REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 13 OF 2020

JANET KALONDU MUSEMBI.....APPELLANT

VERSUS

KAHINDI KATANA THOYA & AGNES KATANA THOYA

(Suing as administrators and legal representatives of the estate of

KARISA MATANDI KAKULO (Deceased).....RESPONDENTS

(Being an appeal from the Judgment and decree of the Learned Resident Magistrate

Hon. S. D. Sitati in Kilifi Civil Suit No. 17 of 2018 delivered on the 23rd November, 2020)

Coram: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocates for the Appellant

Ameli Inyangu Advocates for the Respondents

J U D G M E N T

This is an appeal by the appellant, a duly sued defendant in **CMCC NO. 17 OF 2018** at Kilifi as a result of a wrongful act, of negligence and breach of duty of care in which motor vehicle Registration No. KCJ 271 L collided with the respondent motor cycle registration number KMDM 733 G.

As a consequence of the fatal injuries suffered by the victim of the accident **Karisa Matandi Kakulo**, his estate filed a claim for damages under the Fatal Accident Act and the Law Reform Miscellaneous Provisions Act of Kenya. At that trial at Kilifi, the Learned trial Magistrate **Hon. Sitati (RM)** considered the evidence and did decree as follows:

Liability at 100%

Pain and Suffering	***Kshs. 30,000/=***
Loss of expectation of life	***Kshs. 120,000/=***
Loss of dependency	***Kshs.2,438,256/=***
Special damages	***Kshs. 173,010/=***

He also awarded costs and interest to the quantum of damages.

It is this Judgment the appellant was aggrieved with necessitating the preferred appeal based on the following grounds:

(1). That the Learned Resident Magistrate erred in Law and in fact in holding the appellant (hereinafter referred to as the defendant) 100% to blame for the accident contrary to the evidence before him.

(2). That the Learned Resident Magistrate erred in failing to hold that the deceased Karisa Matandi Kakulo was substantially to blame for the accident when there was clear evidence before him that he did not heed the presence of the defendant's motor vehicle Registration No. KCJ 271L on the said road and exposed himself to a risk of damage or injury of which he knew or ought to have known.

(2). That the Learned Resident Magistrate erred in failing to hold that the deceased could easily have avoided the accident by keeping a proper lookout and having sufficient regard to his own safety whilst riding motor cycle registration number KMDM 733G along Mombasa-Kilifi highway.

(4). That the Learned Resident Magistrate erred in relying on the evidence of (PW3) Safari Mangi Kithungu whilst arriving at his decision when the said witness was not truthful in his evidence.

(5). That the Learned Resident Magistrate erred in relying on the evidence of (PW2) PC Stephen Wandera when it was clear that he was not the investigating officer and did not visit the scene of the accident and did not produce a sketch plan of the scene of the accident from which the Honourable Court could ascertain the point of impact etc.

(6). That the Learned Resident Magistrate erred in holding the defendant vicariously liable for the negligence of her said driver when there was no evidence before him to show why and how the defendant was culpable.

(7). That the Learned Resident Magistrate erred in failing to give any or any adequate reason to hold the defendant vicariously liable for the negligence of her said driver.

(8). That the Learned Resident Magistrate erred in failing to apportion liability between the deceased and the defendant.

(9). That the Learned Resident Magistrate erred in awarding to the plaintiff's a sum of Shs.2,438,256.00 for loss of dependency under the Fatal Accidents Act which said sum is so excessive as to amount to an erroneous estimate of the damage payable to the plaintiff.

(10). That the Learned Resident Magistrate erred in Law and in adopting a multiplier of 20 whilst assessing damages under the Fatal Accident Act considering all the circumstances of the case.

(11). That the Learned Resident Magistrate erred in Law and in fact in not holding that in the absence of any documentary and credible evidence in respect of the actual earnings of the deceased there was no evidence before the Honourable Court to assess damages for loss of dependency under the Fatal Accidents Act.

(12). The Learned Resident Magistrate erred in Law and in fact in not holding that there was no or no adequate evidence before him to show that the deceased was in business and earning a salary.

(13). That the Learned Resident Magistrate erred in Law and in fact in making awards under the various heads by failing to take into account that the general damages awarded to the plaintiffs would be invested to earn interest. If the Learned Resident Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the plaintiff under each head.

From this memorandum of appeal, it is understandable that both liability and assessment of damages are in issue in this appeal. The appeal was disposed off by way of written submissions from both counsels.

