REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 82 OF 2018

BETWEEN:

CHEMOIYAI LABAN.....APPELLANT

AND

RACHEL AFANCI ONACHA (Suing as the Administrator ad litem of the

Estate of MARK MUDERWA ONACHA (Deceased) ..... RESPONDENT

Being an Appeal from the Judgment and Decree of Hon. W.K. Cheruiyot, Resident Magistrate delivered in the Vihiga Principal Magistrate's Court in PMCC No 89 of 2016 on 24th May 2018

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon W.K. Cheruiyot, Resident Magistrate in ***PMCC No 89 of 2016*** delivered in the Vihiga Principal Magistrates Court on 24th May 2018. The Judgment which appears at pages 81-84 of the Record of Appeal. The Lower Court found in favour of the Plaintiff but apportioned liability 60:40 and made the following award:

2. (a) Liability 60:40 in favour of the Plaintiff

(b) Pain and suffering Kshs. 30,000.00

(c) Loss of expectation of life Kshs. 150,000.00

(d) Loss of Dependency Kshs. 4,245,600.00

(e) Special Damages Kshs. 79,607.00

(f) Total Kshs. 4,505,207.00

(g) Less 40% contribution Kshs. 1,802,082.00

(h) Net award Kshs. 2,703,127.20

3. The subject matter of the suit was a road traffic accident which resulted in a fatality. The Learned Trial Court found that "the (point of) impact was in the yellow line, both parties were to blame. Had DW1 swerved to the left, a collision may have been avoided. I therefore find the defendant 60% vicariously liable and the deceased 40% liable for the accident. The quantum arrived at was 4,505,207/=, which was then discounted by 40%.

4. The Defendant being dissatisfied with the decision and Judgment of the Trial Court filed an appeal against the decision of the Hon Trial Court both on liability and quantum. The Memorandum of Appeal relies on the following grounds:

"1.The finding on liability was erroneous vis-a-vis the issues entailed and evidence tendered by the Appellant

2.The Learned trial Magistrate's award on damages was inordinately high, improper, unrealistic and inappropriate under all the circumstances of the case.

3. The Learned trial Magistrate erred both in law and in fact in failing to appreciate or take into account the Appellant submissions or at all;

4. The Learned Magistrate erred in law and in fact in failing to appreciate or take into account the Appellant submissions or at all.

5. The Learned trial Magistrate erred on all points of fact and law in as far as award of damages is concerned."

5. The Appellant's prayer is for a judgment that the Resident Magistrate's Decision on quantum and liability be set aside and a proper finding be made by this Honourable Court.

6. The Appeal is opposed. The Record of Appeal was filed on 10th September 2020. There appears to have been some delaying in obtaining typed and certified proceedings. The Parties were directed to file written submissions which they have done. The Appellants were filed on 17th November 2020 and the Respondents were filed on 16th December 2020. They have been carefully considered and taken into account in coming to this decision.

7. The Appellants Submissions rely on the following:

1. The testimony of PW-2 should be disregarded because although he said he was close to the scene he was unable to recall essential features eg whether the vehicles had their lights on and whether the motorcyclist was wearing an helmet and reflective clothing. His evidence is also said to be inconsistent. The Appellant doubts whether he was actually at the scene.

2. It is argued that the Learned Trial Magistrate failed to take into account fundamental evidence that the Deceased should not have been on the road. He did not have a licence, he was not insured, he was not wearing a helmet, he was not wearing reflective clothing and he was on the wrong side of the road.

3. PW-3 who stepped into the shoes of the Investigating Officer to give evidence, yet he had never visited the scene. Further the outcome of the investigation was that there was no charge against either party. However, had there been cogent evidence that the lorry left his own lane and crossed over to the other side of the road, while swerving, that would be prima facie evidence of dangerous driving.

4. Further, it is said the evidence of PW-4 was a complete fabrication intended to mislead the court.

5. It is argued that the apportionment of blame should have been equal liability.

6. The Appellant also challenges the quantum on the basis that a multiplier of 25 years it does not take into account the vagaries of life.

