REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 31 OF 2018

ACCELLER GLOBAL LOGISTICS .... APPELLANT

VERSUS

BOO AND HBO (Both suing as the Administrators and Legal

representatives of the estate of DAA (Deceased)...........RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. D. M. Ndungi delivered on 6th June 2018 in Mariakani SRMCC No. 282 of 2016)

Coram: Hon. Justice R. Nyakundi

Hamilton Harrison & Matthews Advocates for the appellant

Ameli Inyangu Advocates for the respondent

JUDGMENT

This appeal by **Acceller Global Logistics** hereinafter the appellant being dissatisfied with the Judgment of the trial court delivered by **Hon. D. M. Ndungi** on 6.6.2018 has appealed to this court seeking leave of the court to have it set aside majorly as deduced from the Memorandum of Appeal on the issue of assessment of damages.

Background

This is a claim filed by the administrators to the estate of the deceased **DAA** following wrongful injury and death due to a Traffic Road accident which occurred on 13.2.2016 along Mombasa-Nairobi Highway specifically at Bonje area.

As pleaded in the Plaint, the deceased was a lawful passenger in motor vehicle registration number KCC 135R when motor vehicle registration number KBP 476A ZC 2679 Nissan Diesel, being driven by the appellant's driver, employee or servant was so carelessly driven, controlled that it veered off its lane to the motor vehicle KCC 135R in which the deceased was a passenger on board. Consequently, the deceased suffered fatal injuries.

At Common Law, the administrators to the estate **BOO** and **HBO** brought this action against the appellant for wrongful death to obtain damages under the Law Reform (Miscellaneous Act and the Fatal Accidents Act).

The trial commenced in earnest before the trial court and from the analysis of the evidence placed before Learned Magistrate, Judgment was entered in favour of the respondents in the following terms:

(a). Pain and suffering *Kshs. 100,000/=*

(b). Loss of expectation of life *Kshs. 100,000/=*

(c). Loss of dependency *Kshs.5,400,000/=*

(d). Loss of consortium *Kshs. 100,000/=*

(e). Special damages Kshs. 325,400/=

(f). In addition the appellant was also condemned to pay interest and costs of the suit.

It is this award the appellant has appealed against to this court for it to be set aside on the following grounds:

(i). The Learned Magistrate erred in Law and fact in the assessment of damages awardable leading to excessive amounts on all limbs of the award under the Law Reform and Fatal Accidents Act, not forgetting the claim on loss of consortium.

(ii). That the Learned Kadhi misapprehended and misunderstood the application of the appellant and the implication thereof.

(iii). That the Learned Kadhi erred in Law and in fact by misdirecting himself by admitting evidence from the bar.

(iv). That the Learned Kadhi erred in fact and Law in failing to take into consideration all the evidence and documents produced and filed by the appellant vis-a-viz no evidence produced the respondent.

(v). That the Learned Kadhi erred in fact and Law by adjudging that the appellant would only be admitted to the suit as a witness only and not as a party.

(vi). That the Learned trial Judge erred in law and fact in failing to weight all the evidence placed before him before delivering the Ruling.

It is necessary to go in depth to the evidence which was before the trial court. The respondent **BOO** testified on the *locus standi* to sue on behalf of the estate pursuant the grant of letters of administration admitted as **exhibit-2.** His evidence as regards the accident was based on the police abstract and the investigations carried out by **PW2 CPL Philip Kurgat**.

According to **PW2,** in the course of investigations it emerged that the driver of motor vehicle registration number KBB 476A Trailer ZC 2679UD owned by the appellant was to blame for the accident. As a result a traffic indictment for causing death by dangerous driving was preferred and at the time pending determination at Mariakani Law Courts referred as **Traffic Criminal Case No. 306 of 2016.**

PW1, further in his testimony told the court that the deceased prior to her death was a lecturer at [particulars withheld] earning gross salary of Kshs.51,000/= as supported with pay slip **exhibit – 8 (b).** The witness also gave evidence that he was dependant of the deceased together with their children **HBO** aged 19 years old, **ID** aged 16 years old, **TO** aged 12 years old. In support of this, PW1 produced birth certificates as **exhibit 7 (a) – (d).** During the burial and interment of the body, PW1 told the trial court that he did incur funeral expenses and other incidentals totaling to Kshs.432,070.00/= which he claims on behalf of the estate. In this claim he produced a bundle of receipts marked as exhibit 6 (a) – (k).

