REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM; R. MWONGO, J.

CIVIL APPEAL NOS. 14 & 15 OF 2018 (CONSOLIDATED)

TIPPER HAULIERS LIMITED.....APPELLANT

VERSUS

ROSELINE TUMBI & DANIEL JAMWAKA (Suing as the Administrators

of the of the Estate of Amin Mbole) (Deceased).....1ST RESPONDENT

(Being an appeal from the judgment and/or decree of Resident Magistrate, Hon Z. Abdul in Naivasha in CMCC Civil Suit No. 297 of 2016, delivered on 20th February, 2018.)

AND

TIPPER HAULIERS LIMITED.....APPELLANT

VERSUS

LAWRENCE MUYA.....2ND RESPONDENT

(Being an appeal from the judgment and/or decree of Resident Magistrate, Hon Z. Abdul in Naivasha in CMCC Civil Suit No. 127 of 2016, delivered on 20th February, 2018.)

JUDGMENT

Background

1. These appeals emanate from compensatory awards made by the lower court following a fatal road traffic accident that occurred on 01/11/2015 at Maili Mbili area, along the Naivasha- Maai Mahiu road. The accident occurred at about 10.30pm, when the deceased and the 2nd Respondent were travelling aboard motor vehicle registration number KCE 576Z, a Canter, which collided with a Lorry registration number KBU 675R which had allegedly veered off the tarmac and into the Canter in which the deceased and 2nd Respondent were travelling.

2. In the lower court, the two suits, CMCC Nos 127 and 297 were consolidated, and CMCC No 297 was the lead file. Liability was determined at 100% against the Appellant in the lead file. The 1st Respondent had called two witnesses, while the Appellant called one witness. After the hearing, the trial court found liability at 100% against the appellant and made an award as follows in favour of the 1st Respondent:

Pain and suffering	Kshs 100,000.00
Loss of expectation of life	Kshs. 100,000.00
Loss of dependency	Kshs 2,021,400.00
Special damages	Kshs 28,000.00

Kshs 2,249,400.00

3. In respect of the hearing on quantum involving the 2nd Respondent, the trial court adopted the determination of 100% liability found against the appellant. On the question of quantum, the trial court awarded damages to the 2nd Respondent as follows:

General damages	Kshs	550,000.00
Future Medical Expenses	Kshs	150,000.00
Special Damages	Kshs	5,950.00
	Kshs	**705,950.00**

4. Dissatisfied with the judgments, the appellant filed an appeal against each of the awards, containing twenty and fourteen grounds of appeal, respectively. Essentially, the appellant impugns the trial court's finding on liability and also challenges the quantum of damages awarded in each case. I will deal with each of these issues in light of the parties' submissions.

5. The Respondents on the other hand supported the determination of the trial court.

Issues

6. Ultimately, the issues for determination are:

a) Which party was liable for the accident if at all; and

b) what, if any, is the appropriate quantum of damages awardable to each of the plaintifffs in the circumstances?

Analysis and determination

7. These being first appeals, the court is bound by the following three principles:

a) this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) In reconsidering and re-evaluating the evidence, the court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her, which this court has not had; and

c) It is not open to this court to review the findings of the trial court simply because it would have reached a different outcome if it were hearing the matter for the first time. See: **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123***;* **Peters v Sunday Post Limited [1958] EA 424***;* and *Butt* **v Khan (1977) KAR 1**.

8. I have summarized the parties' submissions in respect of each of the major issues for determination.

Liability: the issue of who to sue and who was liable

9. On liability, the appellant submits that whilst PW1 testified that she did not know how the accident occurred, PW2 stated that the accident occurred when Lorry KBU 675R which was trying to overtake a Toyota Probox encroached into the lane of Canter registration KCE 576Z hitting it on the rear. However, that was different from his written statement to the police where he said he was asleep at the time of the accident. When asked to confirm which statement was true he stated that he was asleep at the time of the accident. That he further confirmed that the Probox was ahead of vehicle KCE 576Z and not vehicle KBU 675R hence the question of overtaking was not possible as the vehicles were moving in different directions.