7. Also on quantum the dependency ratio is challenged on the basis that it does not appear anywhere in the law.

8. As stated, the Respondent also filed Written Submissions. The Appeal is opposed. The Respondent reminds the Court that as this is a first appeal the Court can consider the evidence as well as the issues of the law relying on ***Selle vs Associated Motor Boat Co Ltd (19680 EA 123 CA***. The Submissions repeat the salient evidence, in particular that the Deceased was 35 years old with the expectation of working until he was 60 earning an income of KShs.28,304/=. The Submissions argue that a ½ multiplier is appropriate because the Deceased used to support his mother who was old and hypertensive. The Submissions do not point to the evidence adduced in relation to the level of support and the health of the Plaintiff.

9. The Respondent argues that there is absolutely no problem with the Court adopting one half as the dependency ratio as it appears the Court use lower dependency ratio where the deceased is unmarried, like in the present case, and has got no child. In the case of ***Henry Waweru Karanja and another –vs- Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a, deceased) (2017) eKLR***, the Court decide as follows with regard to a deceased who is unmarried and the claimant is a parent:-

> ***"I have look at the decisional law on this point. It would appear that our Courts tend to lower the dependency ratio when the Deceased is an unmarried child and the claimant the parent. This is due to the presumption that such a child spends less at home by virtue of being unmarried. Of course, this is a presumption that can be rebutted by actual evidence. Hence, in*** Mary Kerubo Mabuka –vs- Newton Mucheke Mburu & 3 others (2006) eKLR the Court used a multiplier ***of 20 years on a 26 years old unmarried lady and a dependency ratio of ½. Similar in the case of*** *Alice O. Alukwe –vs- Akamba Public Road Services Ltd (2013) eKLR, the Court used a dependency ration of ½* **on an unmarried lady aged 24 years. In Lucy Wambui Kihoro Suing as personal Representative of deceased Douglas Kinyua Wambui –vs- Elizabeth Njeri Obuong (2015) eKLR the Court similarly used dependency ratio where the deceased was unmarried and therefore less inclined to spend his or her earnings at home. Given this emergent practice, I would agree that the use of the dependency ratio of two thirds here was high. I would, in consonance with the emerging judicial practice, go with a ratio of one half (1/2) in the circumstances of this case"**.

10. The Respondent also asserts the figure for Special damages is justified as the Plaint was amended. Again, there is no mention of whether or not the Defendant was given leave to amend the Defence in response to the Amended Plaint (which is not included in the record).

11. As this is a first Appeal the Court is charged with the responsibility of reconsidering and re-assessing the evidence that was before the Trial Court all the while bearing in mind that it did not have the benefit of observing the witnesses and assessing their demeanour, which the Trial Court did.

12. As with all road traffic cases, there are two principal parts. The Issue of liability and the Issue on Quantum. Starting first with the decision on liability.

13. The suit was brought by the Mother of the Deceased. She was acting pursuant to Letters of Administration ad Litem which she obtained for the purposes of the litigation. The facts of the case are extremely sad, but that should not detract from the application of principle.

14. The Defendant to the Plaint was Chemoiyai Laban. At paragraph 4 of the Plaint it is pleaded that "On or about the 7/12/2015, the Defendant's motor vehicle KBU 435C was being so negligently driven along Kisumu Kakamega Road at Kapsengere that it left its correct side of the Road and fatally wounded Mark Muderwa Onacha, deceased. The implication being that it was the Defendant who was personally responsible for the accident. The Particulars of Negligence were set out as follows:

PARTICULARS OF NEGLIGENCE

(i) Leaving his lane and knocking the deceased down in the opposite lane.

(ii) Driving at an excessive speed in the circumstances.

(iii) Failing to slow down, stop, swerve or an any other way so to control the motor vehicle as to avoid this accident.

(iv) Driving without due care and attention.

(v) Failing to have regard to other road users present on the road.