Submissions on Appeal by the Appellant

Learned counsel for the appellant, who is the owner of the offending motor vehicle vehemently contested the findings of the trial Magistrate on negligence. The contest allegation of the appellant is that the testimony of **(PW3)** both written and on oath did not witness the accident that the excerpts of his witness statement clearly indicates that he did not witness the accident. Therefore, contended Learned counsel for the appellant that it lacked the probative value on the collision.

Second, the appellant also vigorously contested the evidence of **(PW2)** stated to be of a police officer **(PC. Wandera).** The submissions on this witness centered around the question of reliability since he was not the investigating officer of the alleged accident. As if that was not enough, Learned counsel submitted that police abstract admitted in evidence textually showed the accident in question is still pending investigations rendering the burden at a cross-road. To buttress, submissions on liability Learned Counsel placed reliance on the following authorities **Sally Kibu v Francis Ogaro CA No. 102 of 2005, Kenya Cargo Handling Services Ltd {1991} KAR 258, Hussein Omar Farah v Lento Agencies CA NO. 34 of 2005 {2006} eKLR.** With these principles Learned counsel urged this Court to allow the appeal for non-proof of liability.

The Respondents Submissions on Appeal

Learned counsel for the respondent **Ameli Inyangu** relied entirely on his written submissions to challenge the appeal by the appellant. In a rejoinder submissions, Learned Counsel submitted that there was no evidence to apportion liability. That when the Learned trial Magistrate decided on the issue of liability he was only confronted with the evidence from the respondent and his witnesses.

That the discharge of an evidential burden did involve both direct and circumstantial exposition of the witnesses. That he did validly establish the existence of a material fact. That the decision by the Learned trial Magistrate was only to demonstrate enough evidence was adduced to justify a finding in favour of the respondent.

According to Learned counsel contention that burden bearing having been discharged by the respondent failed to be controverted by the appellant on the existence or non-existence of facts on the issue of liability. The interplay between burdens of proof and presumption as submitted by Learned counsel was buttressed in reference to the following authorities: **Karanja v Matere {1983} KLR, Samson Emuru v Ol Esusida Farm Ltd {2006} eKLR, Jael Motanya v Swan Carriers Ltd {2015} eKLR, Kenya Bus Services Ltd v Dina Kandira {2003} KLR.**

Learned counsel submitted that the approach laid down in the above cases formed the basis in which the Learned trial Magistrate exercised discretion on liability. In essence Learned counsel urged the Court to dismiss the appeal in its entirety.

Resolution

In this appeal, the first question tackled is whether the impugned collision was caused solely by the negligence of the appellant or did both the respondent, and the appellant materially contribute to such a collision.

In addressing the appeal as filed, I remind myself of principles in **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machera T/A Machira & Co. Advocates {2013} eKLR** which lays down the boundaries and duty of the 1st appellate Court. It's a duty to rehear the case and come to its own conclusions. In doing so, I must therefore carefully weigh and consider the Judgment of the trial Court and taking into account all facets of the case to establish whether there are any errors as a subject of an appeal to vary, correct or absolutely set the entire Judgment as being erroneous. **(See also Selle & Brother v Associated Motor Boat Co. Ltd {1968} EA 123).**

In that trial all what was expected of the session Magistrate was to establish on the part of the respondent. Whether the burden of proving allegations of negligence had been proved on a balance of probabilities against the appellant. That is the yardstick I would measure this appeal as canvassed by the appellant. In **Kiramuute Henry v Uganda {1977} LLR 72, Masembe v Sugar Corporation & Another {2002} 2 EA 434** held interalia that:

> ***"An appellate Court is not bound to follow a trial's Judges findings of fact if it appears either that he has clearly failed on some part to take account of particular circumstances of probabilities material to an estimate of the evidence."***

The Law on this contested issue of liability is well settled as seen from the **Learned Author Salmon & Houston on the Law of Courts (19th Edition)** stated that:

> ***"Negligence is conduct, not state of mind – conduct which involves an unreasonably great risk of causing damage. Negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something a prudent and reasonable man would not do."***

It follows therefore that under Section 107 (1) of the Evidence Act, it is a salutary principle that whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must proof that those facts exist.

Further under Section 119 of the Evidence Act the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case.

