REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 123 OF 2016

MOTREX COMPANY LIMITED.....APPELLANT

VERSUS

ANNA JELIMO & TARALEY CHERUTO (suing as the legal representatives of the estate of

SAMSON KIPKOECH-deceased).....RESPONDENT

(Being an appeal from the judgment/decree of Hon. Margaret Wambani (C.M),

Eldoret delivered on 2nd August, 2016 in Eldoret Cmmc no.832 of 2014)

JUDGMENT

1. The appellant **(MOTREX COMPANY LIMITED)** was aggrieved by the judgment of the lower court where had been sued by (**ANNA JELIMO & TARALEY CHERUTO)** the respondents, who were administrators of the estate of the deceased (SAMSON KIPKOECH). The respondents claim was for general and special damages against the appellant who was the owner of motor vehicle registration number **KBK 015/ZD 248/Mercedes Benz/Trailer Bhachu**. It is alleged the accident occurred along **Eldoret-Webuye** road and it was as a result of the driver's negligence that the accident occurred which was fatal.

2. The respondent denied the respondent's allegations especially that the deceased was a pedestrian when he was knocked down.

3. The matter proceeded to hearing and the respondents availed one witness where the defence did not avail any witness.

4. The court delivered judgment as follows:

i. Loss of expectation of life……. Ksh. 150,000/=

ii. Loss of consortium……. Ksh. 600,000/=

iii. Loss of dependency……Ksh. 4,441,440

iv. Special damages……. Ksh. 68,200/=

5. The respondents were aggrieved and this led to the filing of an appeal. The following issues were raised.

i. That the trial magistrate erred and misdirected herself in finding the appellant 100% liable notwithstanding the evidence on record to the contrary.

ii. That the trial magistrate erred in in awarding damages under the head of loss of consortium for Ksh. 600,000/= when the same was not specifically pleaded by the respondent and neither was it applicable in the case.

iii. That the trial magistrate erred in law and in fact and misdirected herself in adopting **Ksh. 68,200/-** as special damages despite evidence to the effect that the same was not specifically proven.

iv. That the trial magistrate erred in law and in awarding **Ksh. 20,000/-** as general damages for pain and suffering, which award was

excessive and unjustified considering that the deceased died on the spot.

v. That the learned magistrate erred in law and in fact and misdirected herself in subsequently awarding **Ksh. 5,129,640/-** to the respondent, which award was manifestly excessive and unfair given the circumstances of the case.

The appellant urges that the judgment/decree of the honorable court dated 2.8.2016 be reviewed and/or set aside. That the respondents do bear the costs of this appeal.

6. The parties canvassed this appeal by filing submissions and highlighting them in court where the appellant argued that they were able to prove its driver was not negligent as alleged by the respondents, and referred to **Section 107(1) of the Evidence Act** provides that whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In support of this line of submission the appellant cites **M'MBULA CHARLES MWALIMU V. COAST BROADWAY COMPANY LTD [2012] eKLR**, which held that the respondent was required to prove on a balance of probabilities, the facts it asserted.

7. It is submitted that PW1 was not at the scene of the accident, but was informed later about the incident. She did not produce any sketch maps, which it is argued would have assisted the court to determine the issue on liability. In support of this argument the appellant refers to the decision in **Ahmed Abubakar Hassan v. A.G [2013] eKLR**, Justice Chemitei held as follows:

> **"the circumstances that led to the accident are solely based on what the plaintiff told the court. There is no sketch map or any other drawings from the traffic department to support or corroborate this."**

Also that in **Florence Rebecca Kalume v. Coastline Safaris & Anor [1996] eKLR**, it was held that particulars of negligence must be proved before the court is called upon to find fault upon the defendant.

8. The respondent's reliance on the doctrine *res ipsa loquitar* is contested as baseless since there was no proof of facts consistent with negligence on the driver's part, as was emphasized in **PI v. Zena Roses Ltd & Anor [2015] eKLR** as follows:

> **"Res ipsa loquitur does not mean, as I understand it that merely at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak eloquent of the negligence of somebody who brought about the state of things which is complained of."**

9. That the respondent had a burden to prove the causal nexus between the driver's negligence and the accident, further that from the evidence adduced on a balance of probability, a connection between the two has to be connected, as it was held by Justice Visram (as he then was) in **STAPACK INDUSTRIES V. JAMES MBITHI MUNYAO, Nairobi HCCA No. 152 of 2003.**

10. It was further adduced that in the case the court finds the driver was partly to blame then liability be apportioned in the ration of **50:50**. The driver of motor-vehicle KBK 015E/ZD2487 was not charged with reckless driving, in **ANNE WAMBUI NDIRITU V. JOSEPH KIPRONO ROPKOI & ANOR [2004] eKLR,** there was scanty evidence on record and the court apportioned liability equally.

