REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 27 OF 2019

BASH HAULIERS COMPANY LIMITED..APPELLANT

-VERSUS-

JULIUS MWOLOLO MULU

DORIS MUSANGI MWOLOLO (suing as the Administrators

of the Estate of **MAURICE MULU MWOLOLO-DECEASED).......RESPONDENTS**

J U D G M E N T

1. At trial the respondent sought both general and special damages on account of fatal injuries allegedly suffered by the deceased when hit by the Appellant's car on the 12/02/2015. The plaint sought damages under both Law Reform and Fatal Accidents Acts. The claim was grounded on tort of negligence.

2. Only the Appellant as first defendant at trial resisted the claim by a statement of defence filed on the 11/01/2018. Even though the statement of defence denied the occurrence of the accident, being the registered owner of the offending motor vehicle and the particulars of negligence pleaded while attributing negligence on the deceased in the alternative and without prejudice, the said defence was never proved nor supported by any evidence and thus remained were allegations. Not even witness statement nor bundle of documents were filed by and on behalf of the defendants.

3. At trial, the plaintiff called three witnesses, the father to the deceased, a friend to the deceased and a police officer who produced the police records on the accident. None of the three witnesses witnessed the incident happen although the PW 2 said he was within the vicinity and was opening the gate when a trailer passed and knocked the deceased and that a security guard was requested to follow the trailer. On the other side PW 3, the police officer on his part said that with the aid of a good Samaritan, the motor vehicle was followed to a parking yard, blood stain and brain matter observed splashed on its body, a driver was arrested taken to the police and released on bond but vanished not to return.

4. Having considered the evidence and submissions by the parties, the trial court in its judgment found for the respondent having found that the evidence led by that respondent were never controverted. He found the Appellants jointly and severally liable and assessed damages in the aggregate sum of Kshs.1,200,000/=.

5. It is that decision that has provoked this appeal which raised only two issues for determination:-

a) Was the finding on liability founded on the evidence and law?

b) Were the assessed and awarded damages reasonable or exaggerated and too high and exorbitant?

Liability

6. The Appellant faults the courts finding on liability for having relied on the police abstract contrary to the decision in ***Thuranira Kirauri vs Agness Ncheche CACA 192/1996*** to the effect that an abstract only gives the salient facts of the police record on the occurrence and that the police takes no responsibility for the accuracy of the same. Reliance was also made on the decision in ***John Kinyanjui Njugu vs Daniel Kimani [2000] eKLR*** for the proportion that were the probabilities are equal, the suit stands to be dismissed.

7. For the respondent submissions were made and a position taken that there having been offered no evidence on the part of the Appellant, the plaintiff's evidence stood unchallenged and that the provisions of Evidence Act at Sections 107, 108 and 109 placed a burden on the

party who asserts to prove the assertion with particular reference to Section 116 which says the burden to prove that one is not the owner of anything rests with the person so asserting. The decision in ***Mary Njeri Murigi vs Peter Macharia [2015] eKLR*** was cited for the holding that in the absence of contrary evidence to rebut the contents of a police abstract, the contents of such abstract stand and is fulfilment to prove ownership.

8. On my part I have read the entire record and in my reappraisal I do find that the evidence put forth by the respondent on the occurrence of the accident leading to death and how the offending motor vehicle was traced and related to the occurrence proved on a balance of probabilities the respondents case against the appellant at trial. In fact pursuant to the provision of Section 107, 108 109 and 116 of the Evidence Act while it was the duty of the respondent to prove his cause in negligence it was the Appellant duty to prove, once the police linked it to the motor vehicle, that it was not the owner thereof. That he failed to do because he offered to tender no evidence.

9. On negligence, I take judicial notice that the pleaded site of the accident is a built up area and for a vehicle to knock a cyclist and fail to stop, points more to negligence than a proper look out on the part of the driver. I do find that incoming to its decision on liability no error was committed by the trial court as to entitle me to interfere with the conclusion thereby reached.

10. In addition, I do find that the proof of ownership by the police abstract was sufficient in that a police abstract being a public document issued by the statutory body mandated and tasked with the duty to investigate traffic accidents must be accorded the deserved weight and importance. I have had the benefit of reading other decision after the Thuranira's case and I have come to the conclusion that earlier decision by the Court of Appeal no longer holds.

11. In ***JRs Group Ltd vs Kennedy Odhiambo Andwala [2016] eKLR Majanja J***, had this to say on the weight to be given to a police abstract:-

> **"I hold that it is more probable based on the police abstract, that the appellant was the registered owner of the vehicle on the date of the accident"**

12. In that case as here there was a certificate of official search which was issued way after the date of the accident. In such case, a police abstract issued proximate to the date of the accident upon investigation including interrogation of the driver is more reliable.

13. In ***Wellligntone Nganga Muthiora vs Akamba Public Road Samur Ltd [2010] eKLR***, the Court of Appeal latest position in the matter is revealed in the following words:-

> **"Where the police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standard of probabilities and not beyond reasonable doubt…."**

14. That position by the Court of Appeal was laid much earlier in the decision in ***Ibrahim Wandera vs P.N. Mashru, CACA 33 of 2003*** when the court said:-

> **"The learned judge did not make any reference to the police abstract report which the appellant rendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashru of P.O. Box 89726, Mombasa as the owner. This fact was not challenged. The appellant was not cross examined in it and that means that the respondent was satisfied with the evidence".**

15. I do find that in this matter there was sufficient evidence that the appellant owned the offending motor vehicle and the finding against it thus deserve no disturbance by this court.

16. This finding does address the grounds of appeal no. 2, 3 & 4 for I consider grounds 3 & 4 to overly general and falling short of the dictates of Order 42 Rule 1(2).

Quantum of damages awarded

17. This ground is equally very broad. It would have served the court better if it pinpointed which of the three heeds of general damages was exorbitant and excessive. However being first appeal, I have the duty and obligation to proceed by way of rehearing. In doing so, I do find that the sum awarded for pains and suffering as well as loss of expectation of life were very modest and deserve not being disturbed.

18. For loss of dependency, the trial court chose not to adopt the multiplier formula and approach and opted for a global sum of Kshs.2,000,000/=. I am reminded that the task of assessment of damages is discretionary and known to be a difficult task. It can only be disturbed when clear error is demonstrated but merely that another court could have awarded a different sum is no basis to interfere.

19. From the evidence adduced and the document produced the deceased was aged merely21 years. Even if one was to adopt the minimum wage of say 10,000/= per month and a multiplier factor of some 20 years, the sum to be arrived at would still not be too distant for the global sum awarded.

20. Here the appellant faults the trial court for having picked the sum for the air. That is not a fair fault at all. The trial court laid a basis for not adopting the multiplier approach and I fully agree with the reasons advanced.

21. I do agree because, the multiplier formula is not the only formular available to court. Damages in personal injury claims are intended to compensate and assuage the injured without unduly enriching nor seeking to punish the tortfeasor.

22. In ***Emmanuel Wasike Wabukesa vs Muneria Ndiwa Burman [2019] eKLR*** the Court of Appeal did adopt the approach of awarding a global sum where the subtle mathematical calculations was found to be inappropriate. In that decision the court said:

> **"Although the deceased had not even started schooling, it is probable that she would live a normal life and be engaged in an income generating venture or in a profession and save money for a rainy day atleast for some years considering the value of money today and the improbable of life, a sum of Kshs.500,000/= would be a reasonable compensation to the estate"**.

23. The upshot is that this appeal lacks merit and the same is for that reason dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 15th day of January 2020.

P.J.O. OTIENO

JUDGE