



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 90 OF 2011

SHIVA CARRIERS LTD.....APPELLANT

VERSUS

LOISE JEPKOECH SANG.....1ST RESPONDENT

SHADRACK KIPKOECH TARUS.....2ND RESPONDENT

(An appeal from the Judgment of Hon. R. Mutoka, Chief Magistrate, delivered on 6th May, 2011 in Mombasa Chief Magistrate's Court Civil case No. 2172 of 2009)

JUDGMENT

1. The suit the subject of this appeal arises from a fatal road traffic accident where Judgment was entered in favour of the plaintiffs (respondents) who sued as the Administrators of the estate of the deceased, Caroline Jeptoo Sang.
2. The defendant (appellant), Shiva Carriers Limited, being dissatisfied with the Judgment by the Hon. Magistrate, filed a memorandum of appeal on 3rd June, 2011, raising the following grounds of appeal:-
 - (i) That the Learned Trial Magistrate erred in law and in fact in finding that the appellant was liable at 100%;
 - (ii) That the Learned Trial Magistrate erred in law and in fact in holding that the appellant was liable without vicarious liability having been pleaded in the plaint or even proven by evidence;
 - (iii) That the Learned Magistrate erred in law and fact in holding the appellant liable for negligence yet there was no conclusive evidence that the appellant was to blame for the occurrence of the accident;
 - (iv) That the Learned Magistrate erred in awarding the respondents the sum of Kshs. 40,000/= as general damages for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs. 1,612,000/= as loss of dependency and Kshs. 58,000/= as special damages;
 - (v) That the Learned Magistrate erred in law and fact in awarding an amount of damages that is so high as to be an erroneous and an unjust estimate; and
 - (vi) That the Learned Trial Magistrate erred in law and fact by totally disregarding the submissions of the appellant and thereby arriving at a wrong decision.
3. The appellant prayed for the appeal to be allowed with costs and for the lower court case to be dismissed with costs.
4. The appellant filed written submissions on 17th May, 2018. The respondents filed their written submissions on 15th May, 2018 and supplementary submissions on 17th May, 2018.
5. In highlighting their submissions, Mr. Kinuthia, Learned Counsel for the appellant informed the court that they were contesting the issue of liability and quantum of damages. He submitted that the Hon. Magistrate erred by finding the appellant 100% liable, yet the said issue was not proved under the provisions of Section 62 of the Evidence Act which relates to proof of facts in regard to the contents of documents by way of oral evidence. It was submitted that the motor vehicle in issue belonged to Kara Roadways and that PW3 marked some documents for identification, that were from the said company, as MFI-9 and MFI-10 but they were not produced in court. It was contended that the Hon.

Magistrate referred to MFI-9 in her Judgment.

6. The appellant's Counsel argued that the police abstract produced by PW4 was not conclusive proof of ownership of the motor vehicle that caused the accident and could not be the basis of liability against the appellant. He cited the case of **Thuranira K. Karauri vs Agnes Ncheche** [1997] eKLR to augment his submissions on proof of ownership of the motor vehicle. In relying on the provisions of Section 107 of the Evidence Act, Counsel stated that the issue of the ownership of the motor vehicle was left unresolved.

7. On the issue of vicarious liability, Counsel submitted that the lower court could not have arrived at the said issue without proof of ownership of the motor vehicle. He referred to the case of **Morgans vs Launchbury** [1972] ALL ER 606 as cited with approval in **General Motors East Africa Limited vs Eunice Alila Ndeswa and Another** [2015] eKLR. He also relied on **Malawi Railways Ltd. vs Nyasulu** that was cited with approval in **IEBC vs Stephen Mutinda Mule and 3 Others** [2014] eKLR.

8. On quantum of damages, it was submitted that the deceased died instantly and was not dragged along by the motor vehicle as was found by the Hon. Magistrate. The appellant's Counsel was of the view that no award should have been made under the head of pain and suffering.

9. On loss of expectation of life, he was of the view that the sum of Kshs. 65,000/= would have been adequate compensation.

10. Counsel argued that on loss of dependency, the Hon. Magistrate should have used the minimum wage but she used a multiplicand of Kshs. 6,500/=. He cited the case of **Transpires Kenya Limited and Another vs SMM** (suing as the legal representative of the estate of EMM [2015] eKLR, to support his argument.

