REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 45 OF 2017

BOARD OF TRUSTEES

DIOCESE OF EMBU KAIRU PARISH.....APPELLANT

VERSUS

ANTONY NJERU NGUGI.....1ST RESPONDENT

VERONICA KIURA NGUGI.....2ND RESPONDENT

(Being an Appeal from the judgment of the Magistrate Court in Siakago CMCC No. 19 of 2015 delivered on 21st July 2017 by Hon. Omwange J (Resident Magistrate)

J U D G M E N T

A. Introduction

1. This appeal was instituted vide a memorandum filed on 18/08/2017 with the appellant challenging the entire judgment of the Resident Magistrate in Siakago PMCC No. 19 of 2015. The grounds upon which the appeal is premised can be summarized as follows: -

> ***1)*** *That the learned trial magistrate erred in law and in fact by failing to dismiss the plaintiff's case when the plaintiff failed to discharge their burden of proof as per the provisions of Evidence Act by failing to call evidence on how the accident occurred.*
>
> ***2)*** *That the learned trial magistrate erred in law and in fact by failing to give due consideration to the appellant's evidence on how the accident occurred which proved the defendant's causation of the accident.*
>
> ***3)*** *That the learned trial magistrate erred in law and in fact in the way he weighed the evidence before him and the matters he took into consideration.*
>
> ***4)*** *That the learned trial magistrate erred in law by finding against the appellant on liability while none was disclosed*
>
> ***5)*** *That the learned trial magistrate erred in using unproven multiplicand and ended up giving an award that was manifestly excessive.*
>
> ***6)*** *That the learned trial magistrate erred in awarding loss of dependency to the plaintiff who was not a dependant of the deceased.*
>
> ***7)*** *That the learned trial magistrate erred by using a dependency that was too high in the circumstances of the case.*
>
> ***8)*** *That the award of the damages was too high as to amount to a completely wrong estimate.*

2. The appellant thus prayed that the judgment of the lower court be set aside and in its place an order be given dismissing the respondent's suit and that the costs in this court and in the trial court be awarded to them.

3. The appeal was canvassed by way of written submissions that were filed by both parties.

B. Submission by the Appellant

4. The appellant argued all the four (4) grounds of appeal together and submitted that the evidence tendered in the trial court was not

sufficient to prove negligence on the balance of probabilities. Reliance was made on **Mbugu David & Another -vs- Joyce Gathoni Wathena & Another (2016) eKLR.** It was further submitted that mere occurrence of the accident or injury was not proof of negligence and that the Respondent called one witness who was not an eye witness. That being the case, the court erred in invoking the doctrine of res Ipsa Loquitor. Reliance on that was made on **Jeremiah Maina Kagema -vs- Kenya Power & Lighting Co. Ltd (2001) eKLR** and **Jacinta Njura Gathogo -vs- Mugoya Construction & Engineering Co. Ltd [2000] eKLR** which was quotted with approval by the Court of Appeal in **Mary Ayoo Wanyama -vs- Nairobi City Council (Court of Appeal at Nairobi Civil Appeal No. 2 of 1998)**. On ground No. 5 of the appeal, the Appellant submitted that the multiplicand of 3000 was too high bearing in mind that there was no proof that the deceased had any income or was doing any work. Further it was submitted that in ground number 6 that the Plaintiffs therein were not dependants of the deceased within the meaning of section 4(1) of the Fatal Accidents Act as none of the plaintiff's was the deceased' mother. Reliance was made on the case of **Aphia Plus Western Kenya &Another -vs- Mary Anyango Kadenge [2015] eKLR**. Further that even supposing that the plaintiffs were the parents of the deceased and thus entitled to an award, the dependency ratio of 2/3 was too high as he was unemployed. Reliance was made on **Lucy Wambui Muhoro vs- Elizabeth Njeri [2015] eKLR.**

C. Submission by the Respondent

5. The Respondent opposed the appeal and submitted that the Respondents proved their case to the required standards and that despite the plaintiff's witnesses not being an eye witness, the defense witness was an eye witness and that negligence could be gleaned from the evidence of DW1 and therefore the trial court's finding was based on sufficient evidence. Reliance was made on **Simon Muchemi Atako & Anor -vs- Gordon Osore [2013] eKLR**. It was further submitted that the multiplicand of Kshs. 5,218/- was based on the minimum wages for general workers as in the year 2017 when the judgment was written. Further that the Respondents were the parents of the deceased and thus dependants.