11. The appellant cited the cases of **KENYA RAILWAYS CORPORATION V. SAMWEL MUGWE GIOCHE (2012) eKLR AND BOBMIL INDUSTRIES LTD & ANOR V. KENNEDY INDAKWA ESHITEMI [2012] eKLR** to contend that court awarded damages in excess for pain and suffering yet the plaintiff died on the spot, so a sum of Ksh. 10,000/- would be sufficient**.**

12. As regards special damages, it was submitted that these had to be pleaded and specifically proved, pointing out that in **JOSEPH GITONGA NDIRANGU V. TOTAL(K)LTD [2014] eKLR**. That in the present case, respondents had pleaded Ksh. 68,000/- but had proved only Ksh. 21,200/-.

13. It was further submitted that there was no law which provided for loss of consortium. That fatal accidents are governed by the **Law Reform Act and the Fatal Accidents Act**. The appellant urged this court to set aside the award in it is entirety drawing from Githua (J) IN **INNOCENT KETIE MAKAYA DENGE V. PETER KIPKORE CHESEREK & ANOR [2013] eKLR** as follows

> **"In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/ her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own. In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law and cannot be allowed to stand. It is consequently set aside."**

That the same sentiments were expressed in **David Mwende & Anor v. Alice Kawira suing as the administrator of the estate of John Munyoki Malyunga (deceased) HCCA (2007) eKLR.**

14. That in any event that the award was too excessive and therefore the same be set aside.

15. The respondent's counsel submitted that an eyewitness (PW2) was at **Kosachei Trading Centre** when he saw a lorry coming from Eldoret direction driven at a high speed and it knocked down the deceased throwing him into a trench on impact. The lorry did not stop.

16. That the police abstract produced by consent confirmed the occurrence of the accident and was uncontroverted. Further, the appellant had pleaded negligence and/or contributory negligence but the same was not proved. It was contended that the driver ought not have been driving

at a low speed while at the trading center.

17. Whilst referring to **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES & ANOR V. A.M LUBIA & ANOR (1982-88) KAR 727** the court was reminded that a superior court can only disturb an award of damages by the trial court if it established the award was either inordinately too low or too high, or where the trial court took into account irrelevant factors or failed to consider relevant factors so as to arrive at an erroneous estimate. See.

18. On special damages, pleaded at **KS. 68,200/-**, it is submitted that the same was proved by production of receipts. As regards funeral expenses, it was argued courts have always awarded a reasonable amount even where no receipts are availed. In support of this submission the respondent cited **ALICE OLUKWE (SUING ON BEHALF OF MUREEN ALUKWE(DCD) V. AKAMBA PUBLIC ROAD SERVICES & ORS, Nakuru HCCC No. 26 of 2005**.

19. That on the issue of loss of consortium, the widows testified that they had lost a companion and had not remarried. The Court of Appeal in **SALVATORE DE LUCA V. ABDULLAHI HEMED KHALIL & ANOR [1994] eKLR** the court made an award of Ksh. 40,000/=. It was brought to the court's attention that in **Innocent Ketir Makaya Denge v. Peter Kipkore Cheserek & Anor**(Supra), cited by the appellant the court upheld the award on loss of consortium as was awarded by the trial court. In the present case there were two widows, each was awarded Ksh 300,000/= for the same.

20. With regard to loss of dependency, it was pointed out that the deceased was aged 40 years and a teacher by profession. That he earned KHz. 27,759/- as supported by the pay-slip, which was adopted by the multiplicand. A multiplier of 20 years and dependency ratio of 2/3 was applied, resulting to the figure of **Kshs. 4,441,440/-.** The court deducted the award under Law Reform Act, and the total award was arrived at correctly and not to be disturbed. The respondent urged for the appeal to be dismissed with costs.

Analysis and determination

21. This is the first appellate court whose duty is to review the evidence adduced in the lower court with a view of satisfying itself that the same was well-founded. In **Selle & Anor v. Associated Motor Boat Co. Ltd & Ors [1968] EA 123,** it was held 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." See also the Court of Appeal decision in Tayab v. Kinanu [1983] eKLR 114."**

Analysis of evidence

22. The trial court acknowledged that whereas the driver of the trailer reg. No.KBK 015E/ZD 2487 Mercedes Benz did not testify, the respondents had an eye witness, and relied on the police abstract which was produced by consent of both parties. Further, that there was no evidence to rebut what PW2 gave as the existing set of facts prior to the accident, and the sum total of the evidence as offered by the respondents was uncontroverted.

