The burden to prove contributory negligence lies with the defendant which must proof on a balance of probabilities."*** **(See also J. Odunga Digest on Civil Case Law and Procedure Vol. 4 2nd Edition Law Africa Pg 3611 Paragraph (a), (b), (c) respectively).**

Time is not ripe to apply the above mentioned principles to the facts in the present case. The evidence in which the trial Court placed reliance to make a finding on negligence was that of **(PW2).** According to **(PW2),** he visited the scene of the accident soon after its occurrence. It is instructive to note that **(PW2)** evidence was purely circumstantial on particulars determined at the scene on the point of impact. From **(PW2)** testimony, the deceased was driving on the same direction with the appellant's driver on a major road Garsen-Malindi. Indeed, according to **(PW2),** the deceased Tuktuk was ahead of the appellants' Bus Registration No. KBP 963B. That from the observations he made at the scene, the appellants' driver failed to yield whereas overtaking and the said vehicle hit the Tuktuk from the rear. What that means to me the said appellants vehicle *primafacie* was speeding and did not keep a proper look out. It is also clear from the record and the Judgment of the trial Court that the appellants' driver failed to stop or keep a safe distance within which evasive steps could be taken to avoid the collision. This whatever the explanation being given by the appellants' driver **(DW1)** the accident occurred as a result of negligence in his part. If the trial Court was to accept **(DW1's)** version that he was driving with due care and attention or kept a proper look out he could have structured the deputation of negligence outside the known limitations.

Consequently, **(DW1)** had a duty to keep a proper look out in the course of overtaking and drive the said vehicle at a speed that could have allowed him to overtake without hitting the Tuktuk from the rear. He would also have allowed safe distance to navigate the overtaking without colliding with the Tuktuk. From the evidence herein, **(DW1)** failed so to do. He simply did not seem to care or even contemplate, the occurrence of the accident with most probable as he approached the Tuktuk. Therefore, a skillful or experienced driver in that regard he failed the test of a reasonable man.

All in all on appeal, the appellant has not adduced substantial and compelling evidence on causation for this Court to differ with the trial Court. In the case of **Dedhar v Commissioner of Lands {1957} EA 104:**

> ***"It was observed, an appeal which falls within the discretion of the Judge to make on the basis of the evidence, the cogency and credibility of minds cannot be interfered with unless the aggrieved party shows that he exercised his or her discretion. Under a mistake of Law or in disregard of principle or misapprehension as to the facts or that he or her took into account irrelevant matters or failed to exercise his discretion or that his or her order resulted in an injustice."***

Since the appellant driver was in control of a heavy machine compared with the Tuktuk, it was incumbent upon him to keep extra care and proper look out to the other road users on that major road including the deceased. The appellants' driver should also have anticipated that the other road user or persons on that highway may not show this requisite standard of skill, experience and care. Proving negligence on this issue was discharged by circumstantial evidence from the testimony of **(PW2)** upon visiting the scene. **(See the case of Abanga alias Onyango v R CR Appeal No. 32 of 1990).** Circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly: typically, when the witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered.

In this case the appellants' driver never controverted the evidence given by **(PW2)** on the failure of due and whether on the part of the offending motor vehicle KBP 943B. The appeal on liability fails and the findings by the trial Court affirmed as stated in the Judgment.

The second key battleground in this appeal is on assessment of damages. The Law on assessment of damages is now well settled. The Court of Appeal in **Mohammed Jabane v Highstore Tolenja Vol. KAR 982** stated:

> ***"the correct approach to comprise of the following elements: (a). Each case depends on its own facts. (b). Awards must not be excessive and must take into account the need to avoid escalation of insurance premiums. (c). Comparable injuries should attract comparable awards. (d). Inflation should be taken into account."***

The mere figure in the Judgment however colossal it looks should not be a ground of dissatisfaction with the assessment of damages. The jurisdiction of an appeals Court to vary or set aside the award must be within the threshold stated in **KEMFRO Africa Ltd T/a Meru Express Services v Lubia {1987} KLR 349.** In the same breadth the Court in **Shell (Uganda) Ltd v Ndyabawe {2008} 1 EA 409 (Tsekooko, Karokora, Kanyeihamba & Katureebe, JJSC on 23 November 2006) (SCU):**

