REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL NO 39 OF 2018

AWALE TRANSPORTERS LIMITED.....APPELLANT

VS

DORCAS WAMAITHA MAINA.....1ST RESPONDENT

GRACE WAMBUI NJOROGE.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. V.Chianda CMCC 30 of 20212 delivered on 9th July 2018).

JUDGMENT

Background

1. The appeal is from a judgment of Naivasha Senior Resident Magistrate Hon. V. Chianda delivered on 9th July, 2018 in Civil Suit No.30 of 2012. The Appellant was the Defendant whereas the Respondents were the Plaintiffs in the said suit.

2. The claim arose from a Plaint filed on 24th January, 2012 seeking damages both under the Law Reform Act and Fatal Accidents Act where the Plaintiffs were suing as the legal representatives of the Estate of Ebrahim Ngumba Njoroge aged 35 who met his demise through a road traffic accident at Naivasha Road, Gilgil Weigh Bridge occasioned by the driver of the Appellant. The deceased left four dependants, namely the 1st Respondent (his wife), the 2nd Respondent (his mother) and two children then aged 11 years and 2 years respectively. Together with general damages, the Plaintiff also prayed for special damages amounting to Kshs 76,700/- costs of the suit ad interest on the three prayers.

3. The Defendant denied being the owner of the motor vehicle, a prime mover KBJ 0202E and ZD1807 and alleged that the injuries sustained by the Plaintiff were caused solely by the Plaintiff. The Defendant denied liability for damages for pain and suffering and denied receiving any demand and or notice of intention to sue as alleged in the plaint.

4. In his judgment the learned trial magistrate arrived at a finding in favour of the Respondents under three headings;

a) Pain and suffering KShs 10,000

b) Loss of expectation of life kshs 90,000

c) Loss of dependence Kshs 1,179,468

d) Sub-Total 1,279,000-

e) Less damages under the LRA 100,000/

f) Balance 1,169,000/

g) Special damages of Ksh. 76,700.

h) Grand Total 1,235,700/

5. As to costs, the learned magistrate stated that costs follow the event.

6. The Defendant appealed against this decision citing four(4) grounds of appeal as contained in the Memorandum of Appeal dated 2nd August, 2018 which can be summarized as follows:

a) That the Respondents had not proved their case against the appellant on a balance of probabilities as evidence was not corroborated.

b) That the trial court erred in apportioning 100% liability against the appellant in disregard of the evidence given by the appellant's driver.

c) That the trial court did not consider the appellant's submissions on liability and contradictions in the evidence of Respondents.

d) That the court erred in using a multiplicand of Kshs.9,780 as against KShs 6,743=.

Summary of evidence

7. Two witnesses testified for the Plaintiff's case, being the Plaintiff's themselves as PWI and PW2 respectively.

8. **PW1, Dorcas Maina** was the deceased wife. She received a call on 25/07/2010 at 11.00 pm from **PW2, Grace Wambui Njoroge**, the mother to the deceased informing her that the deceased was involved in a road traffic accident at Gilgil Weigh Bridge and was critically injured. She met up with PW2 for more information and started making their way to Gilgil Hospital. On their way, they saw the motor vehicle KAT 068Q where the deceased was in being towed as it was badly damaged. On arrival at Gilgil they called the turn boy of KAT 068Q who told her that her husband had passed on. On the following day, PW1 witnessed the post mortem and was informed that motor vehicle KBJ 020E/ZD1807 caused the accident. She thus blamed the death of her husband on the negligent driving of the driver of motor vehicle KBJ 020E/ZD1807. The deceased was laid to rest on 3rd August, 2010.

9. It was her further evidence that the deceased had a well-paying job and used to support her and their two children.

10. She prayed for general damages, costs of the suit and interests thereon.

11. In cross examination, she stated that she had no pay slip for the deceased or birth certificate for the children she and deceased had together. She also stated that the deceased used to support her in part and that he was born in 1974.

