REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 152 OF 2016

MOTREX LIMITED..APPELLANT

VERSUS

MUSA KANGOGO KIPKORIR and

DUNCAN AEGWO KORIR (Suing as the legal Representatives of the Estate of the Late

KANDIE MICAH KIPKORIR (Deceased)**..RESPONDENTS**

(*Being an appeal from the Judgment and decree delivered by Hon. L. Mbugua(Chief Magistrate) in Machakos C.M.C.C. No. 974 of 2014, on 23.11.2016)*

JUDGEMENT

1. The appeal herein arises from the judgment and decree of the Chief Magistrate's court at Machakos in Civil Case Number 974 of 2014. The trial court after considering the evidence before it found that the driver of the tractor reg. No. KAZ 584R was 70% liable for the accident. The trial court awarded the Respondent Kshs.2,283,000/= as General Damages and Kshs.50,000/- as special damages.

2. The appellant was aggrieved by the said decision and filed this appeal based on the following grounds that seem to challenge the finding on quantum and not liability;-

> ***a. The trial Magistrate erred in law and fact by finding that at the time of his death, Kandie Micah Korir was a duly licensed Heavy Commercial Vehicle Driver yet the Respondents tendered no evidence to show that the deceased was employed or licensed as such.***
>
> ***b. The trial Magistrate erred in law and fact by applying the Basic Statutory Minimum Wage for a Heavy Commercial Driver in computing damages for loss of dependency thereby making a wholly erroneous award yet the respondents tendered no evidence to show that the deceased was employed or licensed as such.***
>
> ***c. The trial Magistrate showed extreme prejudice by totally ignoring the Appellant's submissions on issues of law and evidence thereby made an inordinately high award of damages.***

3. The appellant wants the appeal allowed and the award of damages for loss of dependency in the subordinate court set aside and substituted with an award of Kshs 439,392/- or such lesser award. The appellant also seeks for an order in respect of costs of the appeal.

4. This being a first appeal, this court is under a duty to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind the fact that it neither saw nor heard the witnesses testify (**Selle & Another -vrs – Associated Motor Boat Co.Ltd & others (1968)E.A 123). In Kiruga – vs- Kiruga and Another (1988) KLR** 348 the Court of Appeal observed that. "An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."

5. In order to proceed with this task, i shall give a summary of the evidence placed before the trial court.

6. The respondents filed their plaint after being issued with a limited grant ad litem under Section 54 of the Law of Succession Act on 5.11.2013. The plaint dated 1.12.2014 and filed on 17.12.2014 sets out the cause of action at paragraph 5 thereof. It is to the effect that on or about the 9.9.2012, the deceased was lawfully driving motor vehicle registration number KAL 663B which was pulling trailer registration No. ZB 6774 from Mombasa to Nairobi when at Salama Mukaa area along Mombasa- Nairobi road, the Appellant's driver while driving

Motor Vehicle Registration Number KAZ 584Z, pulling trailer registration ZD 2485 towards Mombasa, drove so negligently and or recklessly and permitted it to lose control, veer off the road into the direction along which KAL 663B which was pulling trailer registration No. ZB 6774 was being driven, thereby permitting the subject vehicle to violently collide with KAL 663B which was pulling trailer registration No. ZB 6774 and as a result the deceased was fatally injured and his estate suffered damages.

7. At paragraph 6, the respondents aver that they shall rely on the doctrine of *res ipsa loquitor*.

8. The accident was attributed to the negligence of the appellant's driver as particularized in paragraph 5 and by reason of the accident the deceased, an adult driver by profession earning Kshs 22,000/- per month which sum was applied for meeting his upkeep and to support his family died. The deceased's dependants and/or estate suffered great loss and damage. Particulars under the Fatal Accidents Act and special damages have been set out at paragraph 9 and the respondents prayed for damages under the Fatal Accidents Act Cap 32 laws of Kenya and under the Law Reform Act cap 26 Laws of Kenya.

9. The respondent called 4 witnesses. Pw1, the 1st Respondent told the Court that his brother (deceased) was involved in a road traffic accident on 9.9.2012 where he suffered fatal injuries and died on 9.9.2012 (see PEX2 the death certificate). He did not witness the accident. He explained that his brother was earning Kshs 22,000/- per month but was not getting a payslip. He got the information about the accident from his brother's turnboy. He produced the grant of letters of administration ad litem, PEXh1, receipts PEx6 and after doing a search which showed that the subject motor vehicle was owned by MOTREX LIMITED he produced the copy of records(PEX4a, 4b) and the receipt (PEX4c and 4d).

10. He also produced the demand letter (PEX7), transport receipt and a copy of Birth Certificate for the child PEX 5.

11. PW2, the 2nd respondent, adopted his statement and told the trial court that he got a call on 11.9.2012 from David Kimosop, the brother's turnboy that the deceased died as a result of the accident.

12. PW3 was David Kimosop who adopted his witness statement and testified that on the date of the accident, he was the turnboy of the deceased and that the deceased was being paid Kshs 22,000/- per month which were paid vide petty cash vouchers. On cross-examination, he testified that at 5.30 a.m. the vehicle being driven by the deceased was going downhill near Salama and that the mattress vehicle emerged from a corner and came to his side where a collision took place and his vehicle went off to the pavement while the appellant's vehicle remained on the road. He testified that the accident occurred on his lane and that the appellant's driver was to blame for the vehicle was on high speed and caused the collision. Further that the deceased was being paid Kshs 22,000/- per month which was via petty cash vouchers.