15. The Defence was pleaded thus: "THE CONTENTS of paragraph 4 of the Plaintiff's Plaint are vehemently denied particularly that on or about 7th December the Defendant's motor vehicle KBU 435C was so negligently diven along Kisumu-Kakamega road at Kapsengere that it left it the correct side of the road and fatally wounded Mark Murerwa Onacha, Deceased. The Plaintiff is put to strict and specific proof.". At paragraph 5, the Defendant went further and denied that the accident was as a result of the sole negligence of his servant driver and/or employee thereby cannot be held liable. Notwithstanding that clue, the Plaintiff did not amend her Plaint to plead vicarious liability. The Learned Trial Court found, the Defendant vicariously liable for the collision. From the record, it appears that the Learned Trial Court did not hear any evidence whatsoever on the relationship between the Defendant and the driver who was called as Defence Witness -1. All he said was that he was driving the vehicle. There was no cross-examination on the issue. Mr Amaya was more interested in ascertaining whether the owner of the vehicle was a police officer.

16. The Learned Trial Magistrate has not set out the grounds and reasons on which he found that the Defendant was vicariously liable for the conduct of the driver, save that he owned the vehicle. There was no evidence led, nor heard (according to the certified proceedings) on whether or not he was acting in the course of his employment. The Defendant was not called to give evidence.

17. Moving onto causation and more particularly the evidence before the Learned Trial Court on the issue of the cause of the accident. The Plaintiff pleads and asserts that the driver of the Lorry index number KBU 435C was to blame. The driver asserts that it was the motorcyclist who was to blame, namely the Deceased. In the circumstances, the evidence of the scene was crucial. PW-2 was presented as an eyewitness. He said he was close to the accident, yet he also said that both vehicles were on the correct side of the road but somehow the accident occurred in the middle of the road. PW-4 was also put forward as an eye-witness. His evidence was that he was in a matatu following the lorry. He said the lorry driver was at fault entirely. He said he was able to see that the lorry swerved to its right and the motorcyclist hit it on the left of the vehicle. The Learned Trial Magistrate did not conduct a site visit yet was able to accept that the point of contact was the fuel tank on the left of the lorry. However, in coming to that decision the Learned Trial Magistrate did not address his mind to the relative positioning of the vehicles. If the lorry was on the left hand side of the road and the motorcycle collided with the left side of the lorry, that suggests that the motorcycle was to the left of the lorry which could either be on its extreme right or the lorry had somehow changed direction. However, there was no oral evidence to that effect and the Learned Trial Magistrate made no findings to that effect before apportioning blame.

18. As to the evidence of PW-4, he was a passenger in a matatu, he said. That was challenged by the Defence. He said he saw the accident, however, it is difficult to see how he would have had an unrestricted view on what was taking place at the front of the lorry before the driver swerved. DW-1 accepted he did swerve but he said he did so to avoid the motorcycle. As PW-4 confirms, he swerved to the right, and the motorcycle passed to his left yet they were both in the middle of the road. It seems to this Court that the evidence of DW-1 that he was taking evasive action is more plausible.

19. On the issue of contributory negligence, the trial court heard oral evidence that it was nightfall and it was dark. Although DW-1 thought it was later than 0745, PW-2 and PW-4 were adamant it was between 7.30 and 7.45 pm. Therefore there was consensus that it was dark. There was also consensus that there were no street lights. The evidence for the Defence was that the motorcycle did not have any lights on, also that he was not wearing any reflective clothing. Even the Police Officer who was at the scene (a chief inspector based at Kisumu) saw the lorry colliding with the motorcyclist but he does not state whether or not either had its lights on. If it did not that would be a factor in contributory negligence. It was also said the motorcyclist was not insured, however that provides no assistance to how and where the accident occurred. In chief PW-2 said the cyclist landed in the middle of the road. Under cross-examination he said he could not really tell where the accident really occurred and also that the motorcycle fell next to the Telecom line. That suggests the other side of the road yet neither the Police File nor PW-3 were able to state which side of the road that was.

