REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 162 OF 2013

SALIM BIN AHMED HANJI &

ASHUR AHMED TRANSPORTERS.....APPELLANTS

-VERSUS-

S K K &

L C K …..... RESPONDENTS

(Suing as the next friends and parents of **F C (Deceased)**

(Being and Appeal from the Judgment of the Senior Resident Magistrate Hon. A. Towett delivered on 5th September 2013 in Molo Principal Magistrate Court Civil Case No.245 of 2012 Simon Kimtai Korir and Another -vs- Salim Bin Ahmed Hanji & Another)

JUDGMENT

1. The plaintiffs obtained letters of Administration for the Estate of the Late F C (deceased) vide Nakuru High Court Succession Cause No. 125 of 2012. This followed the demise of the deceased in a road traffic Accident along the Eldoret-Nakuru Highway at Chepseon area involving a Mercedes Benz Prime Mover Reg. No. KBA 440z -ZC7389 and the deceased who was a pedestrian allegedly walking along the said road.

2. The plaintiffs blamed the owner of the vehicle and the driver for negligence and sought damages.

Upon the trial court hearing the said case which was defended, a verdict was rendered that the deceased was 30% liable and an award of Kshs.765,275/= plus costs of the suit granted in favour of the Respondents (then plaintiffs).

3. This appeal was filed by the owner and driver of the accident vehicle as the Appellants faulting the trial court in both the apportionment of liability and the award of damages, upon the following grounds:

1. The Learned Trial Magistrate erred both in law and in fact by allowing a fatally defective suit.

2. The Learned Trial Magistrate erred both in law and in fact by apportioning liability at 70% in favour of the Respondents contrary to the evidence on record.

3. The Learned Trial Magistrate erred both law and in fact by awarding the deceased's estate a sum of Kshs.765,265.00 contrary to the authorities quoted by the parties.

4. The Learned Trial Magistrate erred both in law and in fact by awarding a sum of Kshs.765,265.00 which was excessive in the circumstances.

4. This is the first appellate court. It is obligated to reconsider and re-evaluate the evidence adduced before the trial court and make its own decision on the issues raised in the appeal.

I am minded that an appeal court cannot substitute its own factual findings for that of the trial court unless the same is plainly wrong or is based on no evidence. See **Kiruga -vs- Kiruga & Another (1988) e KLR.**

I shall therefore set out the evidence before the trial court and re-evaluate the same, starting with the issue of liability.

5. The Respondents evidence in its totality is that the deceased, 13 years old girl and daughter to the Respondents was knocked down by the 2nd Appellants vehicle while crossing the road from the right to the left and was accompanied by her sister. A sister to the deceased was the only eye witness. The Respondents produced as exhibits the necessary documents to prove their case including the police abstract, postmortem report, death certificate and official search for the accident vehicle as well as receipts in support of burial and other expenses.

6. A sister to the deceased M C, 13 year old (PW2)who accompanied the deceased testified that the deceased crossed the road before her and was standing on the other side of the road and was waiting for her to cross when a speeding lorry hit her as it went downhill, and that it rested on the left side of the road.

7. **The Appellants case was urged by the 1st appellant who was the driver of the vehicle**. His testimony was that he saw two girls standing next to the road ahead but suddenly one of them ran into the road while the other was left on the side of the road. However, on cross examination he conceded that the girl was standing on the pedestrian walk after she crossed the road.

He testified that he tried to swerve to the left to avoid hitting her and also slowed down but nevertheless hit the girl. He testified that he was not speeding but nevertheless blamed the girl, the deceased for the accident.

In cross examination, the driver confirmed that he was charged in a traffic court and pleaded guilty but added that the deceased's parents had a duty to protect the young children.

That is the evidence upon which the trial magistrate relied on, together with the parties Advocates submissions to arrive at the findings and conclusions, subject of the appeal.

8. I have considered the trial Magistrates judgment.

There is no doubt that he analysed the evidence adduced before him.