23. The respondent's case was purely on negligence by the appellant, its driver, agent or employee. The respondents also invoked the doctrine of *res ipsa locquitur*.

24. 32-year-old **AMINA JELIMO** (PW1) the widow to the deceased, told the trial court that she was a housewife, and had a 27 year old co-wife named **TALALEI CHERUTO-** both were housewives, and had not remarried. It was her evidence that the accident occurred on 26.6.2014 along Eldoret-Webuye road at Kosachei area at 8.00 p.m., and she was informed the deceased had died instantly. At the time of his death, the deceased was 40 years old. She produced the death certificate and the pay-slip both had not remarried.

25. Pw2 **(KIPROTICH ROBERT NGETICH)** testified that on 26.7.2014, at 8.30 p.m. he had gone to watch football at **Kosachei Trading Centre** when he saw a Nissan which came from Turbo direction, and passengers alighted. Then a lorry christened **MOTREX**, registration No KBK 015E which was being driven at a high speed, came from Eldoret direction and hit someone, whom he recognized as **KURGAT**. He knew KURGAT as a teacher. However, the lorry did not stop. There was moonlight and electricity light that shone from the nearby premises thus enabling him to see what was happening. On cross-examination he was categorical that the deceased was at the motor-vehicle stage, and the driver did not hoot at the deceased who was then off the road. He denied suggestions that the deceased alighted from the matatu, and clarified that the Nissan was far away from the lorry which was on the left side of the road as one faces Turbo.

Liability

26. The respondents blamed the driver of the lorry for causing the accident. PW2 testified that the lorry was at a high speed and it sped off after the accident. There was moonlight and that is how he saw the vehicle speed. The witness explained that although he was watching football and the road, he was facing the road and could thus see what transpired.

27. Further the police abstract produced is dated 23.7.2014, it indicates an accident occurred on 26.6.2014 at 8.30 p.m. and that no person was charged for the occurrence of the accident, as the same was still under investigations. By the time the parties were testifying in court, there was no conclusion on the matter. The respondents did not avail the police file in relation to this matter if at all the same was under investigations.

28. The burden of proof in civil cases is on the one who alleges as held in Section 107 of the Evidence Act. In **HENDERSON V. HENRY**

E. JENKINS & SONS [1970] AC 282 at 301 Lord Pearson at letter D states:

> **"In an action for negligence the plaintiff must allege, and has a burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants."**

29. The respondents claim was on negligence and in the case of **TREADSETTERS TYRES LTD –VS- JOHN WEKESA WEPUKHULU** [2010] eKLR Ibrahim J. in allowing an Appeal quoted **CHARLESWORTH & PERCY ON NEGLIGENCE, 9TH EDITION at P. 387** on the question of proof, and burden thereof where it is stated: -

> **In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.**

30. The respondents further relied on the doctrine of *res ipsa loquitor* which was denied by the appellants. The appellant's argument was that the mere occurrence of an accident, was not proof that it been caused by their driver. The respondents maintained that the driver's negligence led to the occurrence of the accident. This doctrine is used when facts speak for themselves, and a solution has to be found whether those established facts, negligence was inferred, as was held in **BARKWAY V. SOUTH WALES TRANSPORT CO. LTD [1950] 1ALL ER 392 at 393 B**, these words were referred to **in NANDWA V. KENYA KAZI LTD [1988] KLR pg. 491.**

31. The evidence by the eye witness described clearly how the lorry approached at a fast speed, did not hoot and swept off the deceased who was standing on the side of the road at a motor-vehicle stage, the impact threw him into a trench. Despite contesting this version of events, the appellant's driver did not testify to even claim that the deceased was attempting to cross the road or was on the road. The refrain about contributory negligence therefore did not arise. The facts presented, on a balance of probabilities established and indeed led to the finding that the driver of the said vehicle was to blame and I do not find any error on the part of the trial court in visiting liability at 100% against the appellant.

Production of police abstract

32. The police abstract which indicates there was an accident involving the deceased and the said motor vehicle was produced. The abstract's content was never challenged in cross-examination, thus the evidence adduced that the said motor vehicle caused an accident remains unchallenged. I agree that the abstract was an indication that an accident was reported at a certain police station, in **TECHARD STEAM & POWER LIMITED V. MUTIO MULI & MUTUA NGAO [2019] eKLR**, the learned judge held as follows:

> **"However, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR *it was held:***

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."**

Damages

Loss of consortium

33. The appellants' contention on loss of consortium is that the same was not awardable under the law. The respondents contend that the widows to the deceased had lost a life partner and had stated that they had not remarried. The trial court awarded damages in the sum of Kshs 600,00/-. In ***SALVADORE DE LUCA V. ABDULLAHI HEMEDI KHALIL & ANOR* [1994] eKLR,** the three judge bench of the Court of Appeal held as follows:

> **"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of KShs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."**

There are two widows with a total of 7 children ranging between ages 16-4 years. The court had its own discretion in awarding this. The widows were fairly young at the time-both were under 35 years. What is Loss of Consortium? My understanding is that this usually arises as

part of a personal injury claim, a loss of consortium action is usually a standalone claim brought by the spouse or family member of a person who has been injured or killed as a result of the defendant's negligent or intentional action. The idea is that, as a result of the defendant's conduct, the person who was injured or killed cannot provide his or her spouse or family member with the same love, affection, companionship, comfort, society, or sexual relations that were provided before the accident. So, the spouse or family member of the injured person has a claim for those losses.

Typically, claims for loss of consortium are not awarded unless the injured person dies or suffers a severe, long lasting, or permanent. Factors to take into consideration include whether the marriage suffered any hardships or tribulations prior to the injury—such as separation, criminal charges, or abuse. There is nothing on record to suggest that the deceased's marriage had suffered any of these

A claim for Loss of Consortium falls under the category of "general" or non-economic damages, meaning they are losses for which money is only a rough substitute. In a normal marriage one would expect partner's to enjoy companionship and sexual relations, and that the incident affecting the significant other has impacted on the partner's quality of life. Certainly death robs one of all the companionship, love and benefits that accompany marriage, yet should such damages be awarded in every instance where one loses a spouse, or should it only apply where a spouse survives but with limiting residual effects which impact on the ability to easily or comfortably consort?

Visram (J) in the case **of RUTH CHEPNGENO MUTAI VS PATRICK WAJERO OLOO AND ANOR [2016 eKLR** held that as a result of her husband's death, the plaintiff who had no intention of remarrying was entitled to damages for loss of consortium. I think whereas there is a legal basis to give an award under this head, the decision is purely discretionary. In this instance, the trial magistrate gave no reason whatsoever for the damages awarded. I am of the view that in this instance the only statement given to the trial court was that the widows had not remarried- but their intention as regards future liaisons was not stated. In any event, it might also be useful to consider their ages and whether that would be an inhibiting factor, or an advantage to the surviving partner. In this instance I find that the award under this head was not justified, and it is set aside

34. On damages for **pain and suffering**: Damages under this head are usually determined by the length of time the deceased endured pain and suffering before death. The deceased's wife (PW1) testified that the deceased died on the spot. The trial court awarded the sum of Kshs. 20,000/-, which the appellant has contested as being manifestly high. There was no pain that he suffered, and the conventional figure awarded by courts has been Ksh 10,000/- **[SEE KENYA RAILWAYS CORPORATION VS SAMWEL MOGERE GIOCHE (2012] eKLR**. The trial court thus erred by awarding an inordinately excessive amount and with no reason or explanation given, I therefore set aside the sum of Kshs, 20,000/- and substitute it with a sum of Kshs 10,000-.

35. The damages awarded for **loss of life expectation,** in the sum of Kshs 150,000/- is NOT contested. Likewise, the sum of Kshs. 4,441,440/-awarded under the head loss of dependency is not contested

36. On special damages, it is trite law, that they have to be specifically pleaded and specially proved, as was held in **FRANCIS MUCHEE NTHIGA V. DAVID N. WAWERU (2014) eKLR**. The appellant's contention was the respondents did not produce receipts and suggests that special damages should only amount to Kshs. 21,000 as supported by the produced receipts. However, I take judicial notice that in the natural social context once someone has died, and there are identifiable family members, naturally expenses will be incurred for the funeral. These involve mortuary charges, transporting the body, buying a coffin in which to bury the body, paying the grave diggers, and transporting family members from their residence to the mortuary and back. Indeed, the trial magistrate bore in mind that the respondents must have incurred some expenses towards the funeral and observed that they produced invoices and receipts which covered:

Kshs 200/-paid for the death certificate.

Kshs 13,200 for the post mortem

Mortuary fees Kshs 20,000/-

The award was not improper, inordinately unreasonable or excessive of Ksh 68,200/ was thus proved.

37. Consequently, the appeal only succeeds on the issues of damages awarded for pain and suffering which is set aside and substituted with a sum of Kshs. 10,000, and damages for loss of consortium, which is hereby set aside. The awards under all the other heads were reasonable and are upheld. The appellant shall bear 2/3 of the costs of this appeal, whilst the respondents shall bear 1/3 of the costs.

Delivered and dated this 27th day of January 2020 at Eldoret

H. A. OMONDI

JUDGE