11. In response to the submissions made by Counsel for the appellant, Ms Osino, Learned Counsel for the respondent stated that Section 8 of the Traffic Act provides that the person in whose name a motor vehicle is registered, unless the contrary is proved, is deemed to be the owner. She stated that the police abstract shows that the owner of the motor vehicle was the appellant and a sale agreement was produced during the trial. She indicated that no objection was raised about the said document being produced in evidence. She also submitted that there was an application for production of MFI-10 as an exhibit and no objection was raised.

12. On the issue of the multiplier used, Counsel for the respondents urged the court to correct the multiplier applied from 31 years to 35 years as the Hon. Magistrate intended to use the latter multiplier.

13. On the issue of vicarious liability, Counsel submitted that the Driver who caused the accident was identified as Ezekiel Kungu Njenga and the owner of the motor vehicle was identified as well.

14. Ms. Osino in making reference to the evidence stated that PW2 saw the Driver of the motor vehicle driving towards the port. PW4 indicated that the said Driver was charged. It was submitted that the only inference that could be made is that the Driver was driving the motor vehicle with the authority and consent of the plaintiff, thus the doctrine of *res ipsa loquitur* applies. She cited the case of **Obed Mutua Kinyili vs Wells Fargo & Another** [2014] eKLR. She prayed for the appellant be held 100% liable.

15. On the issue of pain and suffering, the respondent's Counsel submitted that the Hon. Magistrate believed the evidence of PW2 that the deceased was dragged on the road for about 1 metre with her head hanging on the road after she was hit on the pavement. The said Magistrate held that the deceased must have suffered intense pain. Counsel submitted that the award of Kshs. 40,000/= was reasonable.

16. It was further submitted that the deceased was 23 years old and had a 3 year old child. The deceased had been in Mombasa for 3 days where she had reported for a new job, thus an award of Kshs. 100,000/= for loss of expectation of life was reasonable in the circumstances.

17. On the issue of loss of dependency, the respondent's Counsel submitted that the deceased used to work in Nairobi before reporting to Mombasa for her new employment where she was to earn a salary of Kshs. 10,000/= per month. It was stated that the deceased used to give her mother Kshs. 8,000/= for her child's upkeep. Counsel indicated that the Hon. Magistrate applied a multiplicand of Kshs. 6,500/= and a multiplier of 31 years instead of a multiplier of 35 years. She urged the court to rectify the error under the provisions of Section 99 of the Civil Procedure Act. She prayed that the appeal to be dismissed with costs.

18. In response to the foregoing submissions, Mr. Kinuthia stated that on the issue of ownership of the motor vehicle, Section 99 of the Civil Procedure Act cannot come in aid of the respondents.

19. On the issue of the deceased's alleged monthly contribution of Ksh. 8,000/= to her mother, Counsel stated that the Hon. Magistrate held that the said amount was exaggerated. On the issue of the wrong multiplier having been adopted, this court was urged to refer to the handwritten record of the lower court to find out the correct position.

ANALYSIS AND DETERMINATION

20. The issues for determination are:-

- (i) If the appellant was the owner of motor vehicle registration No. KAN 610X/ZA 1474;
- (ii) If the appellant was vicariously liable for the negligence of its Driver, servant and or agent; and
- (iii) If the quantum of damages awarded should be disturbed.

21. The duty of the first appellate court is to analyze and re-evaluate the evidence on record and arrive at its own independent decision bearing in mind that it has neither heard nor seen the witnesses testify. See **Selle vs Associated Motor Boat Company Ltd** [1968] EA 123 and **Williamson Diamonds Ltd vs Brown** [1970] EA 1.

22. When the plaint was filed before the lower court on 5th August, 2009, the 1st plaintiff was Shiva Carriers Ltd and the 2nd plaintiff as Kara Roadways Ltd. The claim against the 2nd defendant was however withdrawn on 8th September, 2009. PW1, Wilfred Kiplagat testified before the lower court that he employed the deceased, Caroline Jeptoo Simon on 21st June, 2009 in his company, Task Holdings Limited. Her starting salary was Kshs. 10,000/= . After she worked for 3 days, he learnt that she was involved in a road traffic accident. He produced her employment letter as exhibit 1.