D. Issues for determination

6. The jurisdiction of this court on appeal is premised on the laid down principles in the cases of **Selle & another -vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123** and ***Pandya v Republic 1957 EA 335*. The** court is required to re-evaluate and examine the evidence before the trial court and in so it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. The appellate **court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See *Mbogo v Shah 1968 EA 93*, *Sir Clement De Lestang, VP*). Further Section 78 (2)** of the **Civil Procedure Act** provides that: -

> ***Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein"***

7. However, there is no uniform method for evaluation of the evidence on record. What is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. (See **John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR**). In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. I am guided by the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

8. I have considered the and analyzed the pleadings and the evidence tendered before the trial court by the parties to this appeal**,** and it is my opinion that the **issues which this court ought to determine are: -**

> ***1) Whether the evidence tendered before the trial*** *proved liability against the respondent.*
>
> ***2) If the above answer is in the affirmative what measure of damages should the trial magistrate have awarded based on the facts and evidence of the case.***

E. Determination of the issues

i. Whether the evidence tendered before the trial court was to the required standards?

9. The legal position that is that as a rule of evidence, whoever asserts a fact is under an obligation to prove it in order to succeed in his case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities (See **Miller v Minister of Pensions [1947] 2 All ER 372** and Sections 107-109 of the Evidence Act).

10. It is not in dispute that there was an accident involving the deceased and the driver of the Appellant's motor vehicle KBK 656W and which resulted in the death of the deceased herein. Further it is not disputed that the motor vehicle was registered in the names of Board of Trustees Diocese of Embu as per a copy of records for motor vehicle registration number KBK 656 W that was produced in evidence. Neither was it disputed that the said Fr. Nazarion the driver of the said vehicle was an agent of the appellant. Being the appellant's agent, whatever acts done by the said employee where binding to the appellant under the doctrine of vicarious liability. Under this doctrine, a master is liable for the acts of his servant committed within the course of his employment. The master remains so liable whether the acts of the servant are negligent or demonstrate or wanton or criminal. The test is where the acts were done in the course of his employment. (See **PA Okiro & Another T/A Kaburu Okello and Partners v Stella Karimi Kobi, Civil appeal No. 183 of 2003** and **Muwonge v Attorney General of Uganda 1967 EA 17**).

11. The suit before the trial court was premised on negligence on the part of the appellant's driver, agent, servant and/or employee and the respondents sought general damages, special damages amongst other reliefs. The appellants therein filed their defense whereby they denied that the accident occurred in the manner described in the plaint and further pleaded that the same was contributed by the negligence of the plaintiffs and the deceased. The plaintiff in the trial court therefore had a duty to prove negligence. In **Kiema Mutuku v Kenya Cargo Handling Services Ltd [1991] 1kar 258** where the court also held interalia: -

> ***"There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove negligence against the defendant where the claim is based on negligence."*** (See **Mount Elgon Hardware –vs- Millers C.A. No. 19 of 1996** and **Mwaura Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989).**

12. In the case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** Baron Alderson made the following famous definition of negligence: -

> ***"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*** (See Salmond and Heuston on the Law of Torts 9th Edition).

13. As such the elements which must be proved for an action in negligence as follows: -

> ***(a) there was a duty of care owed to him or her,***
>
> ***(b) that the duty has been breached, and***
>
> ***(c) as a result of that breach the plaintiff suffered loss*** and damage (See **Donoghue v. Stevenson [1932] A.C. 562.)**

14. As to whether there was a duty of care owed by the Appellants, it is trite that a driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skillful driver would have in all circumstances. A reasonable skillful driver could be said to be one who would do his best to avoid excessive speed, keeps a good look-out and observes traffic signs and signals.