10. The appellant further submits that it was found to be 100% liable without the court establishing any negligence on the part of its driver. The appellant also asserts that it was the duty of the Respondents to sue the right party who was to blame for the accident. The rationale the appellant gives is that since the basis of the judgment was that the appellant ought to have enjoined the driver of vehicle KCE 576Z so as to escape liability, then someone who is not a party to the suit cannot be apportioned any blame.

11. DW1, a police officer, testified that the investigation officer for the accident was Corporal Wako. According to his statement, vehicle KCE 576Z was overtaking and was the one to blame for the accident. He however added that no driver was charged with a traffic offence. He produced a police abstract dated 2.12.2015. He stated that the investigation officer relied on witness statements for witnesses most of whom did not give conclusive reports on what happened. He added that according to the investigation file, both drivers blamed each other and the investigation officer did not get any independent witness who could concisely and accurately state the vehicle that was overtaking as the point of impact was at the middle of the road. This led to his recommendation that the case be heard and determined by way of inquest as he could not establish who was to blame for the accident. The inquest was conducted and a hearing was concluded, but no driver was blamed for the accident.

12. I note that the only eyewitness to give evidence was Lawrence Muya,the 2nd Respondent in these appeals. He testified as PW2. He said he was a passenger in vehicle KCE 576Z which was headed towards Eldoret. He said he saw a lorry overtaking other vehicles and to avoid being hit, the driver of KCE 567Z veered off the road to the right and stopped at a bush. The lorry however, to avoid hitting vehicles ahead of it, veered back to the left lane and struck Vehicle KCE 567Z, whereupon a fire erupted.

13. In cross examination PW2 admitted that in his statement to the police it was recorded that he had said he was asleep when the accident occurred. However, at the hearing he reasserted that he was indeed awake.

14. I also note that witness statements containing the story set out in the police file and contradictory to the story told by PW2 were filed by the driver and turn boy of the Lorry. However, these two potential eyewitnesses were not availed in court to testify, and no reason was given for their failure to attend. Thus their evidence cannot be tested by cross examination and is therefore of no probative value herein. Reports made at the police station were produced by DW1 who stated that the driver of the Canter KCE 567Z was to blame. However, there followed an inquest which was conducted to get to the bottom of the scenario. However, that inqust did not determine which party was to blame.

15. The investigating officer, Corporal Wako, was not available to give evidence too, as he was said to be on leave. Nevertheless, the information in the police file indicated that the Canter, KCE 567Z in which the respondents were travelling, was overtaking when it collided with the Lorry, and was therefore to blame. However, it was also stated in the police file that there was no independent witness to testify on how the accident occurred. This leaves the court in a conundrum, and could rely only on the evidence it had.

16. All in all, the plaintiff's evidence is in tandem with their pleadings. On the other hand, the defence improperly filed two statements of defence which contradict one another. This was picked up and commented on by the trial magistrate when dealing with the question of liability.

17. Paragraphs 7-9 of the first defence filed on 17/6/2016 indicate that the:

> ***"defendant's driver had overtaken the motor vehicle in front"***

when the Canter carrying the plaintiff suddenly:

> ***"swerved in front of the defendant's driver".***

Contrariwise, Paragraph 5 of the second defence filed on 20/6/2016 states that the Lorry driver was driving in his proper lane when the driver of the Canter:

> ***"in an attempt to overtake a third party vehicle, suddenly and without any warning and entered into the lane of the driver of motor vehicle KBU 675R".***

18. The trial magistrate, also correctly, faulted the defence for not enjoining the driver of the Canter yet they were blaming him for the accident. The trial court also noted that there was no allegation that the deceased was control of the Canter.

19. It is notable that in the case of **John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2017] eKLR** the court, pointing out that the person who pleads liability on the part of another is the one to enjoin the party alleged to be at fault, stated*:*

> ***"Further, I find the defendant's submissions that the plaintiff should have joined owners of all the motor vehicles involved in the material accident an act of chasing the wind. The plaintiff never claimed that the other vehicles contributed to the occurrence of the material accident. He was clear in his testimony and pleadings. It is the defendant who pleaded that other motor vehicles were responsible for the accident hence the burden of proof lay on the defendant to enjoin those owners and prove how they contributed to the accident."***

20. I agree with that reasoning. The Plaintiff was entitled to sue any party of its choice. However, since the defendant was the one who was blaming the driver of KCE 567Z, it was incumbent upon them to enjoin that party to the suit for apportionment of liability. The plaintiff proved their case on balance and thus the defendant was rightly held liable.

