REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 289 OF 2017

STEPHEN MAINA KIMANG'A T/A

ACACIA CREST ACADEMY.....1ST APPELLANT

CATHERINE WAMBUI MAINA T/A

ACACIA CREST ACADEMY.....2ND APPELLANT

-VERSUS-

SARAH CHERERE OBARA (Suing as the legal representative

of DEBRAH WAMBUI NJOGU-Deceased).....RESPONDENT

(Being an appeal from the judgment and decree of Honourable L.W. Kabaria (Ms.) (Senior Resident Magistrate) delivered on 12th May, 2017 in CMCC No. 7129 of 2014)

JUDGEMENT

1. The respondent instituted CMCC NO. 7129 OF 2014 against the appellant in her capacity as the legal representative of the estate of Debrah Wambui Njogu ("*the deceased*") through the plaint dated 11th April 2014 seeking for both general and special damages as well as costs of the suit and interest.

2. The appellants were sued in their capacity as the business proprietors of Acacia Crest Academy and the owners of the motor vehicle registration number KAQ 234G Mitsubishi Bus/Coach ("*the subject motor vehicle*").

3. The respondent pleaded in her plaint that sometime on or about the 1st of August, 2012 at about 4.30pm, while the deceased; who was at all material times a student at Acacia Crest Academy and a lawful passenger in the subject motor vehicle; was travelling along Mombasa-Nairobi Road at Sabaki Area, the driver of the subject motor vehicle negligently drove it, thereby causing it to collide with motor vehicle registration number KBA 334M, resulting in fatal injuries to the deceased. The respondent set out the particulars of negligence in the plaint and also relied on the doctrine of *res ipsa loquitor*.

4. It was further pleaded in the plaint that as a result of the death of the deceased, the following persons have suffered loss and damage:

a. Lawrence Njogu Chege	*Adult*	*Father*
b. Sarah Cherere Obara	*Adult*	*Mother*
c. CN	*5 years*	*Sister*
d. IN	*2 years*	*Brother*

5. The appellants entered appearance and filed their joint statement of defence on 30th January, 2015 averring that whereas it is true that the accident occurred on the date and place pleaded in the plaint, the same was solely and/or substantially caused by negligence on the part of the motor vehicle registration number KBA 334M and/or negligence on the part of the deceased, the particulars of which featured in the defence.

6. At the hearing, the respondent testified as the sole plaintiff witness while the appellants closed their defence without calling any witnesses. Afterwards, the parties filed and exchanged written submissions. The trial court entered judgment in favour of the respondent and against the

appellants as follows:

a) Liability	*100%*	
b) General damages		
(i) Pain and suffering	*Kshs. 50,000/*	
(ii) Loss of expectation of life	*Kshs. 100,000/*	
(iii) Lost years	*Kshs.1,200,000/*	
c) *Special damages*	*Kshs. 267,025 /*	
Total	***Kshs.1,617,025/***	

7. Being aggrieved with the aforementioned judgment, the appellants preferred this appeal and put forward the following grounds:

i. THAT the learned trial magistrate erred in fact and in law in failing to hold that the respondent's case was not proved on a balance of probabilities on liability.

ii. THAT the learned trial magistrate erred in law and in fact in relying on hearsay evidence on liability.

iii. THAT the learned trial magistrate erred in law and in fact in introducing extraneous issues leading to a miscarriage of justice.

iv. THAT the learned trial magistrate erred in law and in fact in awarding damages for lost years of Kshs.1,200,000/.

8. The parties recorded a consent to dispose the appeal through written submissions. In their submissions dated 25th June, 2019 the appellants argued *inter alia*, that the respondent at all material times bore the burden of proving negligence on the part of the appellants but did not discharge that burden.

9. The appellants went on to submit that the respondent was the sole witness and that she did not witness the occurrence of the accident, citing the case of **Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another [2010] eKLR** where the court concluded that negligence had not been proven for the reason that the sole witness had not witnessed the accident.