In particular, the effect of a conviction under **Section 47A of the Evidence** Act when no appeal is preferred, it is trite that such evidence is conclusive and that the person was guilty of the offence as charged. No appeal was preferred against the conviction.

9. It is on record that the 1st appellant pleaded guilty to the traffic offence as charged. The trial Magistrate went ahead to expound the effect of the plea of guilt that it connotes a decree of guilt and having considered the circumstances before the accident, found the driver to have substantially contributed to the accident to the extent of 70%. I do not agree with the Magistrates finding that the deceased was also negligent in crossing the road when it was not safe to do so. Evidence on record is that the deceased was hit while standing off the road, waiting for her sister to cross. Also worth noting is that the deceased was a young child hence the principles enunciated in **Tayab -vs- Kaniaru (1983) e KLR** that a court ought to take into account a child's ability to understand and appreciate the dangers involved on the road.

Admittedly the deceased, 13 years old, in my considered view had the requisite safety sense and capable

of appreciating dangers on the road. I find no fault with the trial magistrate's apportionment of liability. The upshot is that the apportionment of liability is upheld.

10. On assessment of damages, the trial court, after citing several authorities made the following awards in the following wording:

> ***"For pain and suffering this court will award Kshs.50,000/=, for loss of expectation of life Kshs.500,000/= and a conventional award of Kshs.150,000/=."***

Special damages of Kshs.65,275/= was also allowed.

In total a sum of Kshs.765,275/= less 30%, being Kshs.535,692/= was awarded to the respondents, plus costs and interest.

11. I have carefully considered the appellants complaint on the award of damages. The trial Magistrates judgment is not very clear on what the two sums, Kshs.500,000/= and Kshs.150,000/= were attached to. There is no dispute as what the respondents prayers in terms of damages were.

It was pleaded General damages under the Fatal Accidents Act and the Law Reform Act, as well as special damages.

12. In their respective submissions under the above two statutes before the trial court, the appellants submitted a sum of Kshs.410,000/= for pain and suffering - Kshs.100,000/= for loss of expectation of life but did not submit on general damages under the Fatal Accidents Act.

The Respondents on their part submitted Kshs.40,000/= under pain & suffering and Kshs.600,000/= for loss of expectation of life and a conventional award under Law Reform of Kshs.200,000/=.

13. I must state that the Respondents submissions did not also indicate what sums ought to be awarded under the Fatal Accidents Act.

The trial court did not indicate nor is it clear I think, what the sum of Kshs.500,000/= represented.

After citing authorities to the extent that for children the courts awarded Kshs.720,000/= for loss of expectation of life and lost years and Kshs.200,000/= under the Fatal Accidents Act, it is, in my considered opinion, that the Kshs.500,000/= awarded by the trial court was damages under the Fatal Accidents Act while the Kshs.150,000/= was for loss of expectation of life. It must have been an unintended oversight. That is the only rational interpretation that I can arrive at.

The parties in the suit ought to have sought a clarification from the trial magistrate which none did.

14. I therefore find that the trial Magistrate's awards were well within the limits, and supported by precedent. I do not find the said sums too high as to invite this court to vary the same. I upheld the assessment of damages by the trial Magistrate.

15. That having been done, I find no other fault on the part of the trial Magistrate's assessment of damages – **Arkay Industries Ltd -vs- Aman (1990) e KLR** it was held:

> ***"For a superior court to interfere with a lower courts assessment of damages, it must be shown, that the sum awarded is demonstrably wrong or that the ward was based on wrong principal or is so manifestly excessive or inadequate that a wrong principal may be inferred."***

16. The appellants have not demonstrated that the awards by the trial court were in any way excessive.

The upshot is that the appeal is without merit. It is dismissed with no orders as to costs.

Dated and signed this.....23rd.....Day of.....October.....2017.

J.N. MULWA

JUDGE

Delivered this ….....24th .....Day of .....October.....2017.

R. LAGAT KORIR

JUDGE