REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 98 OF 2016

BETWEEN

ISHMAEL NYASIMI..... 1ST APPELLANT

CHARLES MICHIEKA NYONGO.....2ND APPELLANT

AND

DAVID ONCHANGU ORIOKI

suing as personal representative of

of ANTONY NYABANDO ONCHANGO (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.T. Obutu, SPM at the Chief Magistrates Court at Kisumu in Civil Case No. 132 of 2015 dated 25th November 2016)

JUDGMENT

1. According plaint filed in the subordinate court, the deceased, Antony Nyabando Onchogu, was a passenger in a Toyota Hiace Matatu registration number KAY 718S ("the matatu") owned by the 1st appellant and driven by the 2nd appellant. While he was travelling along Ahero Katito road on 31st March 2012, the appellant's motor vehicle collided with a Canter registration number KAY 718S ("the Canter") and as a result the deceased suffered fatal injuries. The deceased personal representative claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

2. In their statement of defence, the defendant denied the accident, the fact that the matatu was being driven by its driver or that the deceased was a passenger therein. In the alternative, the appellant pleaded that the deceased was negligent as he solely or substantially contributed to the accident by failing to take care of his own safety.

3. After hearing the matter, the learned magistrate held the appellant fully liable and made the following award that has precipitated this appeal:

Pain and Suffering	Kshs. 20,000/-
Loss of expectation of life	Kshs. 150,000/-
Lost years	Kshs. 5,000,000/-
Special damages	Kshs. 25,000/-
Total	**Kshs. 5,145,000/-**

4. This appeal is against the finding on liability and quantum while the respondent has cross-appealed against the finding on quantum. I shall deal with the issue of liability first. The gravamen of the appellant's appeal is set out in the memorandum of appeal dated 20th December 2016. Counsel for the appellant, Mr Kisinga, augmented these grounds and argued that that the trial magistrate erred in finding that the respondent had failed to discharge his burden of proof as he had failed to provide an eye witness to the accident. Further that the trial magistrate failed to scrutinize or evaluate the evidence he failed to find that the appellants were not liable. Counsel also appellants contended that the testimony of PW 1 relied upon was hearsay and uncorroborated.

5. Mr Meroka, counsel for the respondent, supported the findings of the trial magistrate. He pointed out that the deceased was a passenger in the vehicle and that the vehicle collided with another and despite the fact that no eye witness was called, there was sufficient evidence to support the conclusion that the appellants were liable bearing in mind the defence pleaded by the appellant.

6. 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 reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. The principal witness on the issue of liability was a police officer, PC John Makande (PW 1) attached to Ahero Police Station which confirmed that an accident took place on 31st March 2012 along Ahero-Katito road and involving the 1st appellant's matatu and the Canter. He confirmed that the deceased was a passenger in the matatu and that he died as a result of the accident. PW 1 testified that the matatu driver was liable for causing the accident and that the matter was still pending investigations once he had disappeared. When cross-examined by counsel for the appellant, PW 1 confirmed that he was not the investigating officer and had not visited the scene of the accident. The respondent (PW 2) testified and confirmed that he did not witness the accident. The appellants did not call any evidence.

8. Was liability proved in these circumstances? **Sections 107**, **108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the respondent was to prove liability on the balance of probabilities. Although, PW 1 did not investigate the accident, he produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that the deceased was a passenger and that he died and that the accident was the result of a collision between 2 vehicles. The police abstract relied on was produced without objection and established the fact that two vehicles collided on the material date and time (see ***Joel Muna Opija v East African Sea Food Limited*** **KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR**).

9. The question then is whether the respondent established negligence by establishing the fact that collision took place between two vehicles. In other words, could the respondent rely on the doctrine of *res ipsa liquitor* to make the case that the appellants were liable. In ***Nandwa v Kenya Kazi Limited*** **[1988] eKLR**, Court of Appeal (Gachuhi JA) cited, with approval, a portion ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALLER 392**, **393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:

> *The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.*

10. As the Court of Appeal explained, once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on the it part. Apart from the fact that the accident took place, the evidence of PW 1 as to how the accident could have occurred is merely hearsay as he did not investigate the matter or provide an official record of the accident which showed, for example, the point of collision from which the court could infer negligence on the part of the appellant's driver.