15. In addition to the duty incumbent to all road users comprises, inter alia, keeping a proper look-out and not going at an excessive speed. Again, a driver of a motor vehicle should usually drive at a speed that will permit him to stop or deflect his course within the distance he can see clearly though it is not conclusive proof of negligence to exceed that speed. But if the driver strikes a person or object without seeing that person or object he may be placed in the dilemma that either he was not keeping a sufficient look-out or that he was driving too fast having regard to the limited look that could be kept: (See **Evans v. Downer & Co Ltd (1933) AC 149 and Morris v. Lutton Corporation (1946) KB 114).** Further, that although a driver is not bound to foresee every extremity of folly which occurs on the road, he is bound, nevertheless, to anticipate any act on the part of any road user which is reasonably foreseeable, whether negligent or not. (See **Tart v Chitty & Co. (1931) ALL ER**). As such, the Appellants herein owed a duty of care to the deceased.

16. PW1 testified that he was informed of the accident by businessman from Ishiara and that he was not present at the scene. Under section 62 of the Evidence Act (Cap 81 Laws of Kenya), all facts, except contents of documents, may be proved by oral evidence. Oral evidence is defined under Section 63 (1) and (2) of the same Act to mean direct evidence. This is evidence by a witness which that witness has perceived in the normal manner using the five senses of touch, smell, sight, taste and hearing.

17. However, the respondent did not witness the accident but he testified that was the brother of the victim. He produced all the relevant documents including the police abstract which is by itself evidence of the plaintiff. The accident was investigated by Ishiara Police. It is noted that the investigating officer was not called to testify but the evidence of the police abstract remained uncontroverted on the occurrence of the accident.

18. Further, DW1 denied negligence in his testimony. He testified that after the accident, he called the police who responded immediately. He blamed the deceased for the accident alleging that he entered the lane abruptly and that he crossed from a distance and from left to right. Further that the accident occurred on the right side in the middle of the lane used by him. He further stated that he did not *imagine he was to break* so he did not break. In his statement which was adopted as his evidence in chief, he stated that he was driving at a speed of between 80-100 km per hour.

19. The Court of Appeal in **Devcon Group Limited v Timsales Limited [2016] eKLR** while quoting with approval its earlier decision in **Barclays Bank of Kenya Limited -vs- Evans Ondusa Onzere [2015] eKLR** observed that admissions need not be in the pleadings; that admissions may be in correspondence or documents which are admitted or they may even be oral. DW1 admitted in his evidence that he did not apply brakes and further that he was at a high speed. To my mind, if indeed the appellant was driving the suit vehicle at a reasonable speed, he could have managed to apply brakes and stop the vehicle upon seeing the deceased crossing the road from a distance. A reasonable driver driving or riding at a reasonable speed ought to stop well within time to avoid an accident. Despite the driver testifying that he swerved and the deceased followed him to the left, he contradicted himself when he testified that the accident occurred in the middle of the road on the left lane on which DW1 was driving. It is my considered opinion that DW1 was speeding at the time of the accident. Had he been at a moderate speed, DW1 could have avoided the accident. It is my opinion therefore that the accident was caused by want of care on the part of the Appellant's driver who drove the motor vehicle without due care and attention and at a speed which was excessive in the circumstances.

20. However, it is my considered view that from the evidence tendered, the deceased contributed to the said accident. The defense witness testified to the effect that the deceased emerged abruptly into the road crossing from the right to the left and as a result of which he was hit. This evidence was not challenged by the appellant. The relevant applicable Highway Code provisions are that before a pedestrian crosses the road he must stop at the kerb look right, look left and right again and should only cross on ensuring that the road is clear.

21. The fact that the deceased emerged abruptly from the right of the road towards the left shows that he did not adhere to the highway code. As such, he ought to bear his share of blame of the accident. The trial court apportioned the blame at 10% which in my considered opinion does not measure up to the negligence of the deceased. However, considering the evidence on record, I find that the deceased and the appellants ought to equally share liability.

