REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 2 OF 2019

HASHI HAULIERS LIMITED.....APPELLANT

VERSUS

TAM & AOOM *(Suing as the Legal Representative*

of the Estate of **SOM** *(Deceased)*.....**RESPONDENT**

[Being an appeal arising from the Judgment and decree of the Hon. R. M. Ndombi (SRM) Delivered in KISUMU CMCC NO. 475 OF 2016 on 23rd November, 2018]

JUDGMENT

This appeal arises from the Judgment of the trial court, which held the Appellant 100% liable for the accident which resulted in the death of a boy aged **14**.

1. The boy was a pillion passenger on a bicycle.

2. The trial court held the Appellant liable for the accident, based on the testimony of one eye-witness.

3. The Appellant submitted that the trial court misapprehended the evidence on record, when it held that the Defendant's driver seemed to have been unaware of his surroundings at the time the accident occurred.

4. It was his submission that the driver was alert, as demonstrated by his testimony, that he had clearly seen the tuk tuk which was in front of the trailer he was driving at the material time.

5. I was invited to take judicial notice of the fact that at the time when the accident took place, it was dark.

6. This court was further invited to take judicial notice of the fact that neither the deceased nor the cyclist was wearing a reflector jacket, which would have enabled other road users to see them.

7. I note from the evidence of **PW1**, that the accident occurred at 6pm. On the other hand, **DW1** testified that the accident occurred at *"around 6 – 7pm."*

8. It is when **PW1** was being cross-examined that he said that the accident happened at 6pm. After he had given that answer, the Appellant did not suggest to him either that the accident happened later than 6pm or at a time when it was dark.

9. And even when **DW1** testified, he said that darkness was beginning to set in at the time when the accident happened.

10. In my considered opinion, there are no agreed facts, upon which the court could take judicial notice.

11. The accident could have happened at any time between 6pm and 7pm. During that period, it cannot be presumed that it had already become dark, as the Appellant would have the court to find.

12. I also decline the Appellant's invitation to take judicial notice of the fact that the pedal-cyclist and the deceased were not wearing reflectors.

13. What the two persons were wearing or were not wearing is a matter of factual evidence.

14. There is no evidence on the record from which the court can determine whether or not they wore reflectors.

15. I find it interesting that the Appellant should be saying that if the cyclist and the passenger wore reflectors, that would have enabled other road users to see them. To my mind, the implies that because the cyclist and the deceased were not wearing reflectors, the Defendant's driver could not have seen them.

16. The Appellant submitted that the trial court could not make a conclusive finding regarding the person who was to blame for accident, when it is considered that the only 2 witnesses who testified, had given conflicting evidence.

17. According to the Appellant, he did not knock the deceased from behind, whilst the Plaintiff's only witness said that it was the Appellant who had knocked down the deceased.

18. I have re-evaluated the evidence and found that the Plaintiff's witness was an eye-witness.

19. He saw the deceased, who was a passenger on a pedal cycle. Ahead of the bicycle, there was a tuk tuk, and behind the said tuk tuk, there was the lorry that was being driven by the Defendant's driver **(DW1).**

20. It was the testimony of **PW1** that the tuk tuk stopped abruptly, causing the cyclist to start overtaking it on the right-hand side.

21. At that point, the lorry, being driven by **DW1** also started overtaking both the tuk tuk and the cyclist.

22. PW1 testified that he saw the lorry knock the bicycle from behind, causing the cyclist to fall to one side, whilst the deceased fell on the road.

23. After the deceased fell on the road, the trailer, which was being hauled by the lorry, ran over him.

24. Meanwhile, **DW1** confirmed that he was at the scene of the accident, but he denied having knocked the bicycle.

25. Indeed, he said that he did not see either the bicycle or the persons who were riding on it.

26. However, he did see the tuk tuk, and he testified that he overtook the tuk tuk.

27. During cross-examination, **DW1** said;

> ***"I was stopped by 2 people saying I had injured somebody. I don't know and did not see if I injured anyone. I cannot tell or explain how this accident occurred."***

28. In the light of that testimony, I find that the trial court was right to have held that **DW1** was not aware of how the accident happened.

