REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 94 of 2010

MULTIPLE HAULIERS CO.LIMITED …….APPELLANT

VERSUS

DAVID LUSA (ADMINISTRATORS OF THE ESTATE OF

JACKSON KILONZO LUSA)…….**RESPONDENT**

(*Being an appeal from the original judgment in Makindu Principal Magistrate's Court CMCC No.265/2009 by Hon. B. Ochieng, PM on 13/6/2010)*

JUDGMENT

The origin of this appeal is a road traffic accident that occurred on the 21st February, along the Machinery-Kyulu Road involving motor vehicle registration No. KAU 168K and **Jackson Kilonzo Lusa**, a bicycle cyclist. The respondent sued the appellant as the administrator of the estate of the estate of **Jackson Kilonzo Lusa**-deceased. He claimed damages under, the Fatal Accidents Act and Law Reform Act. The respondent was a father of the deceased who passed on in the road traffic accident aforesaid. Apparently he was hit by the said motor vehicle as he cycled along Machinery-Kyulu Road. He died instantly. The accident was subsequently reported to Mtito Andei Police Station. Prior to his death the deceased had been employed by PW2 as a conductor in one of his matatus and was earning Kshs. 700/= daily.

The appellant in the defence denied that the deceased passed on as a result of the accident and or its driver's negligence. Instead it blamed the deceased for the accident. It averred that its driver was driving along Machinery-Kyulu murram road when a cyclist and his pillion passenger emerged suddenly from a side road ahead of him to his right and though he attempted to swerve to avoid hitting them, he ran over them killing them instantly.

The learned magistrate having carefully evaluated the evidence on record came to the inescapable conclusion that the appellant was to blame for the accident to the extent of 80%. In other words he apportioned liability at 80%:20% in favour of the respondent and awarded him damages in the sum of Kshs. 853,930/=.

The appellant was aggrieved by the judgment and degree aforesaid. Hence it preferred the instant appeal on 12 grounds to wit;-

"1. ***That the learned trial magistrate erred in law and fact in finding the appellant 80% liable despite the overwhelming evidence to the contrary.***

2. ***That the learned trial magistrate erred in law and fact in failing to appreciate that the evidence of***

PW3 was contradicted by PW4 and DW1 and thereby arrived at the wrong conclusion on liability.

3. ***That that the learned trial magistrate erred in law and fact in failing to appreciate that the respondent did not prove negligence against the appellant.***

4. ***That the learned trial magistrate erred in law and fact in failing to consider that the appellant's defence and in failing to appreciate that the version of the DW1 as to how the accident occurred was the more probable version***.

5. ***That the learned trial magistrate erred in law and fact in awarding general damages for loss of dependency in the sum of Ksh. 720,000/=***

6. ***That the learned trial magistrate erred in law and fact and misdirected himself in finding that the deceased was earning Kshs. 900/- when there was no or not sufficient evidence to prove this.***

7. ***That the learned trial magistrate erred in law and fact and misdirected himself in applying Kshs. 15,000/= as the monthly earning by the deceased when there was no evidence to that effect.***

8. That the learned trial magistrate erred in law and fact and misdirected himself in awarding general damages for loss of expectation of life under the Law Reform Act and damages for loss of dependency under the Fatal Accident Act and failing to discount the former and thereby offering double compensation to the respondent.

10. That the learned trial magistrate erred in law and fact in awarding general damages for loss of dependency when the respondent had not pleaded the particulars according to the Fatal Accident Act and when the respondent had not proved dependency.

11. That the learned trial magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the appellant together with the authorities relied on by the appellant.

12. ***That the learned magistrate wholly erred in law and fact in arriving in her said decision."***

When the appeal came before me for directions on 13th July, 2012, part of the directions agreed upon by the parties were that the appeal be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

Before I venture into consideration of the grounds of appeal, I think that it is necessary to set out what I think to be the approach, function and duty of this court. An appeal from the subordinate court to this court is by way of a retrial and as this court has pointed out on various occasions, it is not bound necessarily to accept the findings of fact by the court below but this court must reconsider the evidence re-evaluate it and make its own conclusion although always bearing in mind that it had not had the advantage of the trial court of seeing and hearing witnesses. I will bear these injunctions in mind as I embark on determining this appeal.

