REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 113 OF 2019

WILSON KAMURA……. APPELLANT

VERSUS

DKT(Suing as the legal representative of JK-Deceased……..……..RESPONDENT

(An appeal from the Judgment and Decree of Hon. E.K. Too (S.R.M) in Meru CMCC No. 347 of 2010 delivered on 22/10/2020)

JUDGMENT

1. By a Plaint dated 11/08/2010, the respondent, as the personal representative to the estate of one, JK, deceased, sued the appellant on the tort of negligence and prayed for general damages, special damages and costs of the suit as well as interests on such damages and costs. The claim was pleaded to be based on the facts that on 05/05/2009, the deceased was safely crossing Meru-Maua Road at Gankere, when the appellant drove and/or managed motor vehicle Registration No. KAS 337 H so negligently and carelessly that, it knocked down the deceased. As a result of the accident, the deceased sustained fatal injuries. It was pleaded that the deceased was at the date of the accident a form one student aged 15 years. She had a bright and promising future and life, and was destined for greatness. Consequently, her both parents have lost expected support and dependency.

2. The appellant denied all the allegations in the claim, including the accident, ownership of the motor vehicle and the particulars of negligence as well as the death, by his statement of defence dated 2/10/2012, put the respondent to strict proof thereof and prayed for the respondent's suit to be dismissed.

3. After the conclusion of the trial, where the respondent called a total of two witnesses with the appellant calling three, the trial court found that the respondent had proved his case as required, found the appellant wholly liable for the tort and awarded him an aggregate sum of Kshs 1,540,250 being; Kshs 20,250 for Special damages, Kshs 20,000 for pain and suffering, Kshs 100,000 for loss of expectation of life and Kshs1,400,000 for lost years.

4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 12/09/2019 setting out seven (7) grounds of appeal. A keen reading of the grounds reveals the appellant's complaint to be four fold; that the trial court erred in hearing the case in blatant disregard of the high court order staying all proceedings against Blue Shield Insurance Company Ltd; that the trial court erred by holding that negligence had been proved, a finding contrary to the evidence, that the award by the trial court was too high and lastly that the order on interest on general to be computed from the date of the suit was wholly erroneous.

5. In summary, **PW1,** respondent and the deceased father, testified that on the material day, her daughter was going back to school, after the April holidays. She was however involved in an accident and died on the spot. She was a form 1 student at [Particulars Withheld] High School. He produced her report form to show that she was a very intelligent student. He also produced assorted documents in support of his case. During cross examination, he maintained that, the deceased was involved in the accident on her way to school. **PW2 Shadrack Kubania,** recalled how the accident had happened, right in front of his eyes. According to him, the deceased had flagged down a matatu which stopped slightly past her. As she went to board it, another matatu hit her from behind, thereby fatally injuring her. It appears the driver of the matatu wanted to hinder the deceased from boarding the first matatu. He even managed to see the registration number of the matatu, which was KAS 337 H. He blamed the driver of the matatu, as the deceased was standing by the roadside. This evidence was not displaced, despite being subjected to thorough cross -examination.

6. The appellant, who testified as **DW1,** admitted owning the said motor vehicle. However, he stated that it was being driven by a driver namely Duncan Kalungi Mungathia, on the material day**.** He blamed the deceased for the occurrence of the accident. During cross examination, he admitted that the said Duncan Kalungi was his employee on the material day.

7. **DW2 Dancan Kalunge Mungania**, admitted being the driver of the motor vehicle on the material day. During cross examination, he further admitted driving the said vehicle recklessly thereby knocking down the deceased.

8. **DW3 Francis Kimathi Mburugu,** also claimed to have witnessed how the accident occurred. His evidence was that, the deceased was hit by the vehicle as she was crossing the road from the right to the left. He blamed the deceased wholly for the occurrence of the accident. Nothing useful came from cross examination.