Mr. Benard Nzoro (PW3), testified as an eye-witness to the accident in which he described to the court that a matatu registration number KCC 135R was hit by a lorry/trailer KBP 476A along Bonje area Mombasa-Nairobi Highway. In PW3 observation, the accident occurred as a result of the lorry KBP 476A hitting a pothole – veering off the road into the lane of the Nissan Matatu KCC 135R and there was a collision. As a consequence, some of the passengers suffered fatal injuries.

The appellant at the time was defending the claim opted not to call any evidence as a rejoinder to the respondent’s case. Having ascertained the evidence, the undisputed facts of this claim against the appellant remained as follows:

(a). The deceased Dorothy Adhiambo Aliet was a lawful passenger travelling aboard motor vehicle registration number KCC 135R along Mombasa-Nairobi Highway on 13.2.2016.

(b). That on the material day, a collusion occurred in which the appellant’s motor vehicle KBP 476A hit the aforesaid motor vehicle KCC 135R.

(c). That the deceased sustained fatal injuries soon thereafter the collusion.

(d). That from the police investigations, the driver of the offending motor vehicle KBP 476A was charged with the offence of causing death by dangerous driving currently pending hearing at Mariakani Law Court referred as Traffic No. 306 of 2016.

(d). That the accident happened in the left lane as it hit the matatu.

(e). That the vehicle KCC 135R was maintaining its proper lane. Therefore, the appellant’s motor vehicle failed to keep a proper look out.

(f). That the respondent has lawfully petitioned and granted letters of administration intestate to file this claim against the appellant.

With this in mind, I now proceed to consider the issues raised on appeal.

Analysis and determination

It is to emerge on subsequent analysis that the submissions by both counsels would be factored in the determination of the appeal. The principles of this court sitting on appeal from the decisions of the subordinate courts is well stated in the authorities of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi CA 345 of 2000, Peter v Sunday Post {1958} EA 424 at Page 429:**

> ***"The court recognized that it is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judgment tried the case and now has had the advantage of sitting and hearing the witness." This court however has the power to interfere where the finding is based on no evidence, or a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."***

The Law

(a). Liability

On the question of liability, the trial court had at its disposal direct evidence from **PW3 – Benard**, who happened to be at the scene during the collision and occurrence of the accident. The Traffic Act Section 46, 47 and 49 places a duty of care at every motorist while driving on the road to observe speed limit, taking into account the safety of other road users, the nature and condition of the road.

Notwithstanding the pending traffic proceedings, the appellant driver has been arraigned at Mariakani Law court charged of causing death by dangerous driving contrary to Section 46 of the Traffic Act.

He was therefore under a duty not to drive the said vehicle in a manner that was dangerous to the public and other road users.

The tort of negligence pleaded by the respondent was hinged on the doctrine of vicarious liability.

It has long been settled Law by the English Courts in **Rambarran v Gurrucharan {1970} 1 ALL ER 749 –** that:

> ***"Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to sue the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact. Additionally, the onus of displacing the presumption is on the registered owner and if he fails to discharge that onus, the prima facie case remains and the plaintiff succeeds against him."***

The other precedents I have gleaned through, on this subject of vicarious liability and negligence are from our jurisdiction in **Marcani Athman Senengo v Sun 'n' Sand Beach Hotel and 3 others HCCC NO. 72 of 2002** where in this case the court held that:

> ***"It is a very salutary principle, I think that when one man by his negligence puts another in a position of difficulty, the court ought to be slow to find that other man negligent, merely because he may have failed to do something which looking back on it afterwards might possibly have reduced the amount of damage. The question is whether at the time he ought to have done it and was negligent not to do it."***