12. **PW 2** stated that she received a phone call from a stranger on the night of 25/07/2010 informing her that her son, the deceased was involved in a road traffic accident while driving KAT 068Q and was rammed into by KBJ 020E/ZD1807 at the Gilgil weigh bridge. PW2 travelled with PW1 to the scene of the accident having talked earlier on. They were told he died after he was taken to hospital.

13. Her testimony was that the deceased was employed as a driver and left behind her (aged 62 then), PW1, then aged 34 and two children namely Elvis Njoroge and Grace Njoroge then ages 11 and 3 years respectively. She added that he was the sole bread to the dependants.

14. The **DW1, Ali Mohamed Kosi** was the driver to motor vehicle registration No. KBJ 020E. His hand written statement was adopted. He testified that on 25/7/2010 at about 11.00 p.m he was driving from Nairobi to Nakuru and at Gilgil Weigh Bridge when he was hit by the another motor vehicle on the turn boy's side as he was trying to turn. He testified that the vehicle the deceased was driving was headed to Nairobi and that it hit bumps, lost control and hit their truck on the left side door of the driver's cabin. He was hit, thrown out through the smashed windscreen. He lost consciousness and sustained a cut on the left hand. He was treated at St. Mary's Hospital, Naivasha and later at Avenue Hospital in Nairobi. He later learnt that the driver motor vehicle that hit him did not survive.

15. The trial court found for the Plaintiffs and liability was awarded at 100% against the Defendant.

16. In arriving at this finding, the trial court considered the testimony of PW1 and PW2 and DW1 and surmised that since the police abstract concludes that the case was pending investigation, the testimony of PW2, the deceased's mother was the only one available and had attributed blame to the Defendant's driver who rammed into in KAT 068 Q. The learned magistrate considered the testimony of DW1 who stated that he was turning into the right side of the road where the deceased had the right of way. Further that, at the weigh bridge vehicles were expected to drive at very low speed and he therefore inferred negligence on the part of the Defendant's driver.

17. For pain and suffering the trial court awarded Kshs 10,000/ relying on **Kenya Railways Corporation vs Samuel Muge eKLR [2012]**. For loss of expectation of life, the trial court considered that the deceased was 35 years old at his death and awarded conventional sum of Kshs 90,000/-.

18. For loss of dependence the trial court noted the death certificate and assumed a life expectancy of 15 years, a multiplicand of 2/3 and Legal Notice 197 Regulations of Wages Amendment Order 2013 which set the general labourer at Kshs 9780/.

Submissions

Appellant's submissions

19. The Appellant amalgamated his four grounds from the Memorandum of Appeal into two namely, Liability and quantum. On liability, it submitted that since it was not known how the accident occurred, the same should have been apportioned at 50:50. It was submitted that the learned trial magistrate acknowledged this fact as he stated in his judgment that the only witness who attributed the accident to the

Appellant's driver was PW2, the deceased's mother who testified that she attributed the blame to the Defendant's driver for ramming into KAT 068Q. According to the Appellant, this evidence was not controverted, reasons wherefore each party should shoulder 50:50 liability.

20. In so submitting, the Appellant relied on the following cases:

a) Nyeri Civil Appeal No. 214 of 2004 Joyc Mumbi Mugi vs The Cooperative Bank of Kenya & 2 others.

b) William Momanyi vs Zipporah Kwamboka Abunda [2010] eKLR.

c) Nairobi HCCC No. 2336 of 1990 Erick Oluoch Msango vs Raphaael Gakuru Nganga & Another.

d) Berkley-Steward Ltd, David Cottle & Jean Susan Cottle vs Lewis Kimani.

21. On quantum, the Appellant submitted that the accident occurred on 25th July, 2010. It faulted the learned trial magistrate for pegging the minimum wage premised on Legal Notice No.197 Regulations of Wages Amendment Order 2013 made pursuant to the Labour Institutions Act No. 12/07 which set the minimum wages of a general labourer at Ksh. 9780/.

