REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. 29 OF 2015

FORMERLY NAKURU HCCA 187 OF 2013

(Being an Appeal from Judgment in Naivasha SPMCC No. 312 of 2011)

CUBE MOVERS LTD..1ST APPELLANT

DARIUS MUSEMBI KYEVA....................................2ND APPELLANT

-VERSUS-

VICTOR AYIECHA OKERO AND MONICA MORAA OKERO

(*Suing as the legal representative of the Estate of*

VINCENT MAIKO OKERO (DECEASED)..................RESPONDENTS

J U D G M E N T

1. The undisputed background to this case is that on 19th August, 2010, the deceased Vincent Maiko Okero, was cycling along Naivasha- Nakuru road, along which the 1sts Appellant's vehicle KBJ 428L Mercedez Benz was being driven in the same direction by the second Appellant. A collision occurred between the cyclist and the lorry resulting in fatal injuries for the cyclist. Subsequently, the 2nd Appellant was charged in Naivasha Traffic Case No. 32 of 2010 with the offence of Causing death by dangerous driving Contrary to Section 46 of the Traffic Act.

2. The particulars of the charge were that on 19th August 2010 at around 4.00pm along Moi Avenue road in Naivasha, being driver of motor vehicle KBJ 428L Mercedez Benz canter, he drove the said motor vehicle in a manner which was dangerous to the public, in that he knocked down a pedal cyclist from behind causing the death of Vincent Michael Okero, and extensively damaged his bicycle. At the conclusion of the trial the 2nd Appeallnt was found guilty, convicted for the offence and a fine of Shs 50,000/= in default 12 months imprisonment imposed. He did not appeal the conviction and sentence.

3. Subsequently, the two Respondents brought against the Appellants a suit for compensation being SPMCC 312 of 2011 in their capacity as the legal representatives of the deceased, on behalf of his widow (2nd Respondent) children, and mother. In the amended plaint filed on 5/9/2011, the Respondents pleaded negligence against the 2nd Appellant for whom the 1st Appellant as the vehicle owner and employer, was vicariously liable.

4. The Defendants denied the key averments in the amended plaint and in particular, allegations of negligence. The suit was heard before the learned principal magistrate. Both Respondents gave evidence as PW1 & PW2 and in proving the details of accident relied on the proceedings in the Traffic Case No. 32 of 2010, produced by a court officer Salome Kananu (PW3). The 2nd Appellant testified on behalf of the defendants.

5. In a reserved judgment delivered on 18/9/2013, the learned magistrate found for the Respondents and proceeded to award damages under the Law Reform Act and Fatal Accident Act. The said judgment is the subject of this appeal. Nine grounds are raised in the Memorandum of appeal dated 10th October 2013. The key grounds attack the lower court's findings on liability (Grounds 1, 2, 3) and amount of damages awarded (Grounds 4, 5, 6, 7, 8, 9). This appeal was initially filed in Nakuru and upon transfer to this court, the parties consented to canvass it by way of written submissions.

6. The Appellants argued grounds 1- 3 (on liability together). The Appellants were represented by Mr. Kagucia. The Appellants took issue with the fact that the Respondents did not call eye witness to the accident, instead, relying on the proceedings in Traffic case No. 32 of 2010. They argue that the probative value of the said proceedings does not go beyond the provisions of Section 47A of the evidence Act. And that therefore, all the Respondents succeeding in proving was that the 2nd Appellant was guilty of the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act.

7. The Appellants contend that the Section 47A of the Evidence Act did not relieve the party in a civil case of the duty to call witnesses in proof of his case and that the court erred by disregarding the evidence of the 2nd Defendant regarding the negligent actions of the deceased. In this regard the Appellants relied on the case of **Robinson -Vs- Oluoch (1971) EA 376**.

8. Regarding quantum, the Appellants while not challenging the award for pain and suffering and loss of expectation of life, submitted that the same ought to be deducted from damages award made under the Fatal Accidents Act. To buttress that proposition the Appellants cited **Kemfro Africa Limited t/a Meru Express Service & Ano. –Vs- A. M. Lubia & Another (1982 – 1985) 1 KLR 727)**. On the awards made for lost dependency, the Appellants took issue with the multiplier of 25 years applied by the lower court in alleged disregard of their authorities. Asserting that that the income of the deceased was not proved they argued that the multiplicand used exceeds the applicable basic pay for unskilled labour in 2011.

9. Equally, it was submitted that special damages were awarded without proof, contrary to the well-known legal principle that special damages must be specifically pleaded and proved. The case of **Nizar Virani t/a Kisumu Beach Resort –Vs- Phoenix of East Africa Ltd Association Co. Ltd [2004] eKLR** was cited in this regard. The Appellants therefore urged this court to reverse the judgment of the lower court.