A comparable authority on this principle was that of **James Macharia Gakere & Another v Peter Joseph Ngigi Civil Appeal No. 36 of 1980** also followed in **Jane Waithera & Another v Ndirangu Wakwa HCCC NO. 3022 of 1997** where it was held:

> ***"A driver who is neither negligent nor reckless and is driving on his correct side of the road and a vehicle is approaching him form the opposite direction on the wrong side of the road zig-zagging at high speed and which frustrates his ability to take avoiding action in circumstances when it is also not possible to tell even with the coolest Judgment where the other vehicle will land or hit or that injury will be avoided by brackings or reducing speed it could be unwarranted unless there is some special circumstances to justify it to place the burden of a higher degree of care upon such a driver for it would require of him a computer precision reaction which I fear human being are not yet capable of."***

What one must discern from these principles is that the respondents at the trial court bore the burden of proof of their case to proof matters in issue on negligence and vicarious liability against the appellant.

The case in my view was decided based on the direct evidence of PW3 and circumstantial evidence adduced by PW1 and PW2 respectively. The respondent burden of proof was to prove the pleaded case as asserted in the Plaint.

Also it must be noted that the respondents established a prima facie case on causation and blameworthiness against the appellant. In such a case, the burden of proof shifted to the appellant to disprove the respondents case to defeat the claim on breach of duty of care and resultant negligence. From a consideration of the evidence at the trial court that evidential burden was therefore never discharged to controvert the facts on causation and proximate cause of the accident. This ground was not able to sustain the appeal.

In my view, the Learned trial Magistrate acted perfectly and properly so to say, in exercising discretion judiciously to make a finding that the appellant was wholly to blame for the accident.

The most contested issue in this appeal is on damages under the Law Reform and Fatal Accidents Act.

The appellant's counsel was apparently dismayed by the punitive damages which he described in the Memorandum of Appeal as so

inordinately high and excessive that it's a miscarriage of justice.

The reason for this submitted Learned counsel was that in assessing damages under the limb of dependency a multiplier adopted of fifteen (15) years was on the higher scale. From his perspective Learned counsel contended that a multiplier of fourteen (14) years would have been sufficient to compensate the respondent for loss of dependency as claimed in the Plaint. For this proposition he cited the principle in the case of **Samwel Mwangi & Nation Media Group {2016} eKLR.**

Secondly, Learned counsel was uncomfortable with the income of Kshs.45,000/= used to calculate the award of damages. In this regard he proposed a figure of Kshs.32,000/= as an appropriate net income to apply on the circumstances of this case. It was also contended that the ratio of 2/3 in favour of the respondents was too speculative and as a result the Learned Magistrate arrived at an erroneous estimate of the award. Learned counsel urged this court be guided by the principles in **Janet Chonge Walumbe & 2 Others v Julius Mwaniki & Another {2019} eKLR.**

The respondents' counsel on this front submitted that the grounds advanced by the appellant's counsel to discredit the multiplier, multiplicand and net income are adverse to the prima facie case adduced by the respondent.

Bearing in mind the trial process, the respondent gave evidence to persuade the Learned trial Magistrate the fact in dispute exists. It is more accurately expected that the appellant could have adduced evidence which operates to rebut the prima facie evidence by the respondent.

As such on this ground the respondent is deemed to have discharged the burden of proof under Section 107 (1), 108 of the Evidence Act to obtain Judgment on loss of dependency. From the outset the respondents in their plaint would have the application of the presumptions under Section 119 of the Act based on the facts of the claim applying it, to the common course of events, human conduct an public, or private business in relation to the case. In absence of any evidence to rebut the claim the presumptions would come into play to complete the respondents pleaded case.

Assessment of damages under both statutes with regard to the Law Reform Act (Misc. Provisions Act) tailored under the English principles its intent and purposes is to allow damages claimed by the claimant payable by the tortfeasor for special damages, loss of expectation of life, funeral expenses and lost years.