13. Pw4, No. 233114 IP Jackson Nyasili, produced the police Abstract (PEX3) and who testified that according to the records, KAZ 984Z was at a blind corner and not on its lane and thus was to blame for the accident; according to the sketch map, the point of impact was on the lane to Nairobi and yet the vehicle was heading to Mombasa. On cross examination, he testified that he visited the scene and he could establish the point of impact from the debris and the glasses and it was ascertained that the driver of KAZ 984Z was not in his lane when the accident occurred.

14. The appellant filed its defence on the 2.4.2015. In the defence, it challenged the respondents on the averments stated in the plaint. It denied the facts in the plaint and put the respondents herein to strict proof thereof. The appellant also denied the particulars of negligence alleged by the respondent. It also challenged liability and averred that if an accident occurred, then same was as a result of negligence by the deceased as set out at paragraph 6 of the defence.

15. In support of their case and to challenge or controvert the evidence in the respondents case, the appellant called no witnesses and closed its case.

16. The appeal was canvassed via written submissions. Eboso and Co Advocates challenged the judgment of the trial court, claiming that the trial court in applying the multiplicand of Kshs 22,000/- took into account irrelevant factors for the respondents did not tender any evidence to show that the deceased was earning Kshs 22,000/-.

17. On the issue of damages, appellant's counsel submitted that the trial court ought to have applied the minimum wage of Kshs 4,577 for general workers in other areas as no evidence was tendered to show that the deceased was skilled in any specific vocation and thus loss dependency ought to have been calculated as; Kshs 4577 X 12 months X18 years X 2/5= Kshs 395,453/- which amount should be reduced by Kshs 115,000/- that is the damages under the Law Reform Act.

18. Marube & Co Advocates for the Respondents urged this court to uphold the findings of the lower court on the issue of the award of damages. Counsel submitted that the evidence on liability remained uncontroverted and therefore the finding on liability ought to be set aside and apportioned at 100% against the appellant.

19. Counsel also submitted that the multiplicand of Kshs 22,000/- was reasonable and a multiplier of 28 years was given via oral evidence and the same was not controverted; there was no need for documents like a payslip to prove earnings. Learned counsel cited the case of **Jacob Ayiga Maruja v Simeon Obayo (2005) eKLR** where court found that evidence of the widow was sufficient evidence to amount to strict proof of damages claimed for strict reliance on documentation to prove earnings would occasion injustice to Kenyans who keep no records yet earn livelihood in many ways.

20. The appeal herein raises the twin issues of apportionment of liability and quantum. Before making my findings, this court is aware of the principle that proof in civil cases is on a balance of probabilities and that parties are always bound by their pleadings. See the case of **Karugi & Another – vs- Kabiya & 3 others (1987) KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

21. This court also ought to address the issue of unpleaded issues that find their way in submissions. The Court of Appeal has recently considered two cases in determining whether a party can rely on unpleaded issues.

22. In the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKlr,** the court stated thus;-

> "the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd- vrs – Nyasulu [1998] MWS C 3,in which the learned judge quoted with approval from an article by Sir Jack Jacob entitled "The present importance of Pleadings" which was published in [1960] Current Legal Problems at Pg 174 whereof the author stated' As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings-------- for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is also bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings…………..In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called any other business, "in the sense that points other than those specified may not be raised without notice."

23. In this appeal it is not in dispute that an accident occurred on the 9.9.2012 involving the vehicles KAL 663B/ZB 6774 and KAZ 584Z/ZD 2485 in which the deceased died. Ownership of KAZ 584Z/ZD 2485 has not been contested by the appellant. The finding on liability has not been contested by the appellant. However, the Respondents in their submissions contest the same and urge the court to make a finding of 100% liability against the appellant. I see no reason to disturb the finding on liability by the trial court. Indeed before the collision, the deceased was also expected to take any evasive measures so as to avoid being hit by the appellant's vehicle. In that regard, the trial court cannot be faulted for arriving at the apportionment of liability between the parties herein.

24. On the issue of quantum, the general principle is that in the assessment of damages a trial court exercises its discretion and the appellate court will not normally interfere with such exercise of discretion unless the trial court either acted on wrong principles or awarded so excessive or so inordinately low damages or the court considered irrelevant matters or failed to take into consideration relevant matters and as a result arrived at the wrong decision. See **Butler –vs – Butler (1984) KLR 225 and Kemfro Africa Ltd t/a Meru express & Another – vs – A.M. Lubia and another (1982 – 88) IKAR727).** The claim herein is based on the Law Reform Act and the Fatal Accidents Act. In assessing damages under the Fatal Accidents Act Ringera Judge as he then was, in the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another Nairobi HCCC No. 1638 of 1988 (UR)** stated as follows;-

> "The principles applicable to an assessment of damages under the Fatal Accidents Act are 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 lived. 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 dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

25. In the instant case, the learned trial Magistrate relied on the oral evidence of the turnboy and the deceased's brothers to determine the multiplicand; the said evidence was not challenged or controverted by the appellant. I am satisfied that the trial Courts computation was fair in the circumstances. In any event the deceased worked as a truck driver hauling goods for long distances across the borders which under the circumstances would warrant such kind of a salary. A multiplier of 18 years was used by the trial Court. The issue of multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with reason. I find that the undisputed fact of the multiplier of 18 years was reasonable taking into account that the deceased was 32 years old at the time of his death and would have worked up to about 60 years.

26. The evidence on record is also clear that the deceased was unmarried with a young daughter and living parents and hence he must have used a significant amount of his income to support his family. The dependency ratio of 2/3 was therefore reasonable in the circumstances.

27. The upshot of all the above is that the finding on liability, at the ration of 70:30 against the appellant and quantum by the learned Magistrate is upheld. The appeal herein lacks merit and is accordingly dismissed with costs to the respondents.

It is so ordered.

Dated and Delivered at Machakos this **19th** day of **June, 2019.**

D.K. KEMEI

JUDGE