10. The appeal was stridently opposed by the Respondents in their submissions. In response to the challenge on the probative value of the traffic proceedings in proof of negligence against the 2nd Appellant, counsel for the Respondents Mr. P. K. Njuguna submitted interalia as follows:-

> **"The basis of the civil claim is the wrongful actions of the 2nd Appellant which led to the death of the deceased. In traffic law, the wrongful actions were described as "causing death by dangerous driving." The 2nd Appellant was tried by a court of competent jurisdiction and convicted. Under the Evidence Act, that is conducive proof of the said wrongful actions."**

11. As concerns contributory negligence the Respondents agreed with the holding in **Robinson -Vs- Oluoch (1971) EA 376** but submitted that it was upto the Appellants to prove negligence on the part of the deceased, which they failed to do. He supported the findings of the trial magistrate regarding the evidence of the 2nd Appellant in that regard.

12. On quantum, Mr. Njuguna's view was that the Kemfro case was not applicable to this case as no award had been duplicated. He supported the multiplier of 25 years and cited several authorities including the decision of the Court of Appeal on **Jacob Ayiga Maruja & Anor –Vs- Simeon Obayo [2005] eKLR**. This authority was also relied on in support of the award on loss of dependency, calculated on a multiplicand of Shs 10,000/= arguing that the award was based on the evidence of the Respondents and the 2011 basic wage of a carpenter, being the deceased's trade.

13. Further he submitted that notwithstanding the absence of documentary evidence of income and funeral expenses the respective awards were proper in light of the Court of Appeal decision in **Jacob Ayiga Maruja case**. Mr. Njuguna urged the court to dismiss the appeal.

14. I have considered the pleadings and proceedings in the lower court, the memorandum of appeal and the respective submission of the parties. The duty of the first appellate court is to undertake its own assessment of the evidence and make its own conclusions, always bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify (**See Peters –Vs- Sunday Post Ltd [1958] EA 424)**.

15. In E**phantus Mwangi & Ano. –Vs- Duncan Mwangi Wambugu [1982-88] Hancox JA** as he then was stated at page 292:

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown to demonstrably to have acted on wrong principles in reaching the findings he did."**

16. There was no dispute that a collision occurred between the deceased cyclist and the vehicle driven by the 2nd Appellant, and owned by the 1st Appellant. The Respondents relied during the trial on the proceedings in the Traffic Case no. 32 of 2010 arising from the said accident. From the proceedings of the trial, the said proceedings were produced without any demur by the Appellants and indeed their final submissions did not address the value or evidential weight to be attached to the said proceedings as at all.

17. Their present submission that the proceedings were not 'formally adopted' as the basis of testimony in the case is probably made with Section 34 of the Evidence Act in mind. The section which provides interalia:

> **"(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances-**
>
> > **(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding-**
> >
> > **(b) the proceeding is between the same parties or their representatives in interest; and**
> >
> > **(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and**
> >
> > **(d) the questions in issue were substantially the same in the first as in the second proceeding."**

18. The key words in subsection (1) are *"for the purpose of proving the facts which it states"* while subsection a, b, c, d further limit the circumstances in which such proceedings may be admitted. At the time PW3 produced the proceedings in question, the Appellants did not seek any clarification or raise objection under Section 34 of the Evidence Act. Be that as it may, it is plain to all that the proceedings in question would run afoul of Section 34 (1) (b) as read with Section 34 (2) b) of the Evidence Act. The

proceedings in the traffic trial fall under those contemplated under Section 34 (2) (b) as the Respondents and the 1st Appellants were not parties therein.

19. In the circumstances I would agree with the Appellant's submission that the trial magistrate erred in so far as she purported to analyse the witness evidence of the traffic trial and base her findings thereon. This was both unnecessary and improper. However, as the Appellants concede in their submissions, it is evident from the judgment that the trial magistrate based her final conclusions on the conviction of the Appellant for dangerous driving. She stated interalia:

> **"The court in the Traffic Case considered evidence well and was satisfied that 2nd Defendant was responsible for causing the accident by dangerous driving. 2nd Defendant did not appeal the court judgment, and in his defence in this case, has not been able to convince court that deceased was blame to some extent to make court apportion liability." (sic)**

20. The court's reference to the judgment in the traffic case which is a part of the traffic proceedings brings to play the provisions of Section 47 A of the Evidence Act which states:

> **"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

21. The conviction by a competent court recorded against the 2nd Appellant, it is true, is only proof that the 2nd Appellant had been convicted in connection with the accident of the offence of causing death by dangerous driving. I think in construing the probative value of that conviction, it is important to look carefully at the charge sheet in the traffic case and the amended plaint, in line with the guidance found in the decision of the Court of Appeal in **Robinson -Vs- Oluoch (1971) EA 376.**

22. The Appellants quoted only a portion of a passage in the latter case. In order to properly appreciate what the court was saying, I think it is useful to quote paragraphs B, C, D at page 378 in *extenso*. The court stated:

> **"The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what S. 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**

23. The particulars of the traffic charge set out earlier in this judgment and are pertinent enough to warrant reproduction. They state:-