So in this end, the court in **Rose v Ford {1937} AC 826** held that:

> ***"Whenever a person dies as a result of another's negligence then because before his or her death, he or she had cause of action for loss of expectation of life, that cause survived his or her death for the benefit of his or her estate."***

This principle is though from an English Court is also part of the Law in Kenya as illustrated in the case of **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters and 85 others Civil Appeal No. 125 of 1985**

The scheme of the act has been fortified in a number of decisions which have laid principles and guidelines on assessment of damages. In the case of **Cookson v Knowles {1979} AC 556**, the court expounded the principles in the following passage:

> ***"The court has to make the best estimations that it can having regard to the deceased's age and state of health to his actual earnings immediately before his death, as well as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognized and is clearly sensible, that when the events have occurred, between the date of death, and the date of trial, which enable the court to rely on ascertained facts, rather, than on mere estimates they should be taken into account in assessing damages."***

It is trite as can be deducible from a number of authorities. Thus **P. N. Mashru Ltd v Omar Mwakuro Makenge alias Omar Masoud HCCA NO. 9 OF 2017, Cecilia W. Mwangi & another v Ruth Mwangi {1977} eKLR, Tayabu Kimani {1982 – 88) IKLR, Daniel Kosgei Ngetechi v Catholic Trustee Registered Diocese of Eldoret & Another {2013} eKLR, Adsett v West {1985} 2 ALL ER, White v London Transport Executive {1982} 1QB 489** that in this jurisdiction courts should factor in the following principles dependent on peculiar circumstances of each case:

(i). The death of the victim of the negligence does not increase or reduce the damages for the lost years.

(ii). The sum to be awarded is never a convenient one but compensation for pecuniary loss.

(iii). It must be assessed justly and with moderation.

(iv). Give due disregard to remove inscrutable speculative claims.

(v). Deduct the victim's living expenses during the lost years for they would not form part of the estate.

(vi). The amount will vary greatly from case to case for it depends on the facts of each one including the victims situation in life.

(vii). Calculate the annual gross loss.

(viii). Apply the multiplier (the estimate number of lost working years accepted as reasonable in each case.)

(ix). Deduct the victims probable living expenses of a reasonable satisfying enjoyable life for him or her, and

(x). Living expenses include the reasonable cost of housing, food clothing social activities.

(xi). The figure should be in line with recent awards with similar circumstances.

In addition, **Lord Scarman** in **Gammel v Wilson** succinctly stated:

> ***"If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probability which matters." Subtle mathematical calculations based as they must be on events or contingencies of life, which he will not live are out of place, the Judge must make the best estimate, known facts and on the his or her prospects at the time of his or her death."***

As I embark on this journey to re-assess, and examine the evidence in line with the impugned Judgment of the trial court, I am aware of the principles in the cases of **Butt v Khan Civil Appeal No. 40 of 1977, Channan Singh and Hawa {1955} 22 EACA 129,**

> ***"That this court would duly interfere with the Learned trial Magistrate assessment of damages where it is shown by the appellant that the trial Magistrate took into account irrelevant material or failed to take into account a relevant factor or short of these, that the damages awarded are so inordinately low or high that an error of principle must be assessed."***

Having the aforesaid principles in mind, I can't fathom sometimes the difficulties in my opinion Judges go through to affix a multiplier, multiplicand, annual dependency, amount spent to satisfy enjoyment of life by the victim on clothing, social activities, entertainment, holidays, net annual income at death, etc. This is because, it is now generally accepted that unlike our counter parts in the developed countries accountability as it relates to keeping records, receipts or tracks of income and expenditure statement of account or liabilities is almost nil.