10. The appellants also made reference to the police abstract tendered as evidence by the respondent, arguing that the same is not in itself proof of negligence or liability, neither does it clarify whether the charges were preferred against the driver of the subject motor vehicle. Consequently, it is the appellants' submission that the respondent has not proved liability on its part and thus urges this court to interfere with the trial court's judgment and have the suit dismissed instead.

11. On the subject of damages awarded for lost years, the appellants contend that the award of Kshs.1,200,000/ was not supported by any of the authorities quoted before it and urged this court to substitute the same with a reasonable award of Kshs.300,000/.

12. In her opposing submissions, the respondent has taken the position that since the appellants did not call any evidence to rebut her testimony, it is clear that her evidence remains uncontroverted. The respondent has further argued that despite the fact that the appellants blamed the driver of motor vehicle registration number KBA 334M for the accident, they did not seek his enjoinment as a party to the suit.

13. It is the respondent's contention that whereas she did not witness the accident, she later visited the scene and testified as to what she found there, emphasizing that her evidence was in no way rebutted by the appellants, adding that since she relied on the *res ipsa loquitor* doctrine, the burden lay with the appellants to disprove the particulars of negligence made against them.

14. As concerns the award of damages for lost years, the respondent averred that there is no specific formula to be applied in making such award and that in the present instance, the trial court correctly applied the correct principles and considered the cited authorities in arriving at the figure of Kshs.1,200,000/ hence there is no basis for interfering with the same.

15. It is noted that the appeal is premised on four (4) grounds touching on the limbs of liability and damages in respect of lost years. I will therefore address the said grounds under the two (2) distinct limbs.

16. Grounds (i), (ii) and (iii) of the appeal relate to liability. Going by the trial court proceedings, the respondent who was PW1 gave evidence that she was at her place of work when she was informed about the accident and that she also learnt that the deceased, who was her daughter, had passed on at Sidom Hospital.

17. The respondent also gave evidence that subsequently, she made the necessary arrangements to ensure the deceased was given a befitting send-off and produced documentary evidence to that effect. She further testified that she later visited the scene of the accident and formed the opinion that the driver of the subject motor vehicle was to blame for the accident by taking an illegal turn and failing to drive with due care and attention.

18. During cross examination, the respondent maintained that the driver was to blame, though admitting that she is not aware as to whether he was ever charged in relation to the accident. She also stated that the road was tarmacked and the subject motor vehicle was coming from Kitengela but that the accident had occurred on the opposite side of the road towards Machakos. The respondent added that the deceased passed away at the scene.

19. On being re-examined, the respondent simply stated that she was unaware as to why the owner of the other vehicle involved in the accident was not in court on the said hearing date.

20. In her submissions, the respondent reiterated her evidence, maintaining that there is no way the deceased could have contributed to the accident and that she noted that the collision between the two (2) vehicles had taken place on the opposite side of the road from where the children were being transported, going further to argue that her evidence remained uncontroverted and was supported by the *res ipsa loquitor* doctrine which she had established. The respondent submitted that the appellants were vicariously liable for the accident.

21. Further to the above, the respondent contended that despite the appellants' allegation that the accident was caused by the driver of the motor vehicle registration number KBA 334M, no third party proceedings were ever instituted against him or her, hence the appellants did not disprove the claim of negligence made against them.

22. In opposing the above, the appellants submitted that not only did the respondent not witness the accident, but that she did not call any other witnesses to support her claim for negligence, adding that the police abstract produced in court did not disclose whether the driver of the subject motor vehicle was ever charged.

23. In the end, the learned trial magistrate held that the respondent's evidence was uncontroverted and that though the respondent did not witness the accident, she later visited the scene and testified as to what she saw, and that in any event, the police abstract produced indicated an intention to charge the driver of the subject motor vehicle. On that basis, the learned trial magistrate was satisfied that the respondent had proved her case against the appellants on a balance of probabilities and went ahead to find them 100% vicariously liable.

24. From the foregoing, it is not denied that an accident occurred involving the subject motor vehicle and the motor vehicle registration number KBA 334M. It is also not in dispute that the deceased was at all material times a passenger in the subject motor vehicle. More importantly, the parties are in agreement that the respondent did not witness the occurrence of the accident though it is indicated that she later on visited the scene.

