REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 66 OF 2016

STEPHEN M. MWANGI ..... 1ST APPELLANT

MOHAMMED A. HASSAN ..... 2ND APPELLANT

AHMED & BROTHERS LIMITED ..... 3RD APPELLANT

VERSUS

ALBERT WESONGA (suing as the Administrator,a dependant and on behalf of

the dependants of RHOBA M. SHIKUKU-DCD) .....1ST RESPONDENT

MARGARET KAKAI ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable M. Wambani in Eldoret CMCC No. 815 of 2013, dated 12th April, 2016)

JUDGMENT

The plaintiff brought up this matter by way of a plaint and sought damages under the *Fatal Accidents Act* and the *Law Reform Act*, against the defendants. He claims that on or about 7th October, 2013, the deceased was a lawful passenger aboard motor vehicle registration No. KBK 392U Toyota Saloon, driven along the Eldoret Webuye road and on reaching Jua Kali area, the defendants, their drivers, servants and/or agents so negligently drove, managed and/or controlled motor vehicle Registration Number KBK 392U and KBV 370/2C 6057 thereby permitting the same to loose control and collide, occasioning the deceased fatal injuries.

The Appellant herein who were the 2nd and the 3rd defendants entered appearance and filed defences to the lower court suit. However, the first defendant, one *Stephen M. Mwangi*, despite being served with the summons to enter an appearance, failed to do so and filed no defence to the suit. Consequently, interlocutory judgment was entered against him.

The plaintiff called 4 witnesses. The first one was a police officer who produced a police abstract concerning the accident between a Toyota Saloon Registration Number KBK 396U NZE, and a Prime Mover KBV 370/2C 6507. The officer was not the investigating officer and was not able to trace the police file involving the matter. On cross examination he could not tell who was to blame for the accident. He revealed that the matter was being heard as an Inquest. He as well revealed that the saloon car was carrying 8 passengers, exclusive of the driver, though most of them were minors. Five of the passengers passed on.

PW2 and PW4 were allegedly the eye witnesses to the said accident. They alleged that on 7th October, 2013 at around 5.00 p.m they were at the scene of the accident which is Jua Kali centre. They saw a trailer from Webuye heading towards Eldoret, following an Easy Coach Bus. In between the lorry and the bus was a Pro-box vehicle. On the opposite direction from Eldoret towards Webuye, there was a saloon car and a lorry following it. The bus and the Pro-box overtook the lorry. The lorry going to Webuye also started overtaking. This lorry and the pro-box met and collided. PW-2 indicated the lorry and the small car were moving fast before the accident and the drivers were to blame for it. PW4 indicated that the point of impact was in the middle of the road.

PW3 is the husband to *Rhobai Shikuku*, one of the victims in the said accident. He confirmed her death in the said accident. She was working at Eastleigh Air Base as a casual for 3 months and was earning 20,000/- per month. She used to assist him pay rent and in house work. Their child *Abraham Were Mbaraka* also died in the accident.

The Appellants/2nd and 3rd defendants, called 2 witnesses in defence. The first one was a police officer who availed the file in which the said accident was investigated. He revealed that the investigating officer found that the driver of saloon car, registration Number KBK 392U, Toyota NZE, who died in the accident, was responsible for the accident. He recommended that the matter be terminated by way of a public

inquest. The sketch plan drawn of the scene of accident shows the accident was on the left lane as one faces Webuye from Eldoret of which was lawful lane of the trailer registration No. KBV 370G/ZC 6057.

The second witness was the first defendant/Appellant, the driver of the said trailer. On how the accident occurred he stated that he was driving the said trailer on the material day and time. At Jua Kali area there was a lorry behind him. There was an oncoming Bus and behind it was a saloon car. The said saloon car was overtaking the bus when the accident occurred. He had hooted to warn the saloon driver. He then swerved to the left to avoid a head on collision. The driver's cabin avoided the collision but the trailer which remained on the road collided with the small car. The accident was on his lawful lane and he was not speeding. The lorry was loaded and could not speed. He was at about 40kph. He was also not driving in a zig zag manner. He blamed the driver of the saloon car for the accident.

The trial court evaluated the evidence and delivered judgment on 12th April 2016 as follows:-

a. Liability in favour of the plaintiff as against the 2nd and 3rd Defendants at 70% and as against the 1st defendant at 30%.

b. Pain and suffering ……..Kshs.20,000/-

c. Loss of expectancy of life ……. Kshs.150,000/-

d. Loss of dependency Kshs.9,780 x 36 years x 12 x 2/3 = Kshs.2,816,640/-.

e. Total …….. Kshs.2,986,640/-

f. Plus costs and interest.

2nd and 3rd defendants/Appellants were to pay 70% of Kshs. 2,986,640 which is Kshs. 1,463,454/-.

