



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 88 OF 2017

HASHI HAULIERS LIMITED.....APPELLANT

VERSUS

RUKIA OSIR OMARI

(Suing as the personal representative of **Billy Osir Omari**)(deceased).....RESPONDENT

(Being an appeal from the judgment and Decree of the Chief Magistrate's court at Molo

(Hon. Mr. James H. Wanyaga, RM) dated the 31st Day of May 2017

in MOLO CMCC NO 75 of 2013)

JUDGMENT

1. Background to the Appeal and Cross-Appeal

The deceased hereof died in a traffic road accident involving two motor vehicles, owned by both the Appellant and the Respondent on the 19th June 2010. Several other persons were either injured or died, resulting to several suits against the parties, filed in the Chief Magistrates Court at Molo. Among the suits are **PMCC No.75 of 2013**, from which the present Appeal and Cross Appeal arose, and **Molo PMCC No. 355 of 2010 – Phyllis Gatheri Koske –vs- Hashi Hauliers**. I have perused proceedings in **Molo CMCC No. 75 of 2013 – Rukia Osir suit as personal representative of Billy Omar) –vs- Hashi Hauliers Ltd both parties** where they were ably represented by their appointed advocates.

2. The appeal and cross appeal challenge the trial magistrate's judgment on both liability and on quantum of damages, respectively.

3. The Appeal on liability

It challenges the matter of liability only, urging that the trial court erred in failing to hold the 3rd party, the Attorney-General, liable for the accident, urging that the Attorney General was properly enjoined as a third party upon which it filed its defence.

This court is urged to set aside the finding that the appellant was wholly to blame, and hold the third party the Hon. The Attorney General, wholly and/or substantially liable for the accident.

4. The Cross appeal on quantum of damages

It challenges the award on damages on grounds that the awards on general damages were inordinately low, and urged for re-assessment upwards, and in particular failure to award damages under the Law Reform Act, adoption of an erroneous multiplier and multiplicand that reduced the awards awardable under the Fatal Accidents Act. This court has been urged to re-asses the damages.

5. Adoption of the judgment on liability in the Test suit **CMCC No. 355/2010** was set aside, upon application on the 30th July 2017, after which evidence on liability was adduced by the parties witnesses which evidence is well recorded.

There were two vehicles involved in the accident.

The Appellant's vehicle registration No KAY 524E, a Prime Mover and Trailer No. ZC 4985, and GK A 87000 – Land Rover, in which the deceased was a passenger on the fateful date.

6. The Respondent blamed the prime Mover/trailer for the causation of the accident and stated the particular of negligence in the plaint.

In its statement of defence, the Appellant denied having caused the accident, and blamed the Government vehicle (aforestated) to have wholly or substantively contributed to the accident, and sought to enjoin it by way of 3rd party proceedings.

7. The appellant submits that it indeed enjoined the 3rd party to the proceedings, a fact denied by the Respondent.

The court record shows that an application dated 5th November 2013 was filed seeking leave to enjoin the 3rd party pursuant to the orders for leave issued on the 4th December 2013, which were upon the plaintiff and received on the 2nd April 2014.

Following thereafter, an appearance and 3rd party defence were filed on the 19th June 2014 denying liability. Directions on the manner of hearing the suit were taken on the 25th September 2014.

Upon application, an order was issued that the issue of liability would be heard during the interpartes hearing of the suit.

8. Notice under **Section 13A** of the Government Proceedings Act is dated 11th September 2013, close to three years after the accident.

In its defence, the 3rd party pleaded Limitation under Section 13A , Cap 40.

It appears from the record that the 3rd party was not served with the hearing notice for the 3rd November 2016 when hearing commenced. The Respondent called one witness and the appellant two. The case was closed, and both the respondent and the appellant filed their written submissions.

9. Trial court's findings on liability

(a) That the Appellant's driver was wholly to blame of the accident

(b) That the 3rd party was not properly enjoined in the proceedings, and never participated in the proceedings.

*(c) That no liability could attach to the 3rd party as the Notice under **Section 13A Cap 40** was not served as provided under the Act.*

(d) That the appellant was 100% liable for negligence, and damages.

10. Analysis and findings

I am persuaded that the 3rd party was properly enjoined into the proceedings, having been served with the notice under **Section 13A, Cap 40(GPA)**. This is evidenced by the party's filing of its defence.

It provides as follows:

13A (1) No proceedings against the Government shall lie or be instituted after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

11. **Section 3(1) and (2) of the Public Authorities Limitations Act** further provide that

3(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action .

12. Though the notice was served, it was clearly outside both periods as mandated under the two statutory provisions.

13. Up and until 2012, service, of the statutory notice to the Attorney General prior to filing of a suit against had to be adhered to. However, the same was declared unconstitutional, and any other statute that tends to bar suits being instituted against the government or public authorities after some stated periods.