29. That evidence cannot be the basis for assigning any contributory negligence to either the cyclist or to the deceased.

30. Accordingly, the trial court was right to have found the Appellant 100% liable for the accident.

31. On the issue of quantum, it is common ground that the deceased was a student who was 14 years old at the material time.

32. The deceased was in Class 7, and was scheduled to be promoted to Class 8 in the following year.

33. PW1 testified that;

> ***"He was our last born and had responsibility of helping mother with domestic activities."***

34. Clearly, therefore, the deceased was not earning any income.

35. The learned trial magistrate appreciated the fact that the deceased was not in employment, and that, therefore, the minimum wage was not applicable when the court was called upon to calculate an appropriate amount as compensation for Loss of Dependency.

36. The trial court awarded a Global Sum of Kshs 1,000,000/=, as it held the considered view that that sum was reasonable in the circumstances.

37. The Appellant suggested to this court that the sum of Kshs 200,000/= was sufficient compensation.

38. I am alive to the legal principle that an appellate court is not justified to substitute the compensation awarded by the trial court unless it is shown that the trial court had applied a wrong principle, or unless the sum awarded was either so inordinately low or so inordinately high that it must have been arrived at through the wrong application of the principles governing the assessment of damages.

39. At the trial, the Respondent cited the decision in **DANIEL MWANGI KILEMI & 2 OTHERS Vs J.G.M. & ANOTHER, CIVIL APPEAL NO. 18 OF 2014** (at Meru High Court), in which the learned Judge expressed himself thus;

> ***"The Deceased was a minor whose full potential was pretty much unknown, although the mother attempted to explain her dreams and ambitions. Unfortunately for her parents, these shall just remain dreams.***
>
> ***However, this does not negate the fact that compensation should be awarded for her untimely demise."***

40. The learned Judge went on to determine the appropriate compensation as follows;

> ***"As a matter of common sense and good judgment, for the deceased who died at the age of nine years; was a student at (particulars withheld) Primary School with excellent performance; and the fact that her parents had reasonable expectations that she would finish school, enter the job market and assist them in old age, a sum of Kshs 1,000,000/= would be fair compensation under the head of damages for loss of dependency."***

41. Relying on that authority, the trial court awarded the sum of Kshs 1,000,000/=.

42. During the trial, the Defendant suggested a figure of Kshs 300,000/= as compensation, relying on the decision in **KUVENJI V STEPHEN KIPLIMO KIMELI HIGH COURT CIVIL APPEAL NO. 40 OF 2009** (at Eldoret).

43. In that case, the Court set aside the award of Kshs 800,000/= that had been awarded by the trial court, and substituted it with an award of Kshs 320,000/=, under the head of Loss of Dependency.

44. The deceased in that case was 6 years old.

45. The learned Judge held as follows;

> ***"I would, in this instance hold the view that the future of the minor is uncertain, and it might be risky to assume what life he/she would have lived into adulthood. As such, I would award a global figure under the head of loss of dependency."***

46. In my considered view, no court can foretell how a child would turn out, whether or not he/she was intelligent in school.

47. Some children may not be very bright academically, but when they grow into adulthood, they may be more successful and more supportive to their parents and siblings than a classmate who was brighter.

48. The converse is also possible.

49. The hopes and aspirations of the parents, to have their child grow into a responsible and supportive adult may never become a reality.

50. Having taken into account life's uncertainties and the comparable awards, I find that the award of Kshs 1,000,000/= was inordinately high.

51. Accordingly, the same is set aside.

52. I substitute the said award with an award of Kshs 600,000/=.

53. The other figures remain unaltered.

54. Finally, as the appeal is partially successful and partially unsuccessful, I order that each party will pay his own costs of the appeal. The order for costs, in respect of the trial, shall remain in place.

DATED, SIGNED and DELIVERED at KISUMU

This 11th day of February 2020

FRED A. OCHIENG

JUDGE