> ***"Whilst an appellate court has jurisdiction to review the evidence on record to determine whether the conclusions of the trial Judge should stand, the jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge failed to appreciate the weight or the bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate Court will not itself hesitate to decide the case. But this is a power, which is, appropriately normally exercised by a first appellate court.*** **(See Peters v Sunday Post Limited {1958} EA 423).**

In the case of **Endoshi v Lema, Arusha High Court Civil Appeal Number 107 of 1971 {1971} THCD N415 (Kwikima, AJ on 30 October 1971) (HCT):**

> ***"The best Court to assess and fix damages is the trial Court and unless the quantum fixed can be shown to be so plainly unreasonable, an appeal court cannot and should be ill-advised to take it upon itself to interfere. The amount of damages is a fact ascertainable by the trial court, which is better equipped with facts and all the circumstances of the case." (See also Odunga's Digest on Civil Case and Law Procedure 3rd Edn Vol.4 2016 pg 3058 paragraph b and 3059 paragraph e)***

This appeal, seeks leave of the Court to interfere with the approach taken by the trial Court in assessing damages for loss of dependency and loss of expectation of life. The question before the Court is whether after a consideration of the evidence and the applicable factors the Learned trial Magistrate can be said to have misdirected himself in the final award in favor of the respondent. In the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR) where J. Ringera** stated as follows:

> ***"The principle applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."***

The core issue is whether the Learned trial Magistrate properly considered the current legal position regarding the Law of damages in particular bearing in mind the above principles. Given the specifics in each particular case there is no lower or upper limit on assessment of damages. The discretion exercisable by various Courts in regard to assessment of damages is that the facts of each case and the social economic conditions obtainable in our society provides a trajectory in which the principles on this issue are underpinned. In a case such as this, regard must be had to the fact that every single penny or monetary loss or expense which the plaintiff had been put to in the past or will be put to in the future has been provided for and will be paid to him or her calculated on a multiplier and multiplicand formula. These sums will cover all loss of earnings past and future and other expenses in relation to the loss and damage to the estate.

Based on these considerations, the trial Court assessed damages taking into account the age of the deceased, the income earned during his lifetime and future loss occasioned by the accident. The damages trilogy cases acknowledge that it is not always possible to reflect accurately what a reasonable amount on general damages for loss of dependency should be especially in fatal accident cases. This is because, of what I refer to as incommensurability of the unique circumstances of each case and the facts as they present themselves before the trial Court.

Another related aspect of the damages awardable is under the heading of special damages. It is trite that the victim to the accident must be fully compensated for the financial loss he or she incurs as a result of the negligence on the part of the defendant.

The Court in **Lindal v Lindal {1981} 2 SCR 629 at page 634 (Dickson J)** made the following observations:

> ***"Anything having a money value which the plaintiff has lost should be made good by the defendant. If the plaintiff is unable to work, then the defendant should compensate him for his [or her] lost earnings. If the plaintiff has to pay for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are "losses" to the plaintiff, in the sense that they are expenses which he [or she] would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant's pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. The first and controlling principle is that the victim must be compensated for his [or her] loss."***

It is worth noting that the appellant with respect to the arguments canvassed on the appropriateness of the assessment of damages has failed to demonstrate which guidelines the Learned trial Magistrate departed from involving significant aspects of the claim to warrant interference by this Court. It is clear on the basis of the evidence before the Court, the Learned trial Magistrate echoed the principles in relation to the material and factors which are reasonably relevant under the headings for loss of expectation of life, loss of dependency and special damages connected to the estate intestate of the deceased.

The Court is satisfied that the findings of the trial Court in the present case is consistent with the provisions for the Fatal Accident Act and the Law Reform Act. Therefore, there has been no misdirection or misapprehension of the evidence which is so vital to entitle this appeals Court to exercise jurisdiction to vary or set aside the quantum in favor of the respondent.

I do not see any grounds for making any increase or decrease in the award already made. Clearly, there is no merit in this appeal and I dismiss it with costs.

DATED, SIGNED ON 19TH DAY OF AUGUST 2021 and DISPATCHED via email ON 19TH DAY OF AUGUST 2021

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R. NYAKUNDI

JUDGE