Majanja J in **Kenya Bus Limited and Another –vs- Minister for Transport & 2 others (2012) e KLR rendered that Section 13 A of GPA** as a mandatory provisions of **Article 48** of the **Constitution**, while the Public Authorities, Act provides for extension of time for limitation, thus does not impose any hurdles to the administration of justice. I am not aware that the said holding has been set aside or varied.

To that extent then, I agree with the appellant's submissions that the notice of intention served upon the 3rd party, the Attorney General though served outside the limitation period was good in law.

The trial court therefore erred on that matter in its judgment.

14. I have analysed the proceedings before the trial court. I find that the 3rd party was properly enjoined to the proceeds by pursuant to provisions of **Oder 1 rule 15 and 16 of Civil Procedure Rules**.

As to the Notice of Intention to sue the Government, I have confirmed that the same was served, duly received and stamped, on the 2nd April 2014. It matters not that it was so served outside the Limitation period.

15. I further find that the 3rd party, though it filed its defence it failed to participate in the hearing of the suit, due to lack of service by the Appellant and/or the respondent of the hearing notice.

The trial court did not make a finding whether or not the 3rd party had been a served or not at the commencement of the hearing.

The 3rd party was brought into these proceedings by the Appellant.

It was incumbent upon it to serve the said 3rd with the hearing notice.

16. In the absence of the 3rd party's evidence, the trial court could not come to a well-founded decision on liability.

It is trite that a party ought not be condemned unheard – **Article 50 of the Constitution**.

Service of court process is a very vital element in the administration of justice. To that end, the 3rd party lost the opportunity to tender evidence on its defence for no fault of its own. **Musinga JA in Equity Bank –vs- West link MBO Ltd** held that

“courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.”

17. Further, the Court of Appeal in the case **John Wainaina Kagwe –vs- Hussein Dairy Limited Ombasa Civil Appeal No.215/2010** rendered that

“a mere defence without any evidence to support the positions taken by the defendants is nothing... neither can submissions on points of fact support a party's case where no evidenced adduced to prove that fact which is alleged.”

18. I therefore find that the trial magistrate erred in law and fact, by misdirected himself on the application and understanding of **Section 13A GPA**, and thus her finding

“that the case against the 3rd party may not hold even though they never participated to defend themselves. Their defence filed pleading limitation will thus stand and no liability may hold as against them.”

19. I further find that the conclusion by the trial court that

“.....this will therefore mean that the liability decided in RMCC No. 355 of 2010 will apply to the current suit...”

The two findings/conclusions above have no basis whatsoever, nor are they supported by the evidence on record.

20. The trial magistrate having made a finding that RMCC No. 355/2010 was not a test suit, it was wrong for the court to reconfirm that the judgment in the “test” suit would apply.

If that were so, it would then beat sense as to why the trial magistrate presided over the taking of the parties evidence, to establish which of the two parties was to blame, or contributed to the occurrence of the accident.

21. Did the Respondent prove her case to the required standard, in the absence of the 3rd party?

What the appellant urges the court to do is to condemn the 3rd party without hearing its side of the story, for its own fault, in failing to serve it with the hearing notice.

I disagree with the trial magistrate's finding that the 3rd party's defence could not hold due to lack of service of the statutory notice even though they never participated to defend itself.

That is a finding without any legal basis. Had the 3rd party been served with the hearing notice, it could have opted to either call evidence to support its position or not. It is only after such service that a proper finding on liability either in whole, or partly could the trial court come to such decision.

22. The party to blame to blame in all this confusion and mix up is the Appellant, in my view. A party cannot be allowed to benefit from its failures. There having been no other evidence on record for the court to refer to, the said trial court upon analysis of what was before her found the appellant wholly culpable for the accident and the sequel damages.

23. However, the trial magistrate's holding that the 3rd party's defence on limitation is an error of law, the adoption of the judgment on liability in RMCC No. 355/2010 was a serious misdirection and misappreciation of the evidence presented before him.

The above two misdirections, in my view, will not change the fact that the appellant was held liable, on the evidence on record, due to its failure to invite the 3rd party, by serving it with the hearing notice. It can only blame itself. I find no merit in the appeal, on the matter of liability.

24. CROSS APPEAL

It is now trite that an appellate court will not disturb an award of damages unless it is so inordinately low or high as to be erroneous estimate of the damage, or that in assessing the damages, the court took into account, or failed to take into account relevant factors in some material aspect. – **Butt –vs- Khan (1078) e KLR.**

25. The deceased was 21 years old at the date of his demise. The action was brought on behalf of his mother, who was his dependant. It was stated that he was a trained tailor and dress maker, with a monthly income of Kshs.7,288/- part of which he used to support his mother. Damages were sought under both the Law Reform Act and Fatal Accidents Act.