11. I am aware that in the courts have held that where a collision involving the two motor vehicles is established, the court is entitled to infer negligence. In this instance, I find that words of Denning LJ., in ***Baker v Market Harborough Industrial Cooperative Society Ltd [*****1953] 1WLR 1472, 1476*** apposite:

> *Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them…*

12. The Court of Appeal in ***Hussein Omar Farah v Lento Agencies*** **CA NAI Civil Appeal 34 of 2005 [2006] eKLR observed** that:

> ***In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.***

13. I agree with those decisions but I would distinguish them from the present case because in those cases there was evidence of how the accident occurred and the issue before the court was how to apportion liability between the defendants. In this case, the appellant called in aid the decision in ***Sally Kibii and Another v Francis Ogaro*** **[2012] eKLR** where Mohammed Ibrahim J., (as he then was) held that;

> *The plaintiff in the trial court only produced two witnesses who admitted that they did witness the accident and could not tell how it happened. The Police Abstract showed that the accident was by collision of two vehicle and investigations were underway. The failure of the police to determine from scene of the accident which motor vehicle was to be blamed and the absence of an eye witness diminishes the Appellant's chance to prove a case of negligence against the Defendant.*

The judge then went on to consider the applicability of the doctrine of *res ipsa loquitur*;

> *To successfully apply this doctrine, there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause. This was a case of two vehicles colluding. What facts had been proved by the Plaintiff to presume*

negligence on the part of the defendant as against the other vehicle. Can I safely presume that the mere fact that the two cars being KAK 746 J and KAG collided, negligence was on the part of the defendant's case and not the other. The Plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot be an assumption which in the Plaintiff's case ….. I f the deceased was in a self involving accident as against a collision, then perhaps, such a presumption can be made against the owner of a car.

14. In this case, there was no evidence on how the accident could have occurred and in the absence of such evidence, I find and hold that the respondent failed to prove negligence against the appellant on the balance of probabilities. I would therefore dismiss the suit for want of proof.

15. I now turn to the issue of quantum. The general principal upon which this Court, as an appellate court, will interfere with an award of damages was stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5** 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 on 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 ….

16. Mr Kisinga challenged the quantum of damages on the ground that the award of damages was inordinately high. He contended that the learned trial magistrate failed to make a distinction as to whether the respondent was making a claim under the ***Law Reform Act*** or the ***Fatal Accidents Act***. Counsel faulted the trial magistrate for failing to find that the claimants were not dependants under the both statutes. In his view, therefore, the court should not have made an award for lost years. He challenged that manner of assessment of the multiplier and multiplicand resulting in an award that was manifestly excessive. He also contended that the award for pain and suffering and loss of expectation of life was excessive in the circumstances.

17. While the respondent submitted that the respondent was entitled to the respective awards under the ***Law Reform Act***, he cross-appealed on several grounds. First, that the trial magistrate erred in failing to consider the evidence in arriving at the proper multiplicand. Secondly, the trial magistrate ought to have used a dependency ratio of 2/3 instead of 1/3 in the circumstances of the case. The respondent also complained that the trial magistrate failed to make an award for funeral expenses yet the same were claimed and proved.

18. According to the plaint, the deceased was aged 25 at the time of death and was an engineer with a bright future ahead of him. The person listed as dependants were his brother and sister. From the testimony of the respondent (PW 2), the deceased was a qualified engineer. He obtained an A- in KCSE after completing High School and proceed to Moi University to pursue a degree in industrial and textile engineering whereupon he graduated on 2011. In order to support the fact that the deceased would have been earning Kshs. 100,000/- per month, he produced an extract from the Human Resources Manual of the Kenya Rural Roads Authority that showed that the proposed income was that of an entry grade engineer in the Authority. He further testified that Kshs. 134,000/- was spent on burial while Kshs. 20,000/- was spent on the coffin. In cross-examination, PW 2 admitted that the deceased was not employed at the time and was unmarried.