In order to guard against this tedious formula of variances and factorials the court in **Harris v Empress Motors Ltd {1984} 1WLR 2 R O' Cornor L. J** stated as follows:

> ***"In the course of time, the courts have worked out a simple solution to the problem of calculating the net dependency under the Fatal Accidents Act. In cases where the dependants are wife and children. In times past, the calculations called for a tedious inquiry into how much housekeeping money was paid to the wife, who paid how much for children's shoes etc. This has all been swept away and the modern practice is to deduct a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentage have come conventional in the sense that they are used unless there is striking evidence to make the conventional figure in appropriate because there is no departure from the principle that each case must be decided on its own facts."***

The rule embodied in this decision informs the means by which the principle of multiplier, multiplicand, net income in the assessment of damages on claims of this nature play an input to the existing purposeful approach to start with the view that a child of tender years his present or future earnings in most cases may be unknown or almost nil, while an adolescents earnings may be or would be real or minimal depending on the facts of each case. It is a matter of common notoriety that the global sum approach found its way in our jurisprudence as model on assessment of damages.

I now turn my legal guns to the facts of this case and their fit with the above illuminating principles.

(a). Loss of expectation of life

the guiding principle that emerges from the cases of **Stella Awinja and another v A. G. HCC 915 OF 1998, Daiso Kajogi Mmugaa v Francis Muthami CA 118 OF 2010 {2012} eKLR** is that on matters to do with assessment of damages under this head it's a conventional sum that is awarded ranging from Kshs.80,000/= to Kshs.200,000/= depending on the peculiar facts of each case. It is indeed a matter of concern that the award should not be made to remain static given the ravages of inflation.

The question as to whether the claimant can reasonably be compensated without taking into account the effect of inflation and its impact on the value of money is a responsive factor to be taken into account in support of any such assessment.

Keeping in mind this principles and cited authorities, I find no misdirection to interfere with the award on loss of expectation of life. On pain and suffering; in electing to challenge this award, Learned counsel for the appellant opines that Kshs.10,000/= would have been an appropriate assessment. Learned counsel was able to submit that the figure of Kshs.100,000/= was on the higher side reasonably inviting this court to draw an inference that if the deceased died the same day there was no pain and suffering, what the Learned counsel fails to appreciate is the aspect that its difficult to quantify pain. The benchmark for quantifying pain and suffering for an accident victim still remains in the realm of unknown and pauses quite a challenge to both trial and appellate courts.

To strike a balance looking at the authorities and principles developed overtime in our jurisdiction, the severity of injury represents some of the standard criteria explicitly endorsed in the court decisions. My view on this issue is that whoever wrongfully violates on purpose or by negligence the right to life, body, health of another human being has to compensate the damage sincerely caused. It must be wholly understood that pain and suffering as a ground of appeal is hard to make any persuasive arguments about it, for the simple reason that there is

no medico-legal barometer ever developed to measure and compare pain and suffering from one human being with another.

Its sufficient that the court adjudicated claims be guided by the similar awards to assess reasonable awards on this limb.

For this appeal courts have previously spoken as can be affirmed in the cases of **General Motors East Africa Ltd v Eunice Ndeswa & Another {2015} eKLR, George Moga v Nairobi Women's Hospital & 3 Others {2015} eKLR** using sampled decisions the court exercised discretion and awarded Kshs.100,000/= for pain and suffering. I have not been told that the Learned trial Magistrate in relying on such similar authorities he inherently misdirected himself and arrived at an erroneous figure. The attempt made to discredit this award therefore fails.

Loss of consortium

It is also my view that the 1st respondent shall be entitled to a claim for loss of consortium resulting from the negligent act and breach of duty by the appellant: in determining such damages the court has to take into account physical and mental pain, inconvenience, emotional stress and impairment of the quality of life by the claimant.

In the instant case the 1st respondent was married to the deceased prior to her demise through the appellant's negligence. The loss of consortium arises due to lack of companionship including sexual intimacy, because his wife is no longer physically available as a home maker. As properly observed by the Learned trial Magistrate, this was a legitimate claim and again I find no evidence of misdirection or misapprehension of the facts and Law. This ground of appeal fails.