22. The Appellant argued that the accident happened on 25th July, 2010 and as such the application of the Legal Notice 197 Regulation of Wages for General labourer at Kshs 9780 was erroneous and ought to have applied the scale as from 28th May, 2010 that allots minimum wage for a labourer at Kshs. 6743/.

Respondent's submissions

23. The Respondents filed their written submissions on 9th July, 2018. On liability it was submitted that the Appellant's driver was to blame because he testified that he was manoeuvring the vehicle to enter the weighbridge across the road on the right side of the road where the deceased was lawfully driving. That as such, he entered the weighbridge at a high speed and without proper lookout. It was submitted that the deceased could have been over speeding because there were bumps on his side. Furthermore, the deceased was rightfully driving on his side where the accident occurred. The Respondents added that in the circumstances the learned trial magistrate arrived at a proper conclusion that the Appellant's driver was to blame; and any event, no evidence to the contrary was adduced.

24. It was the further submission of the Respondents that given all circumstances, the Appellant's driver ought to have given way to the deceased's oncoming vehicle. The Respondents deny that the accident happened in unclear circumstances as clearly the Appellant's driver moved to the side of the deceased vehicle. For this reason, they stated that the authorities cited by the Appellant are distinguishable from the circumstances of the instant case since in those authorities, the accidents occurred in unclear circumstances.

25. Reliance was placed on **Nairobi Civil Appeal No. 279 of 2016-Gathoni Wathena & Another (Suing as the personal Representatives of the Estate of Simon Kiarie Mburu vs Mbugua David & Anor[2020]** where the Court of Appeal stated that it would not interfere with the findings of fact of the two lower court sunless it is clear that the magistrate and the single judge had so misapprehended the evidence that their conclusions are based on incorrect basis, and that the concurrent findings clearly indicate that both courts were not faced with instances of conflicting evidence as to how the accident happened so as to apportion the blame 50:50 as suggested by the Appellants therein.

26. The Respondents urged the court to be guided by the holding in this case. To buttress the position, it was submitted that the deceased lost his life through the gross negligence of the Appellant's driver who made a quick turn to join the weigh bridge on his right side without due regard to the oncoming vehicles.

27. On quantum, it was submitted that the minimum wage under the Labour Institutions Act No. 12/07 for general labourer under Legal Notice No. 197, Regulation of Wages Amendment Order is Ksh. 9780.95. Further that the multiplicand applied by the trial court was correct.

Analysis and determination

28. It is now settled principle that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions. Again, an appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acts on wrong principles in arriving at its findings.

29. The Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd &Another (1968) EA 123** held that:

"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

30. I have considered the evidence adduced before the trial court as well as the respective submissions after which I deduce that there two issues for determination namely whether the Appellant's driver was to blame for the accident and whether the learned trial magistrate arrived at the correct quantum payable.

Liability

31. Under this head, the learned trial magistrate held the Appellant's driver at 100%to blame. In so holding, he observed that the only

evidence on which the court could rely on was that of PW2, the mother to the deceased who attributed the accident to the Appellant's driver ramming into the deceased's vehicle. The learned magistrate found that that evidence had not been controverted. He further took into account that DWI, the Appellant's driver rammed into the right hand side of the deceased's vehicle, on which side the deceased had a right of way. He went on to observe that DW1 could not explain how he would ram into another vehicle and cause a fatal accident in an area where vehicles of high tonnage drive at very low speed.

32. It is clear that none of the Plaintiff's witnesses saw the accident happen. And therefore, the court was left to piece up the testimonies of all the witnesses and make an objective conclusion.