Submissions

9. Upon the directions by the court on 27/7/2020, the parties filed their submissions in respect to the appeal on 30/07/2020 and 19/08/2020 respectively. The position taken by the appellant was that, as long as the moratorium was in place, the trial court ought not to have proceeded with this matter. He termed the resultant judgement as being bad in law and against the principles of justice. He faults the trial court for using a multiplier approach, to award inordinately high damages, as opposed to a global figure. In support of such submissions, he cited **In the matter of Concord Insurance Company (2014) eKLR, General Motors East Africa Limited v Eunice Alila Ndeswa & anor (2015) eKLR, Fredrick Bundi Ruchia & anor v SMM(Suing as the legal representative of the estate of JMM(2019)eKLR and Heinz Broer v Buscar (K) Ltd & anor (2019) eKLR**

10. For the respondent, submissions were offered to the effect that the moratorium in place did not apply to him, as he sued the appellant as a tortfeasor in negligence. He submitted that, the admission by the appellant that, he owned the motor vehicle was sufficient proof of vicarious liability. The court is urged to dismiss the appeal, as the appellant has failed to demonstrate how the trial court fell in error in its decision. The cases of-: **In the matter of Blue Shield Company Limited (under statutory management) (2017) eKLR, Automobile Association of Kenya v James Jaguga (2005) eKLR, Kenya Ihenya Co. Ltd v Njeri Kiriba(2019) eKLR, Richard Nchapi Leiyagu v IEBC &2 others(2014)eKLR, Trustees of Catholic Diocese of Machakos v Benjamin Mwanzia Muoki (2019)eKLR, Swiss Contact Ltd &anor v Esther Mumbi Muthee(2019)eKLR and Japheth Kibwi Jonathan v WMM(Suing on behalf of the estate of AMM-deceased(2017) eKLR** were relied on in support of his submissions.

Determination

11. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. In effect, a first appellate court proceeds by way of a retrial.

12. My starting point is the effect of the stay issued by the High Court against Blue Shield Insurance Company Ltd on these proceedings. I have looked at the order, which was issued on 2/11/2011, staying all proceedings involving Blue Shield Insurance Company Limited, or its policyholders during the currency of the moratorium.

13. The wording of section 67 C (10) of the Insurance Act provides that a statutory manager can only, by law, declare a moratorium on payment to its policyholders and creditors. The question that now begs an answer to determine ground 1 of the memorandum of appeal is whether the respondent herein fell within "policyholders and creditors" or whether the moratorium extended to him.

14. The import and purpose of a moratorium under the Act, is *to protect the insurance company against claims by policy holders and creditors. Such protection does not nevertheless extend to claims against policy holders by third parties. This is the interpretation by the courts the moratoria against our insurers who have walked the root of need for protection. That is the position taken by the court in* ***Blue Shield Insurance Company Limited (under Statutory management) (2017)eKLR*** *cited by the respondent. The respondent, based on the findings of the above case, was not a policyholder, but a third party. He sued the appellant as a tortfeasor in negligence. He had no direct connection, as policy holder or creditor to Blue Shield, and thus, the moratorium in place did not extend to him.* Courts have countlessly stated that, if insurers were allowed to issue moratoriums to third parties, then it is the third parties who would be prejudiced, as they would not be in a position to enforce claims against negligent policyholders. See ***Concord Insurance Company (2014) eKLR*** **cited by the appellant** ***& George Ngure Kariuki v Charles Osoro Makone & Anor (2014) eKLR,*** the courts refused to grant orders extending moratorium to third parties. I find no merit on the fault upon the trial court for having ignored the order of stay.

Was the case against the appellant proved to the requisite standards?

15. I appreciate this issue to address grounds, 2,3,4 & 6 of the Memorandum of Appeal. The suit was grounded upon the tort of negligence. The respondent testified that the motor vehicle which had caused the accident was KAS 337 H, belonging to the appellant. The appellant in his evidence admitted to being the owner of the motor vehicle and equally conceded to having employed DW2 as his driver. DW2 in his testimony also admitted to having been the one driving the motor vehicle on the material day. Additionally, there was evidence in the Police Abstract that the appellant was the owner of the motor vehicle, at the time of the accident. That in itself is sufficient proof that vicarious liability was been established. It was not necessary to call any additional evidence or amend the pleadings and pleading to justify the finding by the trial court. I find no merit in ground 2 and consider same to have been a wildcard just thrown by. See ***Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & anor (2014) eKLR***.

16. On proof of negligence I find the evidence elicited upon cross examination to be very critical. DW2 is captured, during cross examination, to have stated that:

> **"I forgot to slow down while passing the road. Minor had stopped. I was overtaking the vehicle. I could not see ahead of me. I saw that the girl had school uniform. I drove the motor vehicle recklessly. I overtook without having to see ahead and failing to slow down."**

17. This to court was unequivocal admission of negligence. One that went into record, there was no further dispute on whose negligence had occasioned the injury to the respondent. With that evidence on record, grounds 3, 4 and 6 are denied any semblance of good faith. Such cannot succeed but must fail. I dismiss those three grounds.