The 2nd and 3rd appellants being aggrieved with the said judgment and evidence have appealed to this court on eleven grounds as follows:-

1. The Respondents did not prove their case on a balance of probabilities as against the appellants.

2. The 2nd and 3rd appellants are not 70% liable in negligence.

3. The first appellant should have been held 100% liable in negligence.

4. Liability was attributed contrary to the laid down principles.

5. Issues between the parties were not determined.

6. Submissions and authorities availed by the 2nd and 3rd appellants were not considered.

7. Wrong principles were applied in assessment of damages.

8. The assessment of general damages for loss of expectation of life at Kshs. 150,000/-; pain and suffering at kshs. 20,000/- and loss of dependency at kshs. 2,816,640/- when viewed against the evidence adduced is manifestly excessive and inordinately high so as to amount to miscarriage of justice.

9. Loss of dependancy could not have been proved in absence of documentary proof in support of the deceased earnings.

10. The evidence adduced inferred a dependency ratio of one third and not two thirds.

11. The adopted multiplier of 36 years is incorrect bearing in mind the uncertainties and vicissitudes of life.

The appellant in their submissions stated that the respondents, in the trial, called a total of four witnesses whereas they called two. PW1, a police officer, just confirmed that the accident occurred but he was not the investigating officer. PW-2 was an eye witness who stated that he blamed the driver of motor vehicle registration number KBV 370G as he could have waited for the bus in front to finish overtaking for a clear view of the road ahead before starting overtaking. PW4 also an eye witness gave similar evidence, but both never recorded statements with the police and nor appeared as witnesses on the police Abstract. The appellant averred these were coached witnesses and their evidence should not have been relied on.

It's further averred by the appellant that according to the witnesses who recorded statements with the police, the driver of motor vehicle registration number KBK 392U was to blame for the accident. The trial court did not lay any

basis of how liability was apportioned as it is clear the appellant's evidence and their submissions was ignored.

Lastly the appellants claimed that the trial court erred in awarding general damages under both the *Fatal Accidents Act* and *Law Reforms Act*

and yet they dissolve to the same beneficiaries, amounting to double compensation.

The Respondents on their part opposed the appeal and submitted on liability and quantum of damages awarded. They averred that the appellants called only two witnesses in their defence. DW-1 was a police officer who just produced the police investigations file in the accident and he was neither the investigating officer, nor did he visit the scene of the accident. DW-2, the 1st appellant confirmed he was the driver of Prime Mover Registered number KBV 370 G/ZC 6057 and that the 2nd appellant was its lawful and legitimate owner. He blamed the driver of KBK 392 U, for the accident.

On liability the respondents submitted that the cause of action involved two motor vehicles. The nature of the accident required the court to carefully consider the facts, the surrounding circumstances and evidence tendered so as to determine which party was to blame or was otherwise at fault.

As regards the general damages, the respondents opined that under the Fatal Accidents Act, they sought damages for loss of dependency. The court adopted a multiplicand of Kshs. 9,780 which was erroneous and unjustified as they proved income through adduced evidence. On the multiplier, the respondents submitted that thirty years was reasonable considering the medical history of the deceased and the legally set retirement age limit in Kenya. They averred the court properly invoked its discretion in adopting the stated multiplier.

On dependency ration, it was submitted by the respondents that the trial court's adoption of the ratio of two thirds is reasonable and tenable taking into account the pleadings and the evidence tendered.

Having weighed the foregoing, I do find the main issues for determination as :-

a. Who caused the accident/is to blame for it/is liable and to what extent?

b. Whether the trial court erred and arrived at an excessive award by making awards both under the Law Reform Act and the Fatal Accidents Act in respect to the same claimants.

In considering the first issue, I have weighed the evidence first, of the

Respondents two eye witnesses. Their evidence is not explicit on who between the two drivers was to blame for the accident and to what extent, and also on the exact point of impact on the road. PW2 on these issues stated in his evidence –in-chief;-

> **"On the road there was an accident involving 2 vehicles, a small car and a big car. From Eldoret towards Webuye there were 2 vehicles, a car and a trailer following each other heading to Webuye. From Webuye to Eldoret was a trailer, a bus and a small car. The bus was for Easy Coach. From Eldoret to Webuye the trailer was behind a small car coming very fast. The bust was overtaking a trailer that was ahead and the small car followed the bus. On the other side the trailer behind the small car also wanted to overtake the car. That is when the trailer and the small car from Kitale collided head on. The persons in the small car all passed on ……**
>
> **The two drivers have to blame but more blame is on the trailer as he was to wait for the small car to pass …… I blame the driver of the small car, he would have waited for the bus to overtake and he would have a clear view to overtake.**

On cross examination the witnesses stated: -

> **"I blame both drivers more so the trailer. The trailer was overtaking while the saloon was also overtaking. The bus had already overtaken and passed. The saloon car was getting back to its lane after overtaking the trailer, when the trailer heading to Webuye knocked the saloon and moved to the side of the road".**

On re-examination, the witness on the said issue stated: -

> **"The trailer from Eldoret did not have space to overtake saloon and finish overtaking and it was getting back to its lane. The trailer driver would have slowed down a bit for the saloon to finish".** I blame the trailer driver.