> **"On 19/8/2010 at around 4pm along Moi Avenue road in Naivasha town Naivasha District of Rift Valley Province, being driver of motor vehicle KBJ 428L Mercedez Benz Canter drove the said motor vehicle in a manner which was dangerous to the public in that you knocked down a pedal cyclist from behind cause the death of Vincent Michael Okero and extensively damaged his bicycle."**

24. The amended plaint at paragraph 6 described the manner of driving of the 2nd Appellant *interalia*, as negligent, careless and/or reckless in addition to stating that the 2nd Appellant hit the cyclist from the rear as he rode along. The matters of "excessive speed", failure to observe traffic rules, to maintain proper look out for other road users are particularized in paragraph 6a) d) e). Paragraph 6b, c, allude to the failure by 2nd Appellant to the slow down stop, swerve or manage his vehicle to avoid hitting the cyclist from the rear, as well as his failure to drive with due care and attention to circumstances obtaining on the road.

25. It is undeniable that in the traffic case the 2nd Appellant was convicted in connection with dangerous driving resulting in the collision with the cyclist riding ahead of the 2nd Appellants vehicle. Semantics aside, the proof of dangerous driving is also evidence of the element of negligence in these circumstances. The contents of the trial magistrate in the traffic case support this conclusion.

26. In my humble view the argument of the court in **Robinson -Vs- Oluoch (1971) EA 376** is that careless (or in this case, dangerous driving) connotes a degree of negligence. However, that is not to say that the person convicted for dangerous driving is necessarily the only person whose negligence caused the accident, and is therefore precluded from alleging in his pleadings contributory negligence against another party in civil proceedings.

27. Significantly, in this case the amended defence does not contain any pleading against the deceased for contributory negligence. The Applicants ought to have pleaded that defence in their amended defence if it was intended to raise it at the trial. That is the essence of Order 2 Rule 4 of the Civil Procedure Rules: all material facts must be pleaded. In **Fernandes –Vs- People Newspaper Limited (1972) EA 63** the court observed:

> **"A civil case is decided on issues arising out of the pleadings. No allegation of negligence against the Appellant has ever been made, and it was not open to the court find negligence on his part."** See also Gandy –Vs- Caspain (1965) EACA 139.

28. Thus the conviction of the 2nd Appellant for Dangerous driving on the particulars in the charge sheet carries in itself strong evidence of negligence as averred in the amended plaint herein. And the standard of proof in civil matters is lower than in criminal cases. In my considered view, the trial court attached the proper weight to the traffic case conviction, even while rejecting the explanation given by the 2nd Appellant regarding the alleged negligence of the deceased.

29. The court correctly observed that the accident would not have occurred in the circumstances described by the 2nd Appellant in his evidence if he was not speeding and exercised proper control of his vehicle. The 2nd Appellant therefore did not in any way rebut the Respondent's case in that regard. As I have observed, the 2nd Appellant, not having pleaded contributory negligence against the deceased was precluded from blaming the deceased, for the accident. In the circumstances the finding of the lower court that the 2nd Appellant was solely to blame for the accident cannot be faulted.

30. On the question of quantum, the court's assessment of damages for pain and suffering and loss of expectation of life is not challenged and neither was it demonstrated how the Kemfro case applied to the award there being no double award identified in the Appellants' submissions. The uncontroverted evidence of the Respondents at the trial, which the court believed, was that the deceased was a self employed carpenter, supporting his wife and four children.

31. Evidently, no documentary proof of his income or trade was tendered before the court, however, as the Court of Appeal observed in **Jacob Ayiga Maruja (supra)**, documentary evidence cannot be taken as the exclusive method of proving such matter in the social context of this country.

32. I am of the view that the lower court properly accepted the Respondents' evidence in this regard and justified it accordingly. It was also reasonable to base the income on the applicable basic wage of the

year 2011 due to the absence of documentation. The deceased being in self employment, and with a young family would have, barring unknowns, been active for several more years. Hence the multiplier of 25 years is reasonable considering his age at death. This would take active working life to the age of 56 years, which is not in any way exaggerated. I can find no justifiable cause to interfere with the award for lost dependency.

33. I do however think that the Respondent's claim for special damages was not proved. There should be restricted room, in the absence of proof, for making assumptions regarding claims made in respect of funerals, in my view, whether high or not. There is a long line of authorities to the effect that special damages should be specifically pleaded and proved. The Court of Appeal in **Jacob Ayiga Maruja (supra)** made it clear that its decision in assuming therein that funeral expenses were incurred was an exception, and not a departure from the well trodden path.

34. On the authority of **Nizar Virani**, I will interfere with the special damages award of Shs 35,200/= by setting it aside on the basis that the claim was not proved. The appeal succeeds only to that extent, reducing the total judgment sum to Shs 2,120,000/=. The costs of this appeal are awarded to the Respondents

Delivered and signed at Naivasha this **31st** day of **July, 2015.**

In the presence of:

For Appellants

For Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE