REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 7 OF 2019

REDEMPTOR NDUNGE NDAWA (Suing in his capacity as the

Administrator and legal representative of the estate of

CHRISTOPHER MULOKI MASILA-DECEASED................APPELLANT

-VERSUS-

SOLOMON GIKARU KARIRI..RESPONDENT

(An appeal from the Judgment of Hon. Y.A. Shikanda (Senior Resident Magistrate)

at Machakos Chief Magistrate's Court in Civil Case No. 564 of 2018 delivered on 20.12.2018)

BETWEEN

REDEMPTOR NDUNGE NDAWA (Suing in his capacity as the

Administrator and legal representative of the estate of

CHRISTOPHER MULOKI MASILA -DECEASED)...........PLAINTIFF

-VERSUS-

SOLOMON GIKARU KARIRI...DEFENDANT

JUDGEMENT

1. According to the pleadings in the trial court, the deceased was 47 years old when he died as a result of a road accident in which an action was brought in the Chief Magistrates Court at Machakos through his father, as a legal representative against the respondent for damages under the Fatal Accidents Act and the Law Reform Act, loss of earnings and special damages due to negligence attributed to the respondent.

2. It was pleaded that the deceased died from a road traffic accident that occurred on the 23.2.2017 wherein the deceased was driving vehicle KAK 608R along Mombasa- Machakos Road at Mua Junction where the Leyland Lorry Truck KBY 353J that was registered in the names of the respondent lost control, came into the path of the deceased, rolled down making the deceased to lose vision and as a result hit the lorry and sustained fatal injuries. The appellant pleaded negligence as well as that the deceased's estate suffered special damages of Kshs 216,975. It was pleaded that at the time of the death of the deceased, he was a 47 year old in good health and was working as a salesman in New Cooperative Creameries (New KCC) and used to earn a reasonable amount of Kshs 50,778/- per month and catered for his dependants. The appellant also pleaded res ipsa loquitor.

3. The respondent in his defence amended on an unknown date in 2018 denied negligence and its particulars, denied the accident and averred in the alternative that the accident was occasioned by a stray giraffe that appeared suddenly into the path of the motor Vehicle KBY 353J and in an attempt to avoid the giraffe, the respondent lost control and overturned. The respondent pleaded *novus actus intervenius* and *vis major*. The respondent pleaded in the alternative that the accident was caused by or substantially contributed to by the reckless and careless manner that the deceased controlled motor vehicle KAK 608R. He sought to rely on the doctrine of *volenti non fit injuria*. By way of counterclaim, it was pleaded that as a result of the negligence of the deceased, the motor vehicle KBJ 353J was extensively damaged and that he suffered loss at a total of Kshs 3,668,536.04; he claimed the said sum and prayed that the suit be dismissed with costs.

4. Vide the appellant's defence to the counterclaim dated 4.7.2018, the appellant denied the counterclaim and prayed that the defence and counterclaim be dismissed with costs.

5. The suit proceeded for hearing on **20.9.2018** where the appellant and a police officer testified. The respondent, a motor vehicle assessor and a legal officer from UAP Insurance Co Ltd testified. Both parties then rested their respective cases.

6. Parties filed submissions and thereafter the court delivered judgement on **20.12.2018** in which Hon. Y.A Shikanda dismissed the suit for want of proof and equally dismissed the counterclaim. He found that he would have awarded funeral expenses of Kshs 140,000/-, special damages of Kshs 36,000/-; pain and suffering at Kshs 100,000/-; loss of expectation of life at Kshs 100,000/- and damages under the Fatal Accidents Act for loss of dependency of Kshs 1,200,000/- after using a dependency ratio of 1/3, a multiplicand of 30,000/- and a multiplier of 10.

7. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 21.1.2019 that challenged the finding on liability. Counsel prayed that the judgement of the trial court be set aside and that this court make a finding of 100% liability against the respondent and a finding on quantum in favour of the appellant; a finding of special damages as prayed. In the alternative, counsel prayed that the court align itself with the finding of the trial court on quantum and that the appellant be awarded the costs of the suit and appeal.

8. The respondent filed a cross appeal dated 12.2.2019 and averred that the trial court erred in failing to find the appellant wholly liable for the accident and for failing to find that the respondent had proven his counterclaim of Kshs 3,668,536.04. Counsel prayed that the appeal be dismissed with costs; that the cross appeal be allowed with costs and that the decision of the trial magistrate be set aside and the counterclaim be allowed with costs.

9. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 7.1.2020 while the respondent's counsel filed theirs on 20.5.2020. Learned counsel for the appellant submitted that the trial court went into error in dismissing the suit. This was because the fact that the vehicle KBY 353J overturned meant that the appellant was liable. Counsel submitted that the defence evidence was hearsay. It was submitted that it was undisputed that the respondent was the driver of the suit lorry and that he hit the deceased. It was submitted that the blame for the accident ought to be shouldered at 50:50. Learned counsel placed reliance on the case of **Teresia Sebastian Massawe (Suing as the Legal Adminstratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR.** It was counsel's submission that the trial court went into error in wholly relying on the evidence of the respondent. On quantum, counsel proposed Kshs 100,000/- as general damages for pain and suffering; Kshs 100,000/- for loss of expectation of life and Kshs 2,640,000/- for loss of dependency, special damages of Kshs 216, 975/ making a grand total of Kshs 3,057,431/-.

10. In response, learned counsel for the respondent agreed with the findings of the trial court and placed reliance on section 107, 108 and 109 of the Evidence Act. He faulted the trial court for dismissing the counterclaim and urged this court to allow the respondent's cross appeal with costs.

11. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment of the trial court. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

12. The evidence in the trial court was as follows. Pw1was Pc Robert Tomno attached to Machakos Police Station Traffic Base. He testified that a report was received on 24.2.2017 of an accident that occurred along Mombasa-Nairobi road at Mua junction. He testified that the accident occurred at about 11 pm on 23.2.2017 that involved Ashok Leyland KBY 353J being driven by Njehia Gathaiya who reported that he had noticed giraffes crossing when he tried to apply brakes but lost control and as a result the lorry overturned. He testified that the motor vehicle KAK 608R was being driven from Nairobi to Mombasa and it rammed into the suit lorry that was in the middle of the road and as a result the driver of the suit motor vehicle was injured and died while undergoing treatment. The police abstract was tendered in evidence. On cross examination, he testified that he did not investigate the accident but he read information from the OB. He testified that he would blame both drivers equally for the accident.

13. The appellant testified that the deceased was her husband; she told the court that she received a call informing her of the incident and she incurred expenses in burying the deceased. She tendered the death certificate of the deceased, post mortem report, receipts for funeral expenses, letter from the deceased's employer, pay slip of the deceased for the month of February, 2017, grant of representation and search certificate of the suit lorry. She testified on cross examination that she did not witness the accident. The appellant closed her case giving way for the respondent's case.

14. Simon Njihia Gathaiya testified as Dw1 and he relied on his witness statement and testified that the accident was caused by a giraffe that he saw on the road and that he had swerved to the left of the road to avoid hitting it and as a result the lorry lost control and overturned in the middle of the road. On cross-examination, he testified that when the accident occurred the lorry was in the middle of the road; On re-examination, he told the court that he was carrying sand and which fell on the left side of the road. He told the court that the accident occurred on a hilly terrain.

15. Solomon Gikaru Kariri (Dw2) was the respondent and who told the court that the suit lorry belonged to him. He told the court on cross examination that he was informed of the accident and on arrival at the scene he found that the saloon car had rammed into the lorry. He stated that the suit lorry was valued at Kshs 3,560,000/- and that the saloon car caused damage to his motor vehicle. On re-examination, he told the court that he did not have the inspection report of the suit lorry.

16. Dw3 was George Gatama Kagu who testified that he was a motor vehicle assessor, who on 27.2.2017 received instructions to assess the suit lorry. He told the court that the repair cost of the suit lorry was Kshs 3,019,161/- and that it was uneconomical to repair the same. That the vehicle had a pre-accident value of Kshs 3,900,000/- and after the accident its value was Kshs 3,560,000/-. He produced the report and a fee note for his services. On cross examination, he told the court that the damage could have been caused by the falling of the motor vehicle;

that the overturning caused the engine and the gear box to crack. The respondent closed his case.

17. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Pw1 and the cause may be inferred from the evidence of Dw1 as corroborated by the scanty documentary evidence that was neither challenged nor controverted.

18. Having considered the pleadings and the evidence on record, the following issues are to be determined.

a) ***Whether the accident was as a result of the negligence of the respondent.***

b) ***Whether the respondent is liable for damage and loss the deceased and his estate claims to have suffered and at what percentage.***

c) ***Whether the court may interfere with the finding of quantum of the trial court.***

19. The answer to any of the above issue will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers,*** **Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remains this:

(a) there is a duty of care owed by an appellant -

(i) the appellant would foresee the reasonable possibility of his conduct injuring another and causing him loss**; Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404** and

(ii) the appellant would take reasonable steps to guard against such occurrence; and

(b) the appellant failed to take such steps.

In assessing whether the appellant took reasonable steps, the court will consider:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materializes;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm. See **Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617**.

20. It is undisputed that the respondent and the deceased driver of the suit motor vehicle owed a duty of care to other road users. All road users are expected to exercise a duty of care on the road. See **Teresia Sebastian Massawe (Suing as the Legal Adminstratrix of the estate of the late Silvia Sebatian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR**.

21. The evidence points to the fact that the suit lorry overturned and was found on the middle of the road; this was the point of impact. Further the evidence on record speaks to the fact that the lorry was stationary on the road and as a result the suit vehicle rammed into it hence causing the accident. There are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer **See Hoe v Ministry of Health (1954) AC Pages 66, 87- 88 Morris LJ**.

22. A carefully driven vehicle does not overturn on the road, unless it was over speeding. A carefully driven vehicle does not just ram into another vehicle unless the driver was over speeding on the road. I would also take into account the terrain of the road that was indicated as hilly.

23. On foreseeability of the injury, it is commonplace that if a weaker object rams into a heavy object, then the damage will be suffered by the weaker object. I am not able to tell who was on the wrong. On the aspect of steps taken to eliminate harm, the respondent's driver told the court that he swerved so as to avoid hitting a giraffe and as a result the accident occurred. He pleaded *novus actus interveniens* and *vis major.*

24. Normally the intervening incident that breaks the chain of causation and constitutes a *novus actus interveniens* has to be an abnormal one and not one foreseen by the person injuring another. A *novus actus interveniens*, or *nova causa interveniens* is an abnormal, intervening act or event, judged according to the standards of general human experience, which serves to break the chain of causation: see **South African Criminal Law and Procedure, vol. 1, 4th ed., by JONATHAN BURCHELL**, at p 102.

25. In the case of **Elijah Ole Kool v George Ikonya Thuo[2001] eKLR,** it was observed that;

"*Although the Plaintiff may be able to trace even a consequential connexion between an injury and the negligence of the Defendant, the law does necessarily attach liability to the Defendant who has been negligent. In Walker v. Goe [1859], 4 H. & N. 350, it was held that there can be no liability unless the damage is the "proximate" result of the negligence. It, therefore, remains upon the Plaintiff to prove both that the Defendant was negligent and that his negligence caused or materially contributed to the damage*

(see Graig v. Grasgaw Corpn. [1919] 35 T.L.R. 214, at p. 215 per LORD BUCKMASTER). The Learned Authors of Volume 28 of HALSBURYS LAWS OF ENGLAND (3rd Edition) say as follows at page 28:

- "Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability fallows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen."

In other words, causation is a matter of fact to be determined by common sense principles. LORD WRIGHT said as follows in Yorkshire Dale S.S. Co. Ltd. V. Minister of War Transport [1942] A.C. 691, H.L. at p. 706:-

"……the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.

"As LORD DENNING said in Davies v Swan Motor Co. (Swansea) Ltd. [1949] 2 C.B. 291 at p. 321; "the efficiency of causes does not depend on their proximity in point of time." It is enough that the cause forms part of a chain of events which has in fact led to the injury. What cause will be effective? The Learned Authors of HALSBURYS Supra at p. 28 say as follows:-

"In the absence of intervention by voluntary human action the original act is to be regarded as a cause of the injury, provided that its effect is still actively continuing and has not been superseded by some independent natural cause.……..……..If in fact the defendant's neglect of a proper precaution has caused the injury, the court will not enter into hypothetical inquiry to establish whether the Plaintif f's injury must necessarily have happened with or without the defendant's negligence."

In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff's injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence.

In The Oropesa [1943] 1 All E.R. 211 at 213 LORD WRIGHT said as follows:-

"Certain well -known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens . These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other."

26. In the article "**THE INTERPRETATION OF "VIS MAJOR" IN MOTOR VEHICLE ACCIDENTS**, By Norman Doukoff, M.A. Presiding Judge at the Court of Appeal Oberlandesgericht (Court of Appeal) München 2013 it is stated that

"According to the settled case law and the prevailing doctrine, force majeure exists only if the following criteria are met:

(1) The cause must be external. In particular natural disasters (e.g. lightning strike, landslide, 18 avalanche), technical catastrophes (e.g. explosion, air crash), animal behaviour come into consideration, but also human actions which intervene in traffic flow from outside (e.g. acts of sabotage, which cannot be prevented, external force against the driver). The sudden physical or mental failure of the driver (e.g. fainting or epileptic seizure) does not justify force majeure according to the settled German case law and the prevailing doctrine as well as in the Dutch und Polish law unless caused by an external event.