19. In assessing the claim for lost years, the trial magistrate held that the deceased was a professional engineer and would have had gotten meaningful employment in the future hence he pegged the multiplicand on the entitle level salary of an engineer as stated in the Kenya Road Authority Manual which he assessed as Kshs. 50,000/- after taxes. As regards the multiplier, the court considered that the deceased would have worked until he was 60 years old and given the uncertainties of life, a multiplier of 25 would be appropriate. The dependency ratio was arrived at by considering that the deceased would have used 2/3 of his salary as expenses and 1/3 on himself.

20. In resolving this appeal on the issue of quantum it is necessary to determine whether the nature of the respondent's claim. From the plaint, the respondent made claims both under the ***Fatal Accidents Act*** and the ***Law Reform Act*** while the trial magistrate only made awards under the ***Law Reform Act***. Both claims are distinct. The ***Fatal Accidents Act*** was meant to cure a deficiency in the common law where the cause of action did not provide for dependants of a deceased person. **Section 4(1)** of the ***Fatal Accidents Act*** now provides as follows;

Every action brought by nature of the provisions of this act shall be for the benefit of the <u>wife, husband, parent and child of the person</u> whose death was so caused [and shall ….. be brought by and in the name of the execution or administrator of the person deceased]…… **[Emphasis mine]**

I agree that if the plaintiff's claim was considered under the ***Fatal Accidents Act*** the deceased's brothers and sisters would not be dependants and the claim would fail.

21. On the other hand, the ***Law Reform Act*** was intended to ensure that causes of action survive the death of the deceased hence **section 2(1)** thereof provides thereof provides

2(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, <u>all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate</u>: …….. [Emphasis mine]

22. The two statutes exist side by side and are not mutually exclusive hence the **section 2(5)** of the ***Law Reform Act*** provides as follows:

2(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

23. The only limitation in awarding damages under both Acts is that the court should avoid double compensation or duplication of the award

as the claim on behalf of the estate of the deceased is, *"in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act".* In this respect I would adopt the words of the Court of Appeal stated in ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited*** **NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** where it observed that;

> *[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the* ***Law Reform Act*** *and dependants under the* ***Fatal Accidents Act*** *are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the* ***Fatal Accidents Act*** *should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the* ***Law Reform Act****, hence the issue of duplication does not arise.*

24. Although the respondent pleaded its case under both statutes, the respondent's submissions before the trial court were clear that the he was agitating a claim for lost years under the ***Law Reform Act***. Moreover, had the trial magistrate considered that the claim for loss of dependency under the ***Fatal Accidents Act*** and come to the conclusion that the dependants claiming did not fall within **section 2(1)** thereof, the court could still go ahead award the estate damages under the ***Law Reform Act*** as this would not amount to duplication of awards or double compensation. Since the award was for lost years, I shall now proceed to consider whether the trial magistrate erred in making the award.

25. The approach in assessing damages for lost years is to take the income the deceased would have earned, less the living expenses, assuming that one lived and worked upto the age of retirement. In ***Kenya Bus Services Limited v Githae Gatururi*** **NRB CA Civil Appeal No. 100 of 2004 [2013]eKLR** adopted the principles on which damages for lost years under the ***Law Reform Act*** are assessed as stated Lord Scarman in ***Gammell v Wilson*** **[1981] 1 ALL ER 578, 593** where he stated:

> *The problem in these cases, which has troubled the judges since the decision in Pickett's case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in Pickett's case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or contingencies of a life which he will not live, are out of place; the judge must make the best estimate based on the known facts and his prospects at time of death.*

26. The Court of Appeal in ***Roger Dainty v Mwinyi Omar Haji & Another*** **MSA CA Civil Appeal No. 59 of 2004 [2004]eKLR** added that;