23. Ali Salim Chaka testified as PW2. His evidence was that on 23rd January, 2009, he saw two lorries going uphill. When they reached near a bridge, motor vehicle registration No. KAN 610X/ZA 1474 started overtaking at a corner and it lost control. It went to the pavement where a girl was walking heading to the port. He stated that the said motor vehicle pressed her on the wall and dragged her for less than a metre. She fell on the pavement with the head hanging on the road. PW2 blamed the Driver of the said vehicle as he was overtaking a lorry with a trailer at a corner, as he drove uphill. He further stated that the deceased could not have escaped as there was a wall in the place where the accident took place.

24. PW3, Loise Chepkoech Sang was the deceased's mother. She testified that on 23rd January, 2009, she received a phone call from a Police Officer requiring her to travel to Mombasa. PW3 contacted the deceased's Aunt who lived in Mombasa. The Aunt went to Coast General Hospital where she found Caroline dead after a road accident. PW3 further stated that the deceased had a daughter by the name Maureen, who was 2 years and 9 months old as at that time.

25. It was her evidence that she was staying and taking care of the deceased's daughter. She also indicated that the deceased would send her Kshs. 8,000/= monthly for child support. She produced a death certificate as exhibit P2, grant of letters of administration as exhibit P3 for which she paid Kshs. 10,000/=. She produced a receipt thereof as exhibit P4. She testified that she was issued with a police abstract on 26th January, 2009 which she identified as MFI-P5. A search she did at the Registrar of motor vehicles revealed that Shiva (appellant) was the registered owner of trailer ZA/474 (sic), she produced a copy of the records as exhibit 6. She found out that motor vehicle registration No. KAN 610X belonged to Kara Roadways Ltd, as per exhibit P7. She paid for searches for the said motor vehicle and trailer and produced the bundle of receipts as exhibit P8.

26. It was PW3's evidence that her Advocate sent demand letters to Shiva Carriers Ltd and Kara Roadways Ltd but the latter responded by stating that they had sold the motor vehicle to Shiva Carriers Ltd and attached a sale agreement, these were marked as MFI-9 and 10.

27. PW3 produced the deceased's burial permit as exhibit 11. She also produced a bundle of 5 receipts as exhibit 12, to show that they incurred Kshs. 8,000/= for the coffin, Kshs. 28,000/= for transport. They also paid mortuary fees of Kshs. 7,500/= and mortuary attendant fees of Kshs. 3,100/=. She also produced the deceased's certificates as exhibit 13.

28. PW3 indicated that the deceased was 23 years old when she died and could have worked up to the age of 60 years. She prayed for compensation for the deceased's death which will assist her in bringing up the child.

29. PW4 was No. 64051 PC Paul Kiambati attached to Port Police Station Traffic duties. He stated that on 23rd January, 2009 he received an accident report involving motor vehicle registration No. KAN 610X/ZA 147 (sic), a Mercedes Benz and a pedestrian by the name Caroline Sang along Kipevu road near Kengen junction. He testified that the Driver, Ezekiel Kungu Njenga was charged. PW4 produced the police abstract as exhibit 5.

30. The lower court proceedings reveal that Ms. Osino at that juncture applied for production of MFI-10 and there being no objection, it was produced as exhibit 10. The said exhibit comprises a demand letter dated 3rd July, 2009 from the respondent's Advocate and a sale agreement between Kara Roadways Limited and Shiva Carriers Limited showing that the former had on 15th June, 2005 sold motor vehicle registration No. KAN 610X to the latter.

31. In its defence, at paragraph 2, the appellant denied ownership of motor vehicle registration No. KAN 610X/ZA 1474 and put the respondents to strict proof thereof. In order to prove that the appellant was the owner of the said motor vehicle, the respondents produced exhibit 10 which shows that Kara Roadways Limited sold the motor vehicle in issue to the appellant before the date of the accident herein, which occurred on 23rd January, 2009.