PW4 on the same stated: -

> **"I saw a trailer coming from Webuye following a bus, behind it was a pro-box following each other heading to Eldoret. From Eldoret to Webuye a saloon car was in front and a lorry followed it. The bus saw space to overtake from Eldoret it overtook the lorry. The probox also reached the lorry and overtook towards Eldoret. The lorry going to Webuye also started to overtake. The two met before the pro-box went to its side and the lorry hit the Probox on the driver's side. Probox was clear but the lorry blocked his way. The impact was on the saloon car side and the lorry also it's side. The impact was in the middle of the road …… I blame the lorry that came from Eldoret to Webuye registration number KBV 370S. Small car was KBK 392U. He was not being careful. He could have allowed the small car pass. I do not blame the driver. He had space to overtake. The lorry driver was going very fast."**

The evidence by these two said eye witnesses shows that both the driver of the small car registration number KBK 392 U and of the lorry registration No. KBV370/ZC 6057 had overtaken vehicles ahead of them prior to the accident. The small car had followed in the said overtaking, an Easy Coach Bus which was overtaking a lorry. It is therefore clear that this small car, registration number KBK 392 U, a Pro-

box, driver, could not see the road ahead of him while overtaking behind a bigger vehicle, of which was a bus. The other undisputed fact is that the pro-b0x was overloaded. It had either 8 adults and 5 children according to PW2 on cross examination, or 3 children and 5 adults according to PW4, who all died in the accident. Whatever the number, the capacity for a saloon is five passengers, inclusive of the driver. It is a well-known fact that an overloaded vehicle is hard to control and therefore dangerous. If the accident occurred while the two vehicles were overtaking, it could not have been as claimed by the two witnesses as each vehicle while overtaking would have moved to the other lane putting them on different lanes. They could only have collided while either getting back to their lanes after overtaking or after one had got back to its rightful lane. The lorry was not overloaded. If it was overtaking, it was a small vehicle and the driver could see ahead of it, unlike the driver of KBK 392U. The lorry driver stated he was on his rightful lane when the lorry collided with the small car which was overtaking a bus. He hooted and swerved to the left and avoided a head on collision as the lorry driver's cabin got to the left while the lorry trailer collided with the small car. He could not have been speeding as the lorry was loaded. The police file in which the matter was investigated agrees to the appellant's case. The investigating officer found that the driver of saloon car registration number KBK 392 U was to blame for the accident. Since he died in the accident he recommended that the matter be terminated by way of a public inquest. The sketch plan drawn of the scene shows point of impact was on the left lane as one faces Webuye from Eldoret of which is the lawful lane of the lorry registration number KBV 370G/ZC 6057.

Given the foregoing evidence it is not clear on how the trial magistrate agreed with the Respondents case of which is contradictory and unrealistic, instead of the appellant's case which was clear, consistent and logical. The fact of collision of two or several vehicles does not mean that all drivers have to blame for it. The respondents had a legal duty to establish negligence on the part of the appellants to the required standard in law, to which in my consideration of the evidence on record they did not. The trial court was therefore wrong in holding the appellants 70% liable, against the weight of evidence which shows the driver of motor vehicle registration number KBK 392 U, who died in the said accident, was 100% responsible for it.

On the second issue the court of appeal made it explicit in the case of ***Hellen Waruguru Waweru –vs- Kiarie Shoe Store limited CA No. 22 of 2015*** when it held that; -

> **"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 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 they are only awarded under the Law Reform Act, hence the issue of duplication does not arise".**

The foregoing quotation makes it clear that in this case there was duplication in awarding damages for loss of expectation of life and for loss of dependency, given that the beneficiaries are the same. If I was to correct the error, I would have deducted 150,000 awarded for loss of expectation of life from the total award. However, given my finding on liability there is no need of doing so. Liability against the appellants was not established to the required standard in law. I therefore allow the appeal, set aside the judgment and/or decision of the lower court; and do order dismissal of the Respondents suit against the appellant with costs. Costs of this appeal is also awarded to the appellants.

S. M GITHINJI

JUDGE

This decision applies in other related appeals which are No. 78/2016; 86 of 2016; 90 of 2016; 91 of 2016; 93 of 2016 and 94 of 2016.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of **October 2018**

In the presence of:

Mr. Ombima for the appellant

Mr. Mwelem – Court Assistant