The trial court, in the assessment of the damages adopted the following:

(a) Under Law Reform

- Loss of expectation of life - Nil
- Pain and suffering - Nil

(b) Under the Fatal Accidents Act

Multiplier	-	30 years
Income	-	Kshs.4,792 per month
Multiplicand 1/3	-	Kshs.575,040/=
Grand total	-	<u>Kshs.632,690/=</u>

26. The respondent submits that the above award is too low, and has urged for enhancement.

Firstly, it is not true that the deceased did not have a dependant. The Respondent is the mother of the deceased. Under the **Law of Succession Act, Cap 160, Section 29**, the deceased's dependent, in order of priority are **wife or wives, children of the deceased, deceased's parents, step parents, grand parents, grandchildren etc.**

27. Indeed a parent ranks high on the ladder. It is not clear on what basis the trial magistrate made a finding that the deceased had no known dependant, yet PW1's (Respondent) evidence was that the deceased was her only child with whom she lived with and used to provide her with basic needs.

28. An award under the **Law Reform Act, Cap 26** is available for the benefit of the deceased estate. **Section 2(5) Law Reform Act** provides that the rights conferred by the act for the benefit of a deceased's estate shall be in addition and not in derogation of any rights conferred on the dependents of the deceased by the Fatal Accidents Act, Cap 32 Laws of Kenya, so that when the trial magistrate failed to access the damages under the Law Reform Act, there was a misappreciation of the law.

29. The Court of Appeal in **Hellen Waruguru Waweru** (suing as legal representative of Peter **Waweru Mwenja (deceased) -vs- Kiarie Shoe Stores Ltd (2015) e KLR** set the record clear on whether or not damages awarded under the Law Reform Act ought to be arithmetically deducted from an award under the Fatal Accidents Act, if and when the dependants are the same persons, and thus cleared the confusion created by the holdings in **Beatrice Wangui Thairu –vs- Hon. Bargetuny & Another Nairobi HCCC No. 1638 of 1998, (Ringera J, as he then was), as well as in Musinga J's holding in Lydia Kerubo Otworu –vs- Kipkebe Ltd (2010) e KLR while citing the case Kemfro Africa (1987) e KLR 30**, where the court held that pecuniary loss suffered by a dependant must be offset by any pecuniary gain which accrues to him, to avoid a situation where the same dependant benefits twice on account of the same accident.

30. **Hellen Waruguru Waweru** (Supra) clarified that

“The words “to be taken into account” and “to be deducted” are two different things. The words in Section 4(2) of the Fatal Accidents Act are “taken into account.” The Section says what should be taken into account and not necessarily deducted. It is

*sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what was awarded under the Law Reform Act for the non-pecuniary loss. **There is no requirement in law or otherwise for him to engage in a mathematical deduction.**" (emphasis added)*

The trial magistrate thus erred in both fact and law in failure to access damages under the Law Reform Act.

30. I have considered the proposals by each of the parties, in the Appeal and Cross-Appeal.

I shall access the damages as follows

(1) Pain and suffering	- Kshs. 20,000/=
(2) Loss of expectation of life	- <u>Kshs.150,000/=</u>
Total	- <u>Kshs.170,000/=</u>

31. **Damages under the Fatal Accidents Act**

Evidence was adduced that the deceased, then 21 years old, was a trained tailor and dress maker. His earnings were stated in his letter of employment and payslip - PExt 8 and 9 as earning were Kshs.4,792/= and a multiplier of 30 years against dependency ration of 1/3.

The deceased was single but had a mother as his dependant.

The Respondent finds the above awards to be inordinately low.

32. The deceased's **last payslip**, December 2009 (he died on 19th June 2010) was produced in court – and stated Kshs.7,288/=, and in the Amended plaint, Paragraph 9(ii) and produced by PW1 – PExt 9.

Thus I find that the sum of Kshs.4,792/= adopted as the deceased's earnings by the trial court to have had no basis. It was erroneous. The correct salary ought to have been Kshs.7,288/=. That will definately change the award on loss of dependency.

33. The principles in the assessment of damages were set in the case **Beatrice Wangui Thairu –vs- Hon. Bargetuny (Supra)**.

The multiplier adopted by the trial court, in my view, is on the lower side. It was not alleged that the deceased had any ill health, and save for uncertainties of life, he would have enjoyed a long working period in a non risk venture. I set aside the 30 years, and apply 35 years as the multiplier, as a more realistic multiplier.

Thus loss of dependency would be

$$35 \times 12 \times 7288 \times 1/3 = 1,020,320/=$$

34. The upshot is that the Appeal is dismissed, and the Cross-Appeal allowed in the above extent.

The appellant will pay costs of the cross- appeal.

It is so ordered.

Delivered, signed and dated at Nakuru this 20th Day of February 2020.

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J.N. MULWA

JUDGE