The position of the driver on the road/highway is also correctly stated in the following cases in **Baker v Maxel Harborough Industrial Co-operation Society Ltd {1953} 1 WLR 1472**

"Everyday proof of collision is held to be sufficient to call on the dependents for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court unhesitantly hold both are to blame. They would not escape simply because the Court had nothing by which to draw the attention between them." **(See also Hassan Omar Farah v Lengo Agencies {2006} eKLR).**

Here the Law requires trial Courts to draw inferences and conclusions from a proved basic fact by the witnesses. It entails that in such a trial the party against whom such a conclusion is drawn has to adduce sufficient evidence to bring into question the truthfulness of the presumed fact.

In Millan in **Hay Bourhill v Young {1943} AC 92 at 104** the Court summarized the well established principles thus:

> ***"What duty then was incumbent on him or her. The duty of a driver is to use proper care not to cause injury to persons on the Highway or in premises adjourning the highway. Proper care connotes avoidance of excessive speed, keeping a good lookout, observing traffic rules and signals and so on. It is the duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles on or adjourning the road. It has been further stated that reasonable care means care which an ordinary skillful driver would have exercised under all the circumstances."***

In essence what was required to be proven by the respondents at the hearing of the claim for damages against the appellant. It is desirable to

draw inspiration from the text from **Learned writers, clerk and lindset on Torts** that the respondents evidence ought to have established the following:

(a). The existence in Law of a duty of care situation.

(b). Careless behavior by the defendant.

(c). A causal connection between the defendant's careless conduct and the damage.

(d). For see ability that such conduct would have inflicted on the particular claimant the particular damage of which he complains once (a-d) are satisfied, the defendant is liable in negligence and only then the next two factors arise.

(e). The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible.

(f). The monetary estimate of the extent of damage.

This appeal apparently seems to import the aspect of contributory negligence.

Hence in Law, to warrant a verdict against the respondents, on the ground of his negligence, the Law merely requires that his negligence be affirmatively shown by preponderance of the evidence which places the respondent to have contributed to the occurrence of the accident.

From the record in the absence of contributory negligence on the part of the respondents, there is no presumption either way as to his exercise of care or the want of it on his part. At the trial, before **Honorable Sitati (RM).** It's apparent that the appellant's motor vehicle veered off into the lane of the deceased. The approaches made into the crossing into the side of the deceased was employed without due care and attention. The dead body of the deceased drawing inference, from **(PW2)** was found on the lane near side of where he was driving the motorcycle. No evidence was given of the circumstances under which the respondent veered off his lane into the appellant's lane.

In the first instance, the appellant counsel attacked the reliability and veracity of the evidence given by **(PW2)** – which materially contributed to the findings arrived at by the Learned trial Magistrate. In absence of any counter evidence from the appellant, it ought to be presumed that there was no such contributory negligence.

Notwithstanding, the reservations made by the appellant on the evidence by **(PW2),** it's evident that the accident was investigated by the police. The investigations were disposed of by way of the manifested evidence from witnesses and observance of the surrounding circumstances.

In my view on the evidence of **(PW3),** it's not disputed that he was the first responder to the scene of the accident. He was first to hear the loud bang followed with his arrival at the scene before any interference has been occasioned by third parties. Although he did not reproduce the entire of his witness statement, he explained himself that the accident occurred on the side of the motorcycle. As such the deceased had kept into his lane. This evidence remained uncontroverted.

> ***"The general rule as to the burden of proof on the issue of causation. As on other issues in civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant."*** **(See Hamil v Bashline, 481 Pa. 256 {1978}).**

In the instant case, the respondent places primary reliance upon cases which hold that if a party cannot identify which of two or more appellant caused an injury, the burden of proof may shift to the appellant to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

It is quite proper to opine that contributory negligence is a defence and the proof of it devolves upon the appellant to discharge it in rebuttal to the respondents primafacie case.

In the instant appeal, having regard to the evidence and to the incidences of burden of proof as reflective in **(PW2)** and **(PW3)** evidence and in absence of any evidence on the part of the appellant before the trial Court to contradict it, I would be persuaded to agree with the trial Learned Magistrate. In other words, the appellant or driver, agent, servant, employee drove without due and attention to other road users like the deceased whose estate suffered loss and damage.

The case for the respondent was clearly made out based on circumstantial evidence and having been discharged, it was the appellant to prove want of ordinary care upon the motorcyclist, the deceased.

The first question that has to be answered is whether the evidence of **(PW2)** and **(PW3)** should be believed. To me, weight is therefore to the extent to which an item of evidence contributes directly or indirectly to prove existence of facts in issue. Significant to this case are the principles in the case of **Neema Mwandoro Nduzya v R {2008} eKLR** in which the Court held:

"It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20) But circumstantial evidence should be very closely examined before basis of a conviction on it."