(2) The cause must be entirely unpredictable. Force majeure does not exist in the case of an event, which occurs frequently so the road user can prepare to. The event must be so unusual that it amounts concerning the exceptional nature to an elemental force. In addition, an accident sequence influenced by many coincidences is not based on force majeure if it is typical. E.g.: A cyclists being dragged or run over by a bus after being downed by a shove from a child.

(3) The event cannot be averted neither by economically feasible measures nor by reasonable precautions.

27. From the above, it is clear that vis major is intended to exclude unforeseen and unpreventable events, meaning that it does not cover negligence. It also is clear that the essentials of vis major that are to be proved are that

a) The act should result from a natural force- did the giraffe push the lorry? Was there a giraffe?

b) No human intervention.

c) Extraordinary in nature

28. I am not satisfied that the respondent had proved vis major to the required standard. His evidence is too scanty in order to elicit that there was indeed the giraffe that he was evading. I therefore find an error on the part of the trial court in dismissing the suit against the respondent.

29. Where both parties are found to be on the wrong as indicated in paragraph 22 above, case law is to the effect that liability is to be apportioned equally. See **Teresia Sebastian Massawe (Suing as the Legal Adminstratrix of the estate of the late Silvia Sebatian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR.** I will apportion liability at 50:50. The respondent was expected to exercise proper control of his lorry and to ensure that it did not endanger other road users. Similarly, the appellant was expected to have a

proper lookout while on the highway and be alert so as to avoid hitting the lorry that had already fallen in the middle of the road.

30. With regard to the counterclaim, I am not satisfied that the same had been proved, because the evidence of Dw1 was to the effect that when the lorry overturned, then the suit vehicle was not at the scene. The evidence of Dw3 was to the effect that the damage to the suit lorry was on the front and it was as a result of the vehicle overturning on its side; the deceased played no part in the suit lorry overturning. Dw3 was an independent party, his evidence is independent and free from bias, hence I believe him when he gave evidence that absolved the deceased from the damage that was caused to the suit lorry. I therefore find no error in the trial court dismissing the counterclaim and without ado, I dismiss the cross appeal.

31. I will go ahead and make an assessment on quantum. In the instant case, the appellant's claim for damages for loss and damages was set out in the plaint and he also particularized Kshs 216,975/- as the special damages.

32. In the prayer, the plaint asked for: ***"(10) (a) and (b) General damages as under the Fatal Accidents Act and the Law Reform Act and loss of earnings."***

33. In the present case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed. There is no evidence that the deceased would have had an unhappy life. According to his wife, he was employed as a sales person and the pay slip indicated that his pay was Kshs 50,778/-. The conclusion which can be reached here is that the deceased could have enjoyed average happiness, subject to the normal risks and uncertainties. It is not known how the figure of Kshs 1,200,000/- proposed by the appellant was arrived at for loss of dependency, the Kshs 100,000/- for pain and suffering and the Kshs 100,000/- for loss of expectancy of life.

34. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.

35. In line with the multiplier approach, the damages would be by multiplicand and the result reduced by 2/3 because as at the deceased's death he was married with a family and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.

36. The deceased was aged 47 when he met his death and the life expectancy as per statistics given by the World Bank was 66.7 years. The multiplicand would be the expected monthly earnings that as per the pay slip was Kshs 23,275/- after taking into account the fact that the deceased was being deducted loan amounts**.** I shall take the retirement age that would be 55 years meaning that the working life of the deceased would be 8 years on average. The calculation for loss of dependency is thus; 8X2/3X 23,275/X12= **Kshs 1,489,600/-.**

37. **By way of comparison, the award of the trial court was not far from my finding and hence I uphold the finding of the trial court on damages for loss of expectation of life**. I wound interfere with the amount for pain and suffering and substitute it with the sum of Kshs 50,000/ because comparable awards by courts have been between Kshs 20,000/- to Kshs 50,000/- for persons who did not die on the spot. (See **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR**) The rest of the amounts proposed by the trial court remain undisturbed

38. In the result, the appeal partially succeeds. The decision of the trial court on liability is set aside and substituted with a finding of liability apportioned at 50% to 50% jointly. The award of damages is as follows;

Loss of dependency Kshs 1,200,000/-

Pain and suffering Kshs 50,000/-

Loss of expectation of life Kshs 100,000/-

Subtotal Kshs 1,350,000/-

Less 50% contribution Kshs 675,000/-

Total **Kshs 675,000/-**

Add Special damages Kshs 176,000/-

Net total Kshs 851,000/-

39. The counterclaim and the cross appeal are dismissed. The parties shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 29th day of July, 2020.

D. K. Kemei

Judge