20. The evidence for the Plaintiff included were two alleged eyewitnesses. Although the Learned Trial Magistrate puts some reliance on the evidence of the Mother, it is clear from her evidence that she was not an eye witness. Nor did she attend the scene immediately after the accident. Immediately, after the accident the Deceased was moved to the Hospital by some good samaritans (possibly the matatu driver and his passengers). The Lorry Driver reported the accident to the Police. The Lorry and the motorcycle were moved and were not there when the Mother came to the scene. Therefore her evidence on the position can only be conjecture.

21. The first eye witness to the scene gave evidence as PW-2 Timothy Chepngabit. At the time he was a Chief Inspector. He was also gazette to take and process photographs. However, he did not produce those photographs, nor was he asked to by either party. His evidence was that the lorry was traveling from Kapsengere towards Kisumu and the Motor cyle from the direction of Kisumu heading towards Kakamega. He said the collided and the motorcycle fell in the middle of the road. He did not give any evidence on the speed of the vehicles, nor on the point of contact, nor on the layout of the road. The layout of the road was particularly relevant because the accident took place at a trading centre. The driver (DW-1) asserts he was in the correct lane. That suggests there may have been a junction where vehicles were moving across lanes. Neither the Learned Trial Court nor the Parties through their witnesses expanded on that issue. PW-2 said he had been in the bar but not drinking. He confirmed that it was getting dark yet he cannot recall if any of the vehicles had their headlights on. He did however confirm that the lorry was in the correct lane. His evidence is recorded in the proceedings as "*I saw transmit on the motorcycle*" (that is clearly a typographical error but it appears in the certified proceedings). He says he recorded a statement, however, that statement is not part of the evidence before the trial court. The Police abstract was produced as PMF-1 but there are no diagrams or plans attached.

22. Further, when the two files were sent to the ODPP to made a decision whether to prosecute the Defendant's driver. They took no action. Although, it is not stated categorically, it is reasonable to expect that the prosecution would be for dangerous driving. However, there was no such prosecution. The witness (PW-3) said there was insufficient evidence to charge anybody. That runs counter to the evidence of PW-4 that he saw the lorry swerve towards the motorcyclist rather than away from him.

23. The Learned Trial Magistrate made no finding as to whether any vehicles had its headlights on and if so, which one. Also there was no finding on the position of the vehicles after the accident. Neither was there anything held in relation to a crash helmet, or reflective clothing, both of which are requirements and also articles that could have reduced the impact of the accident.

24. The Appellant's argument that the Deceased should not have been on the road, does not hold much water as a duty of care is owed to all other road users however, they come to be there. What is relevant, is that the absence of a driving licence is strong circumstantial evidence that the Deceased was not fully in control of the vehicle which he was driving. That is corroborated by the evidence that he was on the wrong side of the road. Although the Learned Trial Magistrate seems to have discounted completely the evidence of the Defendant, he has not given any reasons for doing so.

25. Moving onto quantum. The Plaintiff pleaded several heads of special damages. These were

1. Coffin – 18,000/-

2. Transportation of body – 20,000/-

3. Body preservation 5,500/=

4. Hospital bill – 3,927/= Those came to a total of KShs 47,427/=

However, the Learned Trial Magistrate permitted the Plaintiff to amend her case, in the middle of her oral evidence. The amendment was to allow for Funeral expenses (KShs 31,680) and vehicle search fee (Kshs 500). There was also the cost of transporting the body from Kisumu to Tigoi. There does not appear to have been any adjournment to allow the Defendant and his lawyer to consider the new evidence. Even in the Plaintiffs own evidence it is referred to as "a bunch of receipts". Did that bunch or receipts relate to the funeral. Also taken into account was the cost of obtaining letters of administration ad litem including the fee for the affidavit and demand letter etc. The Learned Trial Magistrate allowed those as special damages, whereas they are in fact legal costs which should be contained in the bill of costs and not the plaint. There was also a claim for KShs20,000 for transporting the body. Again, the specific piece of evidence that raises that claim to special damages is neither identified nor put to the witness in evidence.