25. I have re-considered the police abstract placed before the trial court. The same confirms that the accident involved two (2) motor vehicles. Further to this, the police abstract pointed out that at the time, the matter was still pending investigations and that there was an intention to prefer charges against the driver of the subject motor vehicle, Patrick Ndung'u Kuria.

26. It is not in dispute that the respondent neither witnessed the accident nor called an eye witness. However the appellant did not tender any evidence to controvert the respondent's evidence. The respondent produced a police abstract form which indicated that a charge of causing death by dangerous driving would be preferred though the accident was still pending investigation. The appellant did not also rebut the allegation that a charge of causing death by dangerous driving was to be preferred.

27. The appellants did not call any evidence to challenge the respondent's testimony or enjoin the driver of the second motor vehicle registration number KBA 334M. I am convinced that the doctrine of res ipsa loquitor applies in this case. In the case of **Jamal Ramadhan Yusuf & Another =vs= Ruth Achieng Onditi & Anor. (2010) eKLR** it was held inter alia:

"It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and/or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove. In this case the 1st respondent was minded to prove that the accident was caused by the negligence of the appellants, or 2nd respondent and or both."

28. The application of the doctrine of *res ipsa loquitor* was discussed in the case of **Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007** inter alia as follows:

> ***"Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations. The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitor and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of res ipsa loquitor was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him."***

29. In the circumstances of this case, I am satisfied that the learned trial magistrate correctly applied the doctrine of res ipsa loquitor hence the appeal as against liability fails.

30. The appellant challenged the award on lost years. I am only required to disturb if it can be shown that either the trial court took into account irrelevant factors or failed to take relevant factors into account or arrived at an inordinately low or high award.

31. Going by the respondent's submissions before the trial court, an award of Kshs.2,190,940/ was proposed for lost years/loss of dependency, with the case of **Abdi Kadir Mohammed & Another v John Wakaba Mwangi [2009] eKLR** where the court awarded Kshs.900,000/ under this head. On their part, the appellants offered an award of Kshs.200,000/ without offering any guiding authorities. Finally, the learned trial magistrate being guided by the decisions of **Oshivji Kuvenji & Another v James Mohamed Ongenge (Suing As**

A Representative Of The Estate Of Samuel Ongenge) [2012] eKLR; **Kenya Breweries Ltd v Saro [1991] eKLR** and **P I v Zena Roses Ltd & another [2015] eKLR** and awarded the sum of Kshs.1,200,000/.

32. It was the respondent's testimony that the deceased was 11 years old at the time of her death and a brilliant performer in school; these factors are shown to have been considered by the learned trial magistrate. The trial magistrate also appreciated that there is no specific formula for assessing an award for lost years in cases involving minors and I thus find her decision to settle for a global approach to be justified. In addition, the learned trial magistrate correctly acknowledged that the future of the deceased, being a minor was unknown/uncertain.

33. I have re-looked at the authorities relied upon by the said magistrate in making her assessment. In **P I v Zena Roses Ltd & another [2015] eKLR** the court awarded the sum of Kshs.300,000/ for a 6-year old deceased minor. Nevertheless, the learned trial magistrate did not cite any comparable awards that had proved useful in her assessment of the damages.

34. I have also drawn reference from **Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased) [2018] eKLR** where the court made a global award of Kshs.700,000/ in respect to a 12-year old child who suffered fatal injuries resulting from a road accident. A similar award was made in respect to a 14-year old deceased minor in **Karanja Edwin v Rahab Wanjiku Njoroge [2018] eKLR.**

35. In view of the foregoing, I am satisfied that the learned trial magistrate's award was inordinately high hence should be interfered with. I am inclined to allow the appeal on quantum. Consequently the award of kshs.1,200,000/= is set aside and is substituted with an award of kshs.600,000/= .

36. In the end, the appeal as against liability is found to be without merit, it is dismissed with costs. However the appeal as against the award on lost years is allowed.Consequently, the award of kshs.1,200,000/= for lost years is set aside and is substituted with an award of kshs.600,000/=.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

…….

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellants

……. for the Respondent