22. I hereby find that the trial court was wrong in holding the respondent only 10% liable. Having found that each of the parties was equally to blame, I hereby apportion liability at the ratio of 50:50.

23. Despite the defence having testified that the deceased was a person of unsound mind, there was no evidence tendered to that effect.

24. As a result of the death of the deceased, his family suffered loss and damage which ought to be compensated by way of damages.

ii. <u>What measure of damages should the court award in the circumstances?</u>

25. The appellant challenged the award of damages awarded by the trail court on the grounds that the trial court erred in using unproven multiplicand and ended up giving an award that was manifestly excessive; that the trial court erred in awarding loss of dependency to the plaintiff who was not a dependant of the deceased and using a dependency that was too high in the circumstances of the case and that the award of the damages was too high as to amount to a completely wrong estimate.

26. The principles on which an appellate court will go about interfering with the trial court findings on award of damages has been clearly discussed in a number of cases. In the case of **<u>Butt v Khan 1982 -1988 1 KAR</u>** the court pronounced itself as follows: -

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*** *(*See also **<u>P.A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR</u>**).

27. The trail court awarded Kshs. 20,500/= as the special damages and having observed that the same was pleaded and proved. It is trite law that special damages must be pleaded and specifically proved. PW1 testified to the effect that they spent Kshs20,000/= to obtain limited grant Ad litem and a receipt thereto produced in court as PExbt 3(b)The witness further produced the receipt for Kshs.500/= being the amount incurred for the search. These documents were never challenged by the defence. I hereby hold that the special damages were pleaded and proved *per se*.

28. The applicable principles under the Fatal Accident Act were well stated in the case of **<u>Ezekiel Barng'entuny –vs-Beatrice Thairu HCC No. 1638 of 1988 Ringera</u>** where Justice Ringera (as he then was) he held as thus: -

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."***

29. I find that the principles laid down were rightly applied by the trial court. The trial court in determining the loss of dependency observed that the deceased was aged 30 years at the time of death The court further observed that he could have had about 30 years of active working life having considered that the retirement age in the civil service is 60 years. The court considered the victuals of life and adopted 25 years as the multiplier which was factual and reasonable. I am of the considered opinion that the court did not err in this regard. The adoption of Kshs. 5,218/= as the amount for future earnings was supported by the law in that the deceased was a farmer with no fixed income. It is common practice that where the deceased is not employed, the minimum wage was rightly applied as the basic wage. I find no reason to interfere with the finding of the trial court.

30. The appellants submitted that dependency was never proved. However, the evidence before the trial court and which was not disputed was that the deceased was supporting his aged parents. Under Section 4 of the Fatal Accidents Act, parents are dependants within the meaning of the Act and the correct multiplicand was applied.

31. The award of damages under the Law Reforms Act was never challenged and neither was the award of funeral expenses as the court awarded Kshs. 20,000/=. As such it is my opinion that this court ought not to interfere with the same.

F. <u>Conclusion</u>

32. Consequently, I find no reason to interfere with the special and general damages awarded to the respondent. It is my considered opinion that the trial court applied the right legal principles in awarding the general damages both under the Fatal Accidents Act and the Law Reforms Act. It is my finding that no factors were applied by the court in the assessment of damages, and neither was any relevant factor

ignored.

33. The total damages payable to the respondent was assessed at Kshs. 1,113,800/= to which I apply the ratio of 50:50 on liability.

34. The appellant will meet the costs of this appeal.

35. The amount payable by the appellant to the respondent is Kshs. 556,900/= plus interests and costs.

36. This appeal is only partly successful.

37. It is hereby so ordered.

DELIVERED, DATED and **SIGNED** at **EMBU** this 22nd day of October, 2020.

F. MUCHEMI

JUDGE

Judgment delivered though video link in the presence of Ms. Kamau for Mbigi for the Appellant