21. Again, in **Joseph Leboo & 2 Others v Director Kenya Forest Services & Another [2013] eKLR,** the court opined as follows:

> ***"I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue.***
>
> ***Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party."***

22. Further, in **Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR** Kimaru J., stated

that:

> ***"The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability"***.

23. In light of all the foregoing, I find that the evidence that is more persuasive and in tandem with the pleadings is that of the plaintiff. I thus agree with the trial magistrate that the plaintiff's version of the facts proves their case. In addition, it was the responsibility of the defendant to enjoin the driver of vehicle KCE 567Z, if they wished to deflect liability to them. I would therefore not disturb the determination of the trial court on liability.

Appeal Against Quantum

Appeal No 14

24. The appellant submits that the court erred in awarding damages under both the **Fatal Accident Act** and the **Law Reform Act** and also erred in applying a multiplier of 25 years since the deceased had a risky job. In addition, the multiplicand of 2/3 was inappropriate since the Respondent testified that she was a house help in Nairobi and was not living with the deceased, and therefore that the amount awarded as general damages was excessive.

25. The appellant submitted that the court erred in awarding damages under both the **Fatal Accident Act** and the **Law Reform Act**, it is to be noted that there is no legal bar to awards being made under both statutes.

26. The Court of Appeal in the case of **Hellen Waruguru Waweru** (suing **as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** opined as follows with regard to assessment of damages:

> ***As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014] eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5.***

27. Aburili J, in the case of **Mary Njeri Murigi v Peter Macharia & Another [2016] eKLR** observed, in reference to awards under the two statutes, as follows:

> ***"…under the Law Reform Act, damages are awardable pursuant to Section 2(5) of the Act which provides that: '"(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom."***
>
> ***In the United Kingdom, the applicable law and principles are common law jurisprudence as adopted and applied by Kenyan courts. Thus, under the Law Reform Act, the courts are entitled to award damages for pain and suffering by the deceased and loss of expectation of life. The correct mode of assessing damages under the Law Reform Act is that the net benefit inherited by the dependants under the Law Reform Act must be taken into account in respect of damages awarded under the Fatal Accidents Act because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased under the Law Reform Act (see Kemfro Africa T/A Meru Express Service & 2 Others V D.M Lubia [1982-88] I KAR 727." (Emphasis supplied)***

28. In **Kemfro Africa Limited t/a Meru v Gathogo Kanini vs. AM Lubia and Olive Lubia (1982-88) 1KAR** the court held that:

> ***'The net benefit inherited by the dependants under the Law Reform Act must be taken into account for the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be off-set by the gain from the estate under the former Act.'***

29. Further, the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR**, the court observed 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.***
>
> ***The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in***

extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as <u>Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2)</u> and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

"6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

30. The Court of Appeal in **Hellen Waruguru's case** is on point and settles the question as to how to approach an award under both the Fatal Accidents Act and the Law Reform Act. Nothing could be clearer: in making the award, the court should consider what it would award under both statutes; there is no requirement to deduct anything under one statute because it was awarded under the other. It is enough if it can be shown that in *reaching the figure awarded under the Fatal Accidents Act, the trial court bore in mind or considered what was awarded under the Law Reform Act.*

31. The appellant argued that the award of general damages was excessive as the court applied a multiplier of 25 years despite the deceased's job being risky, and used a multiplicand of 2/3 notwithstanding that the Respondent testified that she was a house help in Nairobi and was not living with the deceased.

32. On the question of multiplier, the learned trial magistrate adopted 25 years. I note that the deceased was aged 40 years at the time of his death. It is not inconceivable that he would have continued working until age 65, that is not inordinately high, and is in tandem with other decisions of the courts.