33. It is undeniable that vehicles at the weighbridge drive at extremely low speed, more so those that are subjected to the weighing. Both the deceased's and DW1's vehicles fell in this category. It also came out quite clearly that there were bumps around where the vehicles were. More importantly, DW1 in his written statement said:

> ***"As I was manouvering the vehicle to enter the weighbridge across the road while an oncoming vehicle, a Mitsubishi Canter (7 Tonner) carrying potatoes moving towards the Nairobi direction hit the bumps, lost control and hit our truck at the left hand side door driver's cabin."***

34. From the above excerpt, it obvious that DW1 hit the right side of the deceased's vehicle. It is also clear that at the time of the accident, DW1 was in motion and trying to get into the weigh bridge. The dead do not speak. However, DW1 having hit the deceased's vehicle on the right hand side implies that the deceased was rightfully driving on his side. Although DW1 tried to attribute the blame to the deceased, it is clear from his testimony that he is the one who moved to the deceased's side. Consequently, I find no fault in the learned trial magistrate apportioning the blame to DW1.

35. Be that as it may, on account that no independent eye witness testified and the fact that police failed to fully conclude the investigations, I find it prudent to apportion a small percentage of the blame on the Defendants. I say so because determining total liability in such circumstances is a very delicate affair. I would be purely instructed by the circumstances of the case whilst at the same time applying common sense. I take the view that had DW1 taken diligent care in how he drove his vehicle, the accident would not have occurred. But for the uncertainty on the actual position of the deceased's vehicle, I will apportion 20% contributory negligence on the deceased.

Quantum

36. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** delivered itself on the discretion of the trial court in assessing damages in the following terms that: -

> ***"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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."***

37. This point had earlier been captured by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd versus Shepherd (1964) AC 326** in the following words:

> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award by himself would have made. Having done so, and remembering that in his sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment." (see page 353).***

38. The damages claimed are both under the Law Reform Act and the Fatal Accidents Act. **Under the Law Reform Act,** courts award for both pain and suffering and loss of expectation of life. On the former, there is no doubt that the deceased could have died almost immediately after the accident as when PW1 and PW2 went to hospital they were informed he had already died. In such circumstances, a conventional figure is applicable. The Ksh.10,000/= awarded by the learned magistrate were appropriate and I have no reason to disturb the same.

39. As for loss of expectation of life, the learned trial magistrate too awarded a conventional figure of Ksh. 90,000/= which I also have no reason to disturb.

40. Under Fatal Accident's Act, the principles to be considered were stated in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)** Ringera, J(as he then was) the following words:

In as he then was, held at page 248 as follows***:-***

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

41. The deceased herein was aged 35 years as at the time of his death. He is said to have been a driver. Although no documentation such as a driving licence or employer's letter proved his occupation he died in line of duty as a driver. Further, there was no proof of what he earned and therefore, his earnings would be premised on minimum wage provided by the law.

42. Having died at 35 years and retirement age being 60, and having regard to the vagaries of life, he would be expected to work for another 15 years. A multiplicand of 2/3 would be appropriate as he had dependants who depended on him.

43. I make comparison of the instant case with the case of **HCCA No. 182 of 2003 Nakuru Lotepa Njuguna Mwaura v Builders Den Ltd.** The deceased was 35 years old. The court awarded loss of dependency using a multiplier approach of 17 years and multiplicand of Kshs.25,000/= and the dependency ratio of 2/3 awarded a total of KShs2,354,239.

44. The Appellant contends that since the accident happened on 25th July, 2010 the application of the Legal Notice 197 Regulation of Wages for General labourer 2013 at Khs 9780 was erroneous and ought to have applied the scale applicable from 28th May, 2010 that allots minimum wage for a labourer at Khs. 6743/=.

45. On this point I agree with the Appellant that Legal Notice No. 98 of 2010 - Labour Institutions Act (Regulation of Wages (General) (Amendment) Order, 2010 under the Labour Institutions Act, No.12 of 2007 is the applicable Notice. It came into force on 18th June, 2010 to give legal basis for the accident claim that happened on 25th July, 2010 setting the minimum wage at Kshs 6,743/. The Legal Notice No. 197- Regulation of Wages for General Labourers, 2013 relied on by the Respondent does not have a retrospective clause to it.