It is common ground that the accident occurred on 21st February, 2009 involving motor vehicle registration number KAU 168 owned by the appellant and the deceased. It is also common ground that the deceased a cyclist was fatally injured in the said accident.

The only dispute was as to how the accident occurred and who was to blame for the accident. To the respondent it was solely the appellant who was responsible for the accident. However, the appellant thinks otherwise and holds the deceased entirely to blame for the accident.

The respondent called PW3, **Jackson Kiseli Winzi** who testified as to how he was riding a bicycle behind the deceased on the fateful day when the accident occurred. He was from Machinery direction heading to Utithi Market when riding his bicycle on the same road. Infront of him, there was a person cycling a bicycle and he had a pillion passenger heading the same direction. Suddenly, motor vehicle

KAU 168K came from behind passed him and crushed into the people cycling ahead of him. Apparently, the motor vehicle was being driven at a high speed. When it overtook him from his right hand side whilst facing Utithi Market, it did not return to its left side of the road as it was also determined to overtake the bicycle rider and the pillion passenger infront. As it approached to overtake the cyclists, the road had some pot-holes that forced the driver to swerve and avoid the said pot-holes at high speed. He swerved to his left and that is when he crushed the cyclists. Since the bicycle was still in motion, the cyclist fell on the left side of the road and they were passed over by the lorry and fatally injured. According to PW3 the driver of the lorry attempted to run away prompting him to scream for immediate response by members of the public prompted the driver to stop about 100 metres from the scene of the accident. He was forced by members of the public to come out of the lorry. Though PW3 did not talk to him in his own opinion, the driver of the lorry was drunk of alcohol and could not comprehend properly what had happened. He blamed the accident entirely on the driver of motor vehicle registration KAU 168K, for he drove it at an excessive speed in the circumstances and drove without due care and attention, or not regard to the safety of other road users.

In my view, the evidence of PW3 was forthright and coherent and confirmed that he saw what happened and he had no other interest in this matter but only to explain to the court what he saw. PW3 confirmed that having overtaken him the driver even more in order to overtake the cyclist infront of him.

The fact that the driver of the lorry was unable to stop or slow down the lorry completely when he saw the pot-holes on the road is a clear indication and confirmation that the lorry was at high speed on a dirt road. In a bid to avoid the pot-holes, he swerved left and ended up crushing into the cyclists. It would appear that he had actually lost control of the motor vehicle. Further, the fact that the lorry passed over the two people and never stopped shows that it was at speed since 2 obstacles; the two people and the bicycle could not even make it stop. Finally, the fact that the lorry crushed into the cyclist and only went to stop 70 metres away is indeed a confirmation that the lorry was at a very high speed. If the lorry was doing 30Kph as the driver wanted the court to believe, it would have stopped instantly on application of emergency brakes on seeing the pot-holes and would not even have gone over the cyclists.

In a nutshell, it is clear to me that the accident was caused by the culpable negligence on the part of the driver of the appellant's when he abruptly came across some pot-holes on the road at high speed and opted to swerve left to avoid them only to end up crushing the deceased.

The thrust of the appellant's defence was to try and show that the cyclists emerged from a feeder road to the main Machinery-Kyulu Road and as they joined, they swerved and crushed into the body of the trailer behind the head of the lorry as it passed the junction. As a result they fell under the trailer and were crushed by the rear wheels of the trailer. On realizing what had happened, its driver stopped 70 metres away. Otherwise there was nobody who saw or witnessed the accident.

However on cross-examination by **Mr. Muindi,** DW1 confirmed the evidence of the eye witness PW3 that the feeder road he was talking about was about 50 metres from the scene of accident as one faces Utithi Market. He also conceded that he saw the cyclist at a distance of 50 metres after he had joined the main road. Quite notably and as correctly by submitted by counsel for the respondent, he forgot his evidence in chief and said that the cyclists after entering the road 50 metres cycled towards Machinery and when they were by passing the lorry, they crushed into it in the middle section and were run over by the rear tyres of the trailer. The above clearly shows evidence of a witness who is not coherent and who is not telling the truth. The evidence on record is that the cyclists and the lorry were headed in the same direction. There is no way therefore that they could have by-passed each other.