33. In **Sokoro Plywood Limited & Another v Njenga Wainaina [2007] eKLR**, the High Court, upheld the decision of the lower court in adopting a multiplier of 10 years in a case where the deceased was 60 years old. The court, while upholding the decision of the trial magistrate stated that:

"Regarding the multiplier of 10 years, the deceased was 60 years at the time of her death. In the case of Rahab Wanjiku Gitonga –vs- Almas Njoroge Mungai (supra) which was cited by (sic) the deceased was aged 64 years and the court adopted a multiplier of 8 years. In the circumstances of this case the multiplier of 10 years was reasonable"

34. On the question of dependency ratio the trial magistrate used 2/3. PW1 testified that at time of the accident she was living with the deceased in Nairobi and he was the sole provider. Currently, however, she was a house help. She further testified that the deceased was selling tomatoes and would earn Kshs 1200/= daily. This would translate to 1200x 5days x 4 weeks = Kshs 24,000/= per month.

35. In the absence of proof of such income, the trial magistrate properly used the applicable statutory minimum pay under the Regulation of Wages Order as at the time of the accident. The figure adopted was Kshs 10,107/= as stipulated in **The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197).**

36. I find the evidence that the deceased was a family man with 2 young children is clear and uncontroverted, and supported by birth certificates, hence that he must have used a significant amount of his income to support his family. I therefore do not find any error in the dependency ration of 2/3 applied.

Appeal No 15

37. Having dealt with the issue of liability, it need not be repeated in respect of Appeal No 15, and I deal here only with the quantum of damages. The injuries are not in dispute and are Left pilon fracture; and 1st and 2nd degree burns on face, left hand and left forearm.

38. The appellant impugned the award of Kshs150,000/- for future medical expenses on the ground they were not pleaded by the 2nd Respondent.

39. I have perused the Plaint dated 29/1/2016 filed on 26th February, 2016 by the 2nd Respondent. In the prayers, the plaintiff prays for judgment against the Defendant for:

"d) Ksh 150,000 future medical expenses"

40. Further, in the plaintiffs' submissions in the lower court they made future medical expenses an issue and pointed out that Dr Kinuthia had made an estimate of Kshs 150,000/= for metallic implant removal, rehabilitative physiotherapy and follow up and management by an orthopaedic surgeon. The Doctor's report was admitted as Exhibit 11, and this evidence was neither challenged nor controverted in the lower

court. In her judgment, the trial magistrate granted the award ***"as proposed by the doctor"***

41. I have confirmed that the medical report was exhibited. There was no evidence by the appellant to counter the doctor's report. In my view, and in absence of evidence to the contrary, the award cannot be challenged as there is no basis laid for interfering with it. This ground of appeal fails.

42. With regard to the award of Kshs 550,000/- for general damages, the appellant had submitted in the lower court proposing an award of Kshs 100,000/-. This was premised on the case of **Khilna Enterprises Ltd v Charles Maina Migwi [2006] eKLR**. In that case – which the trial magistrate considered and rejected on the ground that it was 12 years old and not reflective of a comparative award – the plaintiff suffered multiple fractures of left ulna distal and radial styloid process and was awarded 100,000/-.

43. The trial court was instead guided by the more recent case of **Dennis Mwendwa Mbithe Kathuku v George M Mwangi [2016] eKLR** where an award was made of Kshs 450,000/- for 1st degree burns on the face, left hand and left forearm.

44. I have carefully considered the appellant's submissions on the appeal against this award, and they merely repeat the argument in the lower court that Kshs 100,000/- should have been awarded in line with the **Khilna case**. However, I agree with the trial court that the injuries in the **Dennis Mwendwa case** compare more realistically with those in the present case. I am therefore not persuaded that there is any basis for interfering with the award of the lower court, and this ground also fails

45. **Disposition**

46. Given all that I have said in the foregoing paragraphs, I am not persuaded that there is any evidential or lawful reason to interfere with the awards made in the two judgments of the lower court.

47. In the result, I uphold the trial court's determinations in the two judgments in CMCC No 297 and CMCC No 127 in their entirety, and the appeals are hereby dismissed with costs of the appeals to be borne by the appellant.

48. Orders accordingly

Dated and Delivered at Naivasha this 20th Day of February, 2020

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for Mbanda for the Appellant

2. Mburu holding brief for B. G. Wainaina for the Respondent

3. Court Clerk - Quinter Ogutu