32. In **Wellington Ng'anga Muthiora vs Akamba Public Road Services Ltd and Another** [2014] eKLR, the Court of Appeal stated thus:-

“where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”

33. I am therefore in agreement with Ms Osino that the respondents discharged their burden of proof under Section 8 of the Traffic Act, Cap 403 Laws of Kenya, by production of the sale agreement. The appellant did not call any witnesses to controvert the evidence produced by the respondent to show that it was the owner of motor vehicle registration No. KAN 610X/ZA 1474. This court is therefore satisfied that from the evidence adduced, the appellant was properly sued as the owner of the motor vehicle that caused the accident.

34. On vicarious liability, the respondents in their plaint averred that motor vehicle registration No. KAN 610X/ZA 1474 was being driven by the appellant's authorized Driver, servant, employee and/or agent, by the name of Ezekiel Kungu Njenga at the time of the accident. PW4 adduced evidence that the said Driver was charged in court for causing the accident. PW2 who was an eye witness gave evidence that it is the said motor vehicle that crashed the deceased as she walked along a pavement, as it overtook another lorry.

35. In the case of **Kenya Bus Services Limited vs Humphrey** [2003] KLR 665, the Court of Appeal held as follows:-

“Where a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver”.

36. I have considered the authorities cited by both Counsel on the issue of vicarious liability and their submissions on the same, I am however not persuaded by the argument by Counsel for the appellant that the court should not have arrived at the issue of vicarious liability without proof of ownership of the motor vehicle that caused the accident. Since the appellant failed to call any evidence to rebut the respondents' evidence that motor vehicle registration No. KAN 610X/ZA 1474 was being driven by a Driver who was authorized by the appellant, the only conclusion that this court can arrive at is that the appellant's motor vehicle was being driven by Ezekiel Kungu Njenga, with the full authority of the appellant. It is therefore the finding of this court that the respondents proved the issue of vicarious liability.

37. The evidence of PW2 was clear that the accident was solely caused by the appellant's Driver. The deceased was walking along a pavement designated for pedestrians but due to the negligent driving of the appellant's Driver, she was crashed to death. I therefore find no fault in the decision by the Hon. Magistrate that the appellant was 100% liable for the accident.

38. The appellant challenged each and every award of damages made by the Hon. Magistrate. In making the award for pain and suffering, the respondents were awarded Kshs. 40,000/=. In so doing, the Hon. Magistrate considered the evidence of PW2, who was an eyewitness who saw the deceased being hit by the appellant's motor vehicle. According to PW2, the appellant's motor vehicle lost control and went to the pavement and pressed the deceased on a wall and then dragged her for less than a meter before she fell on the pavement with the head hanging on the road. Given the foregoing circumstances, this court will not differ from the holding of the Magistrate that the deceased must have suffered excruciating pain even if it was for the shortest period. I therefore hold that the award of Kshs. 40,000/= for pain and suffering was not excessive.

39. On loss of expectation of life, the Hon. Magistrate awarded Kshs. 100,000/= to the respondents. In this court's view, that was a conventional sum. Courts have for many years been awarding the said sum for loss of expectation of life. No valid reason was advanced as to why this court should depart from that well trodden path.

40. On loss of dependency the deceased was 23 years old. She had a child aged about 3 years as at the time PW3 testified. The deceased had been newly employed by PW1 in his company. The letter of employment produced as exhibit 1 showed that her salary was Kshs. 10,000/=. She was however crashed to death 3 days into her new job. Mr. Kinuthia argued that the Hon. Magistrate should have applied the minimum wage, instead of the multiplicand of Kshs. 6,500/=. Ms Osino was however of the view that the Hon. Magistrate did not mislead herself in the above regard.

41. In this case, the deceased was 23 years old and had a 3 year old daughter whom she would have catered for years to come. The Hon. Magistrate took into account that the deceased would have worked up to the age of 60 years. Although the deceased had worked for only 3 days in her new job before she met her death, had she lived and worked to the end of the month that she met her death, she would have earned Kshs. 10,000/=. The Hon. Magistrate took into consideration that the deceased would have paid NSSF and NHIF, thus her take home after deductions would have been Kshs. 6,500/= which was adopted as the multiplicand.

42. It is an established principle of law that an appellate court will disturb an award of quantum of damages in situations where the trial court took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low to amount to an erroneous estimate, or where the assessment is not based on any evidence. This was so held in **Bashir Ahmed Butt vs Uwais Ahmed Khan** [1982-88] KAR 5 and **Peter M. Kariuki vs Attorney General**, [2014] eKLR.