(b). Funeral expenses

As was stated by the Court of Appeal in **Jacob Ayiga Maruja & Another v Simon Obayo {2005} eKLR.** The courts have to make reasonable awards under this claim in the event there are no receipts or other documentary evidence to proof the exact loss and damage arising out of the wrongful act in negligence by the defendant. It is also conceded that such damges fall in the realm of what is commonly known as special damages. The principle that apply is that they must be specifically pleaded and strictly proved.

In the present case, the Learned trial Magistrate considered the evidence by (PW1) as to matters incidental to funeral expenses triggered by the death of the deceased. Apart from the oral evidence (PW1) produced various receipts and documentary evidence totaling to Kshs.325,400/=. It must be said to his favour that at the time of adjudicating the dispute, no evidence was called by the appellant to controvert the credibility and reliability of his evidence to prove special damges christened as funeral expenses; under the Law Reform Act. This ground as advanced for interference by the appellant has no base to stand on. It is therefore lost.

The crux of this appeal was particularly premised on loss of dependency and loss of consortium. I have already stated my view on the loss of consortium.

(a). Loss of dependency

The principles to guide the discretion of the court have been correctly stated in above cited cases elsewhere in this Ruling. The well known interaction of these principles are the elements of multiplier and multiplicand based on comparable awards for loss of dependency.

In the case of **Kimunya Abednego alias Abednego Munyao v Zipporah S. Musyoka & Another {2019} eKLR**, ***"the court adopted a multiplier of twenty (20) years where the deceased was aged forty one (41) years old."***

In the case of **Coast Bus Company v Joseph Maundu Makusu suing as next friend of Jane Paul Mangange'e Tabitha & 2 Others CA NO 56 OF 2016,** the court adopted a multiplier of fifteen (15) years for the deceased aged 42 years. What is the measure of quantum would therefore be assessed within the confines of the guidelines in the case of **Grace Kanini v Kenya Bus Service HCC NO. 4708 OF 1989, Beatrice Wangui Thairu v Hon. Ezekiel Bangetuny & another NAIROBI HCC 1638 OF 1988.**

Involving at all these relevant cases for completeness the respondent consistently established that the deceased was aged forty two (42) years, full of good health working as a lecturer at at [particulars withheld], she earned a monthly salary of Kshs.45,000/=. The letter from the chief indicates that the deceased was summoned by her spouse, the 1st respondent aged 49 years, **HBO** aged 19 years, MS aged 17 years, I 15 years and **TO** aged 12 years old. Taking all the evidence no adverse evidence was adduced to dislodge the statutory position that the deceased could have worked until the retirement age of sixty (60) years or more if the institute which offered her employment was a private college. To this legal position retirement age and the presumptive life expectancy of women in Kenya as at 2018 pegged at sixty nine (69) years, denotes that the deceased years of purchase could have been more than fifteen (15) years. There is no evidence to disapprove the claim that the deceased devoted much of her income to support the best interest of her children and the spouse during her lifetime.

Unfortunately, for reasons not given by the Learned trial Magistrate he applied a lower multiplier of fifteen (15) years instead the appreciative method which would have placed the deceased under the statutory retirement age of sixty (60) years.

In that case the claimant was denied a total of three (3) years purchase on loss of dependency. Since there was no cross – appeal, I reserve any further right to vary the multiplier in favour of the respondent.

I have been referred to a number of issues by the appellant counsel but none of it comes closer to demonstrate that the findings of the trial court was based on no evidence or was on a misapprehension of the evidence or that in assessing damages for loss of dependency he acted on wrong principles. (See **Bundi Marube v Joseph Onkoba Nyamuro {1982 – 88} 1KAR**).

There is no sufficient evidential foundation for this court to conclude that the Learned trial Magistrate failed to exercise proper discretion on the dispute before him and that the decision was erroneous for this court to interfere, vary or quash the impugned Judgment.

That being the view, this appeal is dismissed with costs to the respondent. With this order of dismissal of the appeal, decretal sum deposited in a joint earning interest account of both counsels be released to the respondent forthwith.

Accordingly, the trial court Judgment is affirmed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY 2020

…………………….

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Abeid for Lelu for the appellant

2. Azei for Adhoch for the Respondent