> *To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.*

27. On the issue of the multiplicand, the evidence is that although the deceased was a graduate engineer, he was unemployed at the time and the trial magistrate relied on an extract from the approved Human Resources Manual for Kenya Rural Road Authority which showed that the entry level salary of a graduate engineer is between Kshs. 150,000 and 200,000/-. The duty of the respondent was to prove that the deceased as a graduate engineer would earn so much and in doing so there was nothing wrong in relying on an estimate from a reputable company which would show the general or average wage or income of a person of that level of education and experience. Thus there is no reason why the trial court could not rely on the salary of a graduate engineer from a public firm employing graduate engineers to determine the multiplicant. In ***Rosemary Mwasya v Steve Tito Mwasya and Another*** **NBI CA Civil Appeal No. 100 of 2017 [2018]eKLR**, the Court of Appeal upheld the trial court's assessment of the multiplicand and observed that:

> *As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions …..…..* [Emphasis mine]

28. In considering the multiplicand, the trial magistrate considered the entry level of an engineer and that of a newly employed magistrate and came to the conclusion that a multiplicand of Kshs. 50,000/- was appropriate. I think on this issue, the trial magistrate erred by referring to the salary of a newly employed magistrate when neither party led evidence on the salary of a magistrate, and when such salary was not a matter of common notoriety for the court to take judicial notice. The evidence was that a graduate engineer would earn between Kshs. 150,000/- and Kshs. 200,000/-. Taking into consideration yearly increments, I would take a base or average salary of Kshs. 170,000/- then reduce it by one third to take into account the element of taxation and other statutory deductions resulting in a multiplicand of Kshs. 119,000/-.

29. The respondent argued that the trial magistrate should have used the conventional ratio of 2/3 that is usually used when assessing the dependency ratio where the deceased is a married person with children. In calculating the damages for the lost years, the loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve (see ***Gammell v Wilson*** **(Supra)**). In other words, the question to be answered under the ***Law Reform Act*** is what would the deceased spend on himself while in the case of loss of dependency under the ***Fatal Accidents Act*** is what would the deceased spend on his dependants? I would also note that contrary to the respondent's submission, the dependency ratio is not conventional but a matter of fact dependent of the evidence. Considering the totality of the evidence, I do not think that a ratio of 1/3 applied by the trial magistrate is unreasonable.

30. Funeral expenses are in the nature of special damages and the law is that they must be pleaded and proved to the required standard (see

***Hahn v Singh* [1985] KLR 716**). The respondent prayed for a total amount of Kshs. 134,400/- as funeral expenses. The Court of Appeal in ***Jacob Ayiga Maruja and Another v Simeon Obayo* [2005]eKLR held,** *inter alia:*

> ***We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs. 60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs. 60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs. 60,000/= we have awarded herein apply strictly to the circumstances of this case.***

31. PW 2 testified that Kshs. 134,000/- was spent on the burial, Kshs. 20,000/- was spent on the coffin and Kshs. 25,000/- on obtaining the grant of letters of administration for which he produced a receipt. He told the court that he was not keeping a record of the funeral expenses. The trial magistrate only awarded Kshs. 25,000/- presumably for cost of the grant of representation. I think in this case and in line with ***Jacob Ayiga Maruja and Another v Simeon Obayo* (Supra), I would award Kshs. 40,000/- as funeral expenses.**

32. Even though I have dismissed the appeal, I would have made the following award;

Pain and Suffering	Kshs.	20,000/-
Loss of expectation of life	Kshs.	150,000/-
Lost years		
(119,000 X 12 X 1/3 X 25)	Kshs.	11,900,000/-
Special damages	Kshs.	65,000/-
Total		**Kshs. 12,135,000/-**

33. The appeal is allowed. The judgment of the subordinate court is set aside and substituted with an order dismissing the appeal. The appellant shall have the costs of the appeal.

DATED and DELIVERED at KISUMU this 19th day of March 2018.

D.S. MAJANJA

JUDGE

Mr Kisinga instructed by Mohammed Madhani and Company Advocates for the appellant.

Mr Meroka instructed by Meroka and Company Advocates for the respondent.