43. Since the deceased's monthly salary was stated in evidence, I am not persuaded by the authority cited by Counsel for the appellant in trying to persuade this court to apply the minimum wage in computing loss of dependency. The court in the case of **Transpires Kenya Limited & Another vs SMM** (Suing as the legal representatives of the estate of E.M.M) [2015] eKLR, applied the minimum wage of Kshs. 3,765/= that was applicable as at 10th June, 2011 for the reason that the plaintiff failed to produce evidence of the deceased's monthly income. The circumstances in that case are therefore distinguishable from the present case.

44. Counsel for the respondents prayed for the court to invoke the provisions of Section 99 of the Civil Procedure Act by amending the lower court record so as to apply a multiplier of 35 years instead of 31 years. She stated that the record indicates that the Magistrate's intention was to apply a multiplier of 35 years but erroneously applied 31 years.

45. Ms Osino in asking this court to amend the lower court record with regard to the applicable multiplier of 35 years instead of 31 years relied on the provisions of Section 99 of the Civil Procedure Act. The said provisions state as follows:-

“Clerical or arithmetical mistakes in judgment, decrees order, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

46. Ideally, the respondents should have filed an application before the lower court to have the error on the face of the record corrected by the court that delivered the Judgment. If the said court failed to correct the said error, the respondents should then have cross - appealed against

such a decision. In **Lakhamshi Brothers Ltd vs R. Raja and Sons** [1966] EA 313, Sir Charles Newbold, P., stated as follows in a unanimous decision of the then Court of Appeal:-

“Indeed there has been a multitude of decisions by this court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted.”

47. In responding to the request made by Ms Osino for this court to correct the error on the face of the record, Mr. Kinuthia urged the court to peruse the original handwritten record in order to ascertain if there was such an error. Indeed the handwritten record shows that the intention of the Hon. Magistrate was to apply a multiplier of 35 years and not 31 years when computing the award for loss of dependency.

48. This court emphasizes that an error on the face of the record should be corrected at the first instance by the court that was seized of the hearing of the case. The error on the face of the lower court record was however not corrected by the trial court. If this court fails to address the said issue, it will lead to injustice on the part of the respondents. I invoke the provisions of Section 3A of the Civil Procedure Act which gives this court inherent jurisdiction and hereby correct the error apparent on the face of the record.

49. In the case of **Hanna Wangaturi Moche and Another vs Nelson Muya**, Nairobi HCCC No. 4533/1993, the Court stated as follows:-

“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum”.

50. The appellant's Counsel did not submit on whether the said multiplier was inordinately high or otherwise. The inference to be drawn from their silence on the said issue is that they did not dispute the multiplier of 35 years.

51. The quantum of damages therefore works out as follows:-

(i) Pain and suffering - Kshs. 40,000/=

(ii) Loss of expectation life - Kshs. 100,000/=

(iv) Loss of dependency - Kshs. $6,500 \times 35 \times 12 \times 2/3 =$ Kshs. 1,820,000/=; and

(v) Special damages = Kshs. 58,000/=

Gross award = 2,018,000/=

52. In paragraph 6 of the plaint, the respondents gave the names of the deceased's dependants as Loice Jepkoech Sang who is the deceased's mother, Shadrack Kiprop Tarus, a brother to the deceased and Maurine Jebet who is the deceased's daughter. The provisions of Section 4(1) of the Fatal Accidents Act state as follows:-

“Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child whose death was so caused.”

53. Going by the above legal provisions and as per the averments in paragraph 6 of the plaint, the dependants of the deceased under the Fatal Accidents Act are thus her mother, Loice Jepkoech Sang and the deceased's daughter, Maurine Jebet who is still a minor. The deceased's brother is not a dependant under the provisions of the Fatal Accidents Act. The deceased's brother, Shadrack Kiprop Tarus can only benefit from the award made under the provisions of the Law Reform Act.

54. In addition to the award made herein, the respondents are awarded costs of this appeal and of the case in the lower court. Interest is also awarded to the respondents. The appeal therefore stands dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 21st day of September, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

Ms Osino for the respondent