46. In **Civil Appeal 16 of 2016 Kenya Ports Authority v Andrew Ochieng Odongo [2017] eKLR** the Court of Appeal sitting in Mombasa held;

> ***"It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015. We are of the view therefore that the dispute was governed by the repealed Employment Act as the current labour laws cannot be applied retrospectively. We are guided in arriving at this by the Supreme Court decision in the case of*** *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* ***Civil Application No. 2 of 2011 in which the principle of retrospectivity of a statute was explained this way:***
>
> *"(61) As for non-criminal legislation, the general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."*

47. The Appellant contends that the accident happened on 25th July, 2010 and as such the application of the Legal Notice 197 Regulation of Wages for General Labourer, 2013 at Kshs 9780 was erroneous and ought to have applied the scale as from 28th May, 2010 that allots minimum wage for a general labourer at Kshs. 6743. On this point I agree with the Appellant that Legal Notice 197 Regulation of Wages for General Labourer does not have a retrospective clause to it.

48. In **Civil Appeal 16 of 2016 Kenya Ports Authority v Andrew Ochieng Odongo [2017] eKLR** the Court of Appeal sitting in Mombasa held;

> ***"It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015. We are of the view therefore that the dispute was governed by the repealed Employment Act as the current labour laws cannot be applied retrospectively. We are guided in arriving at this by the Supreme Court decision in the case of*** *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* ***Civil Application No. 2 of 2011 in which the principle of retrospectivity of a statute was explained this way:***
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> ***"(61) As for non-criminal legislation, the general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."***
>
> ***I have nothing more to add other than to say that the wage scale to be applies is vide Legal Notice 98 of 2010 Labour Institutions Act (Regulation of Wages (General) (Amendment) Order, 2010 which came into force on 18th June 2010 to give legal basis for the accident claim that happened on 25th July, 2010 setting the minimum wage at KShs. 6,743/-***

49. The learned trial magistrate deducted from the damages payable, the awards under that Law Reform Act without giving justification for the same. In the case of **Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini v A.M. Lubia C.A. 21 OF 1984 (1882-1988)1 KAR 727** where the court stated as follows**:**

> ***"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act…This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act'…anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate***

anywhere and in my judgment should be applied in Kenya."

50. Courts have held that in awarding damages under the Fatal Accidents Act, the court should bear in mind that it has already awarded damages under the Law Reforms Act. In Civil Appeal 119 of 2017 **John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR** it was held:-

> ***"In my view, the requirement in the Law Reform Act is to "take into account" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency."***

51. Justice Mabeya in **Civil Appeal NO. 568 OF 2010 Peres Wambui Kinuthia And Another v S.S. Mehta & Sons Limited, Nairobi** held that:-

> ***"In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"***

52. The Court of Appeal decision in **Civil Appeal No. 22 of 2014 Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja) vs Kiarie Shore Stores Limited (2015) eKLR** held, *inter alia*, that:

> ***''…This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise…''***

53. Respectively, it is the view of this court that the learned trial magistrate ought not to have deducted the damages he had awarded under the Law Reform Act from the damages under the Fatal Accidents Act. He only needed to have taken into account whilst awarding damages under the Fatal Accidents Act that he had already awarded damages under the Law Reform Act.

54. In sum, the appeal partially succeeds to the extent that I have varied the percentage of damages and minimum wage payable. I thus enter judgment for the Respondents against the Appellant as follows:

a) Pain and suffering – Ksh. 10,000/.

b) Loss of expectation of life – Ksh. 90,000/.

c) Loss of dependency Ksh. 6,743 *12 *2/3 *15 = – Ksh. 809,160/-

d) Sub-Total payable

Less 20% contributory negligence of –

Ksh. 909,160/- Ksh. 181,832/-

e) Total payable ……. – Ksh. 727,328/-

f) Costs to the Respondents both in the trial court and this appeal at 80%.

DATED AND DELIVERED AT NAIVASHA THIS 11TH NOVEMBER, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the absence of the parties who were duly notified of this date.