The expression on circumstantial evidence was also qualified in the case of **Mwangi & Another v R {2004} 2 KLR 32,** the Court held:

"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."

This prayer to reverse the finding on liability stands dismissed for want of merit.

Secondly, did the respondent suffer any damage, if so was assessment by the trial Court within the accepted margins: The **Court of Appeal in Butt v Khan {1982 – 1988}** gave a good elucidation of how to determine whether the appeals Court can just interfere with the decision of the trial Court through a trilogy of various principles. Herein, the Court held:

"That the appellate Court is entitled to interfere with an award of damages, if it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

By using the phrase assessment of damages, the task becomes a difficult one for reasons that it's a discretionary function of a trial Court to determine appropriate compensation. The only rider is that due regard be given to the current range of awards and other set parameters award damages under the relevant limbs. Its first assess and thereafter apportion. Whether the discretion has been ultimately exercised fairly, is a moot question.

Let me now revert to assessment under the Fatal Accident Act. As a general guide, Fatal Accidents Legislation under Section 4 provides the set principles in which the intestate of the deceased is entitled to compensation in damages. Judicial interpretation of this provision is that assessment is not influenced by the financial muscle or material assets of the wrong doer or the claimant. To establish pecuniary injury, the Law does not require that the claimant have a legal right to receive the benefit or fully be financially dependent on the deceased or that the deceased before his death had earned money. What must be shown is that he or she had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive. That life has been disappointed by the death of the deceased.

In my view, the nature of the claim under the Fatal Accidents Act as laid down in the wording of Section 4 of the Act, has stood the test of time, with a distinction between matters giving to liability which affect the defendant's claim and matters going to damages.

In the instant appeal exerting judicial discretion to the statutory list, I find no evidence on the part of the Learned trial Magistrate on misapprehension, of facts or application of irrelevant factors or principles of Law to arrive at an erroneous assessment damages for loss of dependency. The traditional multiplier – multiplicand approach applied by the Learned trial Magistrate was solely dependent on the facts of the case and the applicable principles in seeking pecuniary loss.

It is important to observe that the inherent difficulty in assessing damages with certainty is no ground to interfere with the decision of the trial Court. The general rule is that in calculating damages the trial Court has to consider what is the pecuniary sum which will make good to the claimant, so far as money can do so, the loss which he or she has suffered as the natural result of the wrong done by virtue of an occurrence of the accident. On the other hand, it can be said previous awards do form some guide to the kind of figure which is appropriate to the facts of any particular case. It is a fact that substantial differences in awards on similar facts frequently occur when trial Courts assess the damages but that discrepancy alone will not be advisable for the appellate Court to vary or substitute the estimate of damages awarded to the claimant. Reference to similar cases, to be of value, must reflect any variation in the purchasing power of money. During the recent inflationary period the Courts have considered this factor, only an approximation can be made, however, because money values may fluctuate again.

It may be said as did the appellant that this award on loss of dependency is unjust. Why? The appellant is looking at the concept of fairness from the spark of his or her perspective. Putting the submissions by the appellant aside for a moment, I do not think it would be fair to interfere with the assessment of damages on loss of dependency claimable by intestate estate of the deceased.

Financial loss lends itself to fairly exact calculation, because those portions which cannot be established by clear evidence hinge on probabilities that permit relatively accurate assessment.

As a consequence, I find no adequate basis for a finding that the trial Magistrate was out of order on this element in general damages taking into account the minimum wage guideline, the contingencies that might have reduced the working life of the deceased had he not infact been injured. Therefore, multiplying the wages and by the number of working days lost to arrive at an estimate of future earnings was one of the key aspect incorporated in the assessment of the claim under the Fatal Accident Act. The loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are proper to be taken into account. Consideration should be given to the circumstances of the injured person's life before the accident, and to the earnings that would have been earned after death.

In this case taking the situation fairly and broadly I agree that it cannot be said that the Learned trial Magistrate acted on a wrong principle of Law, or has misapprehended the facts or has made a wholly erroneous estimate of the damage suffered on this aspect of the appeal. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is

to interfere. **(See Lord Wright in Davies v Powell Duffry Associated Collieries Ltd. 1965 E. A. at p. 589).**

As a consequence, the appeal lacks merit. The upshot is that it stands dismissed with costs to the respondent.

DATED, SIGNED DISPATCHED AT MALINDI VIA EMAIL ON 12TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE

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