26. The circumstances of the case are indeed sad, the Deceased was a young man employed as a teacher who lost his life. Therefore general damages for pain and suffering and loss of expectation of life would be allowable on a finding of liability. There is not much dispute between the Parties as to the parameters of such damages. The injuries were severe but the duration was relatively short. The Deceased passed away the next day. However, the trial magistrate heard no evidence about the injuries and the suffering that accompanied them. There was no medical evidence adduced save for the medical receipts. As to funeral expenses, there was no consideration given to the possibility that the Deceased may have received a contribution from his employers. Were there any death benefits. The contract of employment was not addressed. The Learned Trial Magistrate based his entire decision on a single payslip.

27. As to the question of loss of dependency, the Learned Trial Magistrate used a multiplier of 25 years. That appeared to be based on the submissions of the Plaintiff that the Deceased had 25 years left of his working life. However, the approach taken is unrealistic. The Learned Trial Magistrate failed to take into account, the degree of dependency. The Plaintiff who was his mother gave evidence that she relied upon him to pay school fees. She was said to be a retiree, that suggests she may have some income and/or pension. Further, the individuals for whom school fees was said to be payable were aged 24 and 20, in other words adults. A multiplier of 25 suggests they would remain in school for the next 25 years. That is not plausible. Further, it is assumed that they will never work to support themselves or their mother. Again, that seems highly unlikely. Further, there was no consideration given to the fact that the Deceased had a home separate from his mother – at his place of work where he would have expected to apply some of his income. He was also of an age where marriage and a

family of his own would have been a reasonable expectation. In that case, he would not have been able to apply the vaste proportion of his income to his mother and adult siblings.

28. In summary the Learned Trial Magistrate misdirected himself in making a finding of liability in favour of the Plaintiff and the Deceased because that went against the weight of the evidence. From the evidence actually recorded it is clear that PW-1 did not witness the accident. Nor did she produce any medical evidence as to the cause of death. PW-2 was a police officer from Kisumu (where the Deceased was taken). His evidence was evasive and inconsistent – even from what was recorded. The Parties Submissions supplement the evidence on the record, for example it is said the PW-3 had the Police file. That is not recorded and only the abstract is produced. Again, there is insufficient evidence to make a finding on a balance of probabilities. As to the time of the accident, the Plaintiff's Witnesses are adamant it took place around 7.30-745pm but that it was dark. The Defendant gave evidence that it was 10 pm. That anomaly could have been clarified by producing the records of hospital admission. Again that was not produced. What was produced was a till receipt and PExh 2 from Nyanza Provincial Hospital which suggests that the Deceased received treatment on 9th December 2015, that is after he had passed away on 8th December 2015.

29. For the reasons set out above, it is clear that the Learned Trial Court misdirected itself in coming to the decision on liability as well as the quantum. The Judgment of the Lower Court does not give reasons for its findings contrary to the weight of the evidence. Further, it is clear that the Defendant did not have a fair trial in particular on the question of amendments mid-hearing. As a consequence the judgment must be and is hereby set aside on the issue of liability as well as the issue of quantum.

30. The Parties have asked the Court to make its own finding. Unfortunately, the Court is prevented from doing that because of the state of the Lower Court File. Proceedings are said to be Certified yet they contain errors evidence is not fully recorded nor contained in the Record of Appeal. Further, Both Counsel allude to evidence given that is not recorded in the proceedings. The alternative therefore would be a re-trial. That would involve delay and expense.

31. In the circumstances, this Court finds that a more appropriate avenue of resolution would be a mediated settlement. Therefore, the Parties are directed to refer the dispute to Court Annexed Mediation under the auspices of the High Court of Kakamega.

32. Costs are reserved pending the outcome of the Mediation. In the event that a mediation is not successful the Court will give further directions.

33. It is regrettable that this Judgment could not be delivered on the due date. The delay was occasioned by a bereavement and then the containment measures for Covid-19. Any inconvenience caused as a result is regretted.

Order Accordingly,

FARAH AMIN

JUDGE

DELIVERED, DATED AND SIGNED THIS THE 30TH DAY OF NOVEMBER, 2021 IN KAKAMEGA VIRTUALLY IN COMPLIANCE WITH THE COVID 19 PROTOCOLS