18. The third issue is whether the award by the trial court was high. I take this complaint to only relate to the damages awarded for lost year. In doing so, I consider the ground, (3), to be vague in so far as the damages were awarded under four different heads. That ground runs afoul Order 42 Rule 1(2) demanding that the grounds be set out concisely. I have perused the record and I am satisfied that the special damages were properly pleaded and proved. On the other hand, the sums awarded for pains and suffering and loss of expectation of life were modest and merely what some court have called a conventional award. Those three award cannot be upset. I uphold them.

19. On the merits, and concerning the award of lost years, the evidence led portrays the deceased as an intelligent student. I have noted from the report form adduced in court, that she was position 3 out of 71 in her class. *Her parents obviously, and reasonably so, expected that she would finish school, enter the job market and help them in their old age.* I have meticulously weighed the authorities cited by the appellant against those by the respondent. This court in ***Mpaka Muriuki Japheth v HMM & another [2021] eKLR*****,** upheld an award of Kshs 1,500,000 for loss of dependency of a deceased aged 13 years. Similarly in ***China National Aero-Technology International Engineering Corporation v RL(Suing as the legal representatives of the estate of the late SL (2020) eKLR*****,** the appellate court declined to interfere with the trial court's award of Ksh.1,400,000 for loss of dependency of a deceased aged 13 years.

20. I have no doubt in my mind that, the award of Kshs 1,400,000 for lost years was reasonable and consistent with past awards when I give regard to the decision in the case of ***Japheth Kibwi Jonathan v WMM (Suing on behalf of the estate of AMM-deceased (2017) eKLR*****,** cited by the respondent, where the court awarded Kshs 1,747,440 for loss of dependency for a deceased aged 15 years**.** In that case, the court in adopting the multiplier approach observed, **"Each case must be determined on its own facts especially on matters of loss of dependency. In this case, the deceased was aged 15 years at the time of his death. A certificate of death was produced. The evidence of PW1 showed that the deceased was in Form 1 at [Particulars Withheld] Secondary school and was attaining grades ranging from B+ to C. PW1 testified that the deceased had expressed wish to become a doctor. This evidence is relevant and were it not for the untimely death, this boy had great expectation of becoming a doctor. It was, therefore, wrong for the trial magistrate to have ignored this evidence and diminished the prospects of such young person in the manner that: - ''…it is not known what the deceased would have become…''. Being of the view that the award was reasonable and comparable to previous wards for comparable circumstances, I find no reason to interfere.**

21. The fourth and last issue is the question of the interest awarded to the respondent and decreed to be computed from the date of the suit. That was erroneous as the law remains that interests on general damages accrue from the date of the judgment. To that extent only, I allow the appeal to the effect that interests on general damages be computed from the date of judgment while those special damages from the date of the suit. I find that to be the settled position of the law by the court of appeal.

22. The basis and rationale of awarding interest on general damages from the date of judgment is premised on the ground that a plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of institution of the suit. *In* **Shariff Salim & Another vs Malundu Kikava [1989] eKLR** (Supra), the Court of Appeal rendered itself as follows: -

> **"There is no gainsaying the fact under Section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. …the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit…..The judge gave no reason for ordering that interest even on general damages was to be paid from the date of filing the suit. According to the authorities, interest on general damages should be paid from the date of assessment which of course is the date of judgment. That is the earliest date when the defendant's liability to pay does arise. That order even in relation to payment of interest on special damages is, in our view, unsupportable… As a result, it is impossible to ascertain the reasons which compelled the judge to award interest from the date of filing suit and this leads us to the inevitable conclusion that the learned judge wrongly exercised his discretion. This ground of appeal accordingly succeeds.**

23. The upshot from the foregoing facts is that, the appeal is bereft of merit on all grounds except ground 7. I allow the appeal to the limited extent of the when computation of interests on general damages commences. The determination is that the appeal succeeds to the said extent for which reason I award to the appellant half costs of the appeal. To expedite the closure of the matter, I assess such half costs in the sum of Kshs 30,000 to be offset from the sum due from the appellant to the respondent.

24. It is so ordered.

Dated signed and delivered at Meru by Ms teams on 5th July, 2021

Patrick J.O Otieno

Judge