Infact DW1 admitted on cross-examination that he never saw what happened and how the accident occurred and all he knew is that an accident occurred. Clearly, DW1 was not a witness of truth and the lower court correctly rejected his evidence as to how the accident occurred.

I do not buy the appellant's argument that nobody witnessed the accident as claimed by the appellant. The evidence given in court by PW3 was clear that this is somebody who saw how the accident occurred and he screamed for help when appellant's the driver attempted to run away hence prompting him to stop. He

was forthright clear, coherent and quite specific on what happened for he saw it all. PW3 further explained why he had not recorded the statement with the police. He stated that by the time the police came, he had left the scene to go to Utithi where he was going for it was getting late hence the reason why the police did not get him there so that he could give his statement. Since then the police had never asked him to record a statement though he was ready and willing to do so.

In any event, it is out of his own volition that he accepted to come all the way from Nakuru to testify in court for he had the option of refusing to come.

On the basis of the foregoing , I am satisfied just like the learned magistrate that the appellant did proof on a balance of probability that the subject accident was caused due to culpable negligence on the part of the appellant's driver in over speeding on a dirt road, unable to control the motor vehicle when he suddenly came across some pot-holes and opted to swerve and ended up crushing onto **Jackson Kilonzo Lusa** and **Kioko Kimilu** who were riding a bicycle on their rightful side of the road.

With regard to quantum, I think that the learned magistrate erred when he awarded loss of dependency. This is an award under the Fatal Accidents Act. The same is awardable to the dependants of the deceased. The act is specific as to who are such dependants. Section 4(1) thereof provides that the dependants are a wife, husband, parent and children of the person whose death was so caused. The respondent and the alleged dependents of the deceased pleaded in the plaint are all his brothers. They are not therefore among those contemplated as dependants by the act.

The respondent further testified that the deceased had no wife, nor children or parents surviving him. The deceased actually died a bachelor. There was therefore no legal basis for an award under the Fatal Accidents Act. In any event there was no prove of such dependency. Courts have held in numerous decisions that dependency must be proved. It is not upon the court to infer dependency but upon parties to prove the same. In the case of *Omae & Another vs Kirui & Another [2004] eKLR*, the court observed;-

*"…**it is now established law that a party has to prove dependency in cases such as the instant one. A party cannot pluck a figure from the air and state that the deceased used to utilize lets say half of his salary to support his family. The plaintiff has to establish indeed that the deceased actually utilized the said amount of his salary to support his family. On the basis of the foregoing, there was legal basis for the award of loss of dependency."***

The only awards that the learned magistrate ought to have made, was loss of expectation of life, pain and suffering and lastly special damages. In this regard I have no quarrel with the awards he made under these heads. I will not disturb the award of Kshs. 100,000/= for loss of expectations of life, Kshs. 10,000/= for pain and suffering. Finally, I will not disturb the award of Kshs. 23,930/= special damages. The veracity or otherwise of the receipt for special damages notwithstanding, courts have often held that it is bad enough to loose a person in an accident, thereafter the body has to be given a decent burial according to African culture. No doubt expenses are involved in the exercise and to expect a claimant to keep records of such expense in the circumstances would be expecting too much of him. As correctly held by **Dulu, J** in *ELD HCCC No. 2 of 2003 Leonard E. Okisa vs Major K. Birgen (U.R.);-*

"It is trite law as these are expenses incurred, they have to be proved. However, in the absence of specific proof, courts have held that it can be presumed that there will generally be funeral expenses to be incurred… I consider that funeral expenses were incurred and I have to make an award for reasonable funeral expenses incurred …"

It is on this basis that I do not wish to disturb the award of special damages aforesaid.

In the end the appeal succeeds to the limited extent of varying and or removing the award of general damages for loss of dependency from the judgment and decree of the learned magistrate. There will therefore be judgment for the respondent in the total sum of Kshs. 133,930/= less 20% contribution ½ of the costs of the appeal shall go to the appellant.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **14TH** day of **DECEMBER, 2012.**

GEORGE DULU
JUDGE