REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 121 OF 2018

TIMSALES LIMITED.....APPELLANT

-VERSUS-

PETER MBALUKA & KILAU PETER

(Both sued on their own behalf and as legal

representatives of the estate of

GEOFFREY MUMI PETER-Deceased).....1ST RESPONDENTS

SOUTH SIOX FARM LIMITED.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. Wanjala (Miss) (Senior Resident Magistrate) delivered on 19th February, 2018 in CMCC NO. 4888 OF 2015)

JUDGEMENT

1. Peter Mbaluka & Kilau Peter, the 1st respondents herein and the legal representatives of the estate of Geoffrey Mumi Peter *("the deceased")* instituted a suit against the appellant by way of the plaint dated 20th August, 2015 in which they sought for both general damages under the Law Reform Act, Cap. 26 Laws of Kenya and the Fatal Accidents Act, Cap. 32 Laws of Kenya and special damages in the sum of Kshs.47,600/ plus costs of the suit and interest thereon.

2. The 1st respondents pleaded that sometime on or about 7th March, 2014 while the deceased was lawfully walking off a public road, a perimeter wall whose construction, modification, maintenance and/or operation was the responsibility of the appellant collapsed and fell on the deceased, causing him to be buried under the heap thereby resulting in fatal injuries.

3. The 1st respondents attributed the accident to negligence on the part of the appellant and/or its agents, the particulars of which were set out in the plaint.

4. It was also pleaded in the plaint that prior to his death the deceased was a young man aged 26 years who enjoyed robust health and has left behind the following dependants:

(i) Peter Mbaluka	Father	50 years
(ii) Kilau Peter	Mother	44 years

5. The appellant entered appearance and put in a statement of defence dated 2nd October, 2015 and amended on 30th August, 2016 to deny the claim.

6. The appellant pleaded that while it is true that the perimeter wall collapsed on the aforementioned date resulting in fatal injuries to the deceased, the said accident was not the result of negligence on its part; rather, the accident was caused by the driver of motor vehicle KBP 647E/ZC 2269 ("*the subject motor vehicle*") belonging to the 2nd respondent who while reversing the subject motor vehicle rammed into the wall, causing it to collapse. The appellant ensured to plead the particulars of negligence against the 2nd respondent in its amended defence.

7. The appellant subsequently took out third party proceedings against the 2nd respondent who in turn filed a statement of defence to deny the

averments made in the appellant's amended defence.

8. More specifically, the 2nd respondent denied that the subject motor vehicle rammed into the perimeter wall, adding that the wall had been poorly constructed and had visible cracks prior to the accident. The 2nd respondent therefore blamed the appellant solely for the accident.

9. At the hearing, the 1st respondents relied on the evidence of two (2) witnesses for the plaintiff's case whereas the appellant and 2nd respondent called one (1) witness each to testify for the defence and third party's cases respectively. Thereafter, the parties filed and exchanged written submissions.

10. Finally, the trial court entered judgment on 19th February, 2018 in favour of the 1st respondents in the manner hereunder:

a) Liability	*100% as against the appellant*
b) Damages under the	
Law Reform Act	*Kshs. 250,000/*
c) Loss of dependency	*Kshs.1,701,807/*
d) Special damages	*Kshs. 37,600/*
Total	*Kshs.1,989,407/*

Plus costs of the suit and interest thereon from the date of judgment. The trial court further entered judgment for the appellant against the 2nd respondent at 50% liability with interest at court rates from the date of judgment.

11. The abovementioned judgment now forms the subject of the appeal before this court. The appellant has put forward the following grounds of appeal in its memorandum of appeal dated 7th March, 2018:

(i) THAT the learned trial magistrate erred in both fact and law by holding the appellant liable to the 1st respondents which finding was against the weight of evidence.

(ii) THAT the learned trial magistrate erred in both fact and law by failing to appreciate that the totality of the evidence before her demonstrated that the 2nd respondent was wholly and largely to blame for the subject incident.

(iii) THAT the learned trial magistrate erred in both fact and law by failing to appreciate that the 1st respondents had not proved the particulars of negligence alleged against the appellant in the plaint.

(iv) THAT the learned trial magistrate erred in fact and in law by holding the appellant liable without setting out why in her judgment.

(v) THAT the learned trial magistrate erred in fact and in law by awarding damages for pain and suffering, loss of expectation of life and loss of dependency that were so excessive as to amount to erroneous estimates of the loss suffered by the 1st respondents.

(vi) THAT the learned trial magistrate erred in fact and in law by applying the wrong principles in assessing damages for loss of dependency.

(vii) THAT the learned trial magistrate erred in ignoring the appellant's written submissions and authorities cited therein.

12. The appeal was dispensed with through written submissions. On its part, the appellant submitted that the weight of evidence adduced at trial showed that the accident was caused by the ramming of the subject motor vehicle into the perimeter wall and that no evidence was tendered to show that the wall was weak prior to the accident. According to the appellant therefore, the 1st respondents had failed to discharge the burden of proof against the appellant and the trial court therefore erred in entering judgment against the appellant as it did.

13. It was also the appellant's contention that the 2nd respondent's witness did not actually witness the accident and the 2nd respondent ought to have called the driver of the subject motor vehicle to testify but it did not, thereby making the 2nd respondent's evidence hearsay.

14. The appellant further challenged the applicability of the **Rylands v Fletcher** rule on strict liability pleaded by the 1st respondents on the premise that it did not bring to its land or collect anything likely to do mischief if it escaped. Moreover, the appellant argued that the *res ipsa loquitur* doctrine could equally not have applied to the circumstances of the suit since the appellant offered a reasonable explanation for the collapse of the perimeter wall and that in any event, the appellant's witness produced a police abstract indicating that the accident was caused by the driver of the subject motor vehicle.

15. From the foregoing, it was the appellant's contention that the suit against it ought to have failed and it ought to have been exonerated.

16. On quantum, the appellant argued that the award of Kshs.100,000/ as damages for pain and suffering was inordinately high since the deceased died on the date and at the scene of the accident. According to the appellant, the sum of Kshs.10,000/ would have sufficed, placing reliance on the case of **James Gakinya Karienye v Perminus Kariuki Githinji NAIROBI HCCC NO. 91 OF 2014** where a similar award was made.

17. As concerns the award for loss of dependency, it was the appellant's submission that in the absence of evidence to show the deceased's earnings, the trial court correctly applied the minimum wage regulations on the multiplicand.

18. However, the appellant faulted the trial court for applying a multiplier of 29 years, arguing that it should have instead applied a multiplier of 16 years since at the time of his death, the deceased was neither married nor had any children, and his sole dependants were the 1st respondents who were older than the deceased.

19. The appellant also submitted that a dependency ratio of 1/3 would have sufficed, thereby leading to the following assessment:

Kshs.9,780.95 x 12 x 16 x 1/3 = Kshs.625,920/.

20. On their part, the 1st respondents in supporting the trial court's decision, contended that neither the appellant nor the 2nd respondent called an eye witness to testify before the trial court and that the evidence of their own eye witness was adequate enough to establish the torts of *res ipsa loquitur* and strict liability, the applicability of which the appellant and 2nd respondent were unable to controvert at the hearing of the suit.

21. The 1st respondents further contended that the police officer who produced the police abstract was not the one who investigated the accident hence his role was of a limited nature; adding that in any event, it was fair for the trial court to apportion blame equally between the appellant and 2nd respondent.

22. On quantum, it was the 1st respondents' submission that in making its assessment, the trial court took into account all relevant factors in line with the Court of Appeal case of **Catholic Diocese of Kisumu v Sophia Achieng Tete-Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** laid out as follows:

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."***

23. On the award for loss of dependency, it was the 1st respondents' argument that the trial court correctly applied its mind and arrived at a fair award, having considered the deceased's age, inflation and comparable awards made.

24. The 2nd respondent supported the viewpoint that the appeal is deserving of dismissal and that the trial court was correct in apportioning liability as it did, relying *inter alia*, on the case of **Simon v Carlo [1970] EA 285** where it was held that in an accident in which two (2) parties are presumed to be responsible but neither testifies, then a trial court ought to hold both parties liable.

25. As concerns the award for pain and suffering, it was the 2nd respondent's submission that since the deceased likely died instantaneously, an award of Kshs.10,000/ would have been appropriate. The authority of **James Gakinya Karienye & another (suing as the legal Representatives of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR** was cited, in which case a similar award was made.

26. In respect to the award of Kshs.150,000/ made for loss of expectation of life, it was the 2nd respondent's argument that both the award under this head and that made for pain and suffering ought to have been deducted from the gross award to ensure that the beneficiaries of the deceased's estate did not benefit twice.

27. The 2nd respondent also contended that the trial court should have applied a dependency ratio of 1/3 in awarding damages for loss of dependency. The 2nd respondent equally echoed the appellant's sentiments that the trial court fell into error in applying a multiplier of 29 years which in its view constituted an inordinately high figure. In place, the 2nd respondent urged this court to apply a multiplier of 15 years such that the assessment would be presented as follows:

Kshs. 9,780.50 x 1/3 x 15 x 12 = Kshs.586,830/.

28. I have cautiously considered the rival submissions on appeal coupled with the various authorities cited therein. I have also re-evaluated the evidence tendered before the trial court and the resulting judgment. It is noted that the appeal is against both the findings on liability and the award on quantum; consequently, I will address the grounds of appeal under the two limbs, beginning with liability.

29. Peter Mbaluka who was PW1 and is also one of the 1st respondents on appeal adopted his signed witness statement and testified that he was the father to the deceased and that following the demise of the deceased, his body was taken to City Mortuary and he was later buried in Kitui.

30. The witness admitted that he was not present during the occurrence of the accident and was only later informed that the 2nd respondent's subject motor vehicle had knocked the perimeter wall which then fell on the deceased.

31. Musyoka Mitau who was PW2 gave evidence that he was in the company of the deceased who was his cousin and that they were walking to work on the material day, with the deceased walking ahead of him. The witness stated that he did not know what happened but heard a bang and saw the wall collapsing on the deceased, who according to him died instantly.

32. PW2 was sure to mention that there was no way the deceased could have escaped the accident, though he did mention during cross examination that he did not see the subject motor vehicle knocking down the wall but only saw it near the spot in which the said wall collapsed and noticed that the vehicle had scratch marks on it.

33. On behalf of the appellant, PC Ramadhan Yusuf who testified as DW1 produced the police abstract, detailing that the subject motor vehicle had hit the perimeter wall belonging to the appellant, which then fell on the deceased. This witness stated that the police abstract confirmed the subject motor vehicle as being registered in the name of the 2nd respondent.

34. During cross examination, it was DW1's testimony that the wall which collapsed belonged to the appellant though he stated that the officer who had investigated the matter was on transfer. He further stated that he could not tell who was to blame for the accident from the police abstract though he did mention that the Occurrence Book indicated that there was an eye witness who later died.

35. The 2nd respondent summoned Anthony Moshi Mokomo as TW1, who confirmed in his evidence that he worked for the 2nd respondent at all material times as an operations assistant and that the driver of the subject motor vehicle has since left the 2nd respondent's employment.

36. The witness testified that he visited the scene following the accident and found sugar being offloaded from the subject motor vehicle and that there was no indication that the vehicle had hit the wall, neither was the driver charged or asked to record a statement.

37. TW1 went on to state that it was not until much later that the appellant issued a demand notice to the 2nd respondent. Upon being cross examined, the witness confirmed that he received word of the deceased's death resulting from the collapse of the wall and that the driver of the subject motor vehicle had earlier called him to state that he was reversing the vehicle but that he did not get into contact with the wall.

38. The witness further admitted that he did not witness the actual accident and stated that at the time of reversing, the driver was being guided by a security guard working at the appellant's premises.

39. In her analysis, the learned trial magistrate reasoned that PW2 was the only eye witness and the remaining witnesses who testified did not actually witness the accident. The learned trial magistrate drew reference from the **Rylands v Fletcher [1861-73] ALL ER REP 1** case on strict liability, in finding that the 1st respondents had established on a balance of probabilities that it was the appellant's wall that had collapsed on the deceased and resulted in his death. The learned trial magistrate also reasoned that there was evidence to show that the 2nd respondent's subject motor vehicle had contributed to the collapse of the wall, thereby finding that the 2nd respondent ought to indemnify the appellant at 50% liability.

40. From my re-examination of the foregoing, I have established as the learned trial magistrate did, that it is not disputed that on the material date, a perimeter wall belonging to the appellant collapsed on the deceased, causing his death. It is also not controverted that the subject motor vehicle belonging to the 2nd respondent was at the scene of the accident at all material times.

41. On their part, the 1st respondents brought in an eye witness who gave a fair account of the incidences of the material day though he admitted that he did not see the subject motor vehicle knock down the wall. Needless to say that the 1st respondents pleaded the *res ipsa loquitur* doctrine in their plaint which I am convinced became applicable in the circumstances and in any event, the appellant neither denied its ownership of the wall nor the fact that the wall collapsed on the deceased.

42. I noted that the appellant did not call any witnesses to support its version of events that the collapse of the wall was solely the result of impact from the subject motor vehicle. DW1 who produced the police abstract was unsure as to who was to blame for the accident between the appellant and the 2nd respondent.

43. I also noted that the 2nd respondent on its part equally did not call the driver of the subject motor vehicle to narrate the events of the material day.

44. Be that as it may, I differ with the learned trial magistrate's decision to apportion liability for the following reasons. **Section 107** of the **Evidence Act, Cap. 80 Laws of Kenya** succinctly provides that:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"***

45. The evidence which I have re-examined clearly discloses that it is the appellant who brought the 2nd respondent on board as a third party to the suit. It therefore follows that the burden of proof rested with the appellant to demonstrate the manner and extent to which the 2nd respondent contributed to the accident. From my re-evaluation of the evidence, I have arrived at the conclusion that the appellant did not

discharge the burden of proof against the 2nd respondent. The testimony of DW1 was purely hearsay since he was not the Investigating Officer. Further to this, there was no way of verifying the person through whom the Investigating Officer obtained the information which featured in the police abstract.

46. In the circumstances, I am convinced that the learned trial magistrate misdirected herself and fell into error in apportioning liability for there was no basis on which to do so. To my mind, the appellant ought to have been held wholly liable. In that respect, I am satisfied that the learned trial magistrate's apportionment on liability ought to be disturbed.

47. I am now left with the limb on quantum. I observed that the award on special damages was not brought to question. As such, I will deal with the heads of general damages, keeping in mind the principles articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR**:

> ***a) Where an irrelevant factor was taken into account.***
>
> ***b) Where a relevant factor was disregarded.***
>
> ***c) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

a) Pain and suffering

48. Under this head, the 1st respondents sought the sum of Kshs.100,000/ citing the case of **Henry Waweru Karanja & another v Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2017] eKLR** where the High Court upheld a similar award on appeal. The appellant proposed Kshs.10,000/ while relying on the case of **James Gakinya Karienye v Perminus Kariuki Githinji NAIROBI HCCC NO. 91 OF 2014** while the 2nd respondent did not suggest any amount.

49. The learned trial magistrate finally awarded Kshs.100,000/ on general damages for pain and suffering.

50. Going by my re-evaluation of the evidence, I observed that while the length of time between the collapse of the wall and the death of the deceased could not be ascertained, it is only natural that the deceased underwent some level of pain and suffering prior to his death. I likewise observed that there was no mention of the deceased having received medical treatment, while PW1 stated that the deceased's body was taken to City Mortuary. The death certificate produced as evidence indicated that the deceased passed away on the date of the accident. In the premises, I am of the view that the award of Kshs.100,000/ was on the higher side in the circumstances. Courts have been known to award between Kshs.10,000/ and Kshs.100,000/ with higher sums being awarded where the pain and suffering was prolonged.

51. To my mind, an award of Kshs.20,000/ would suffice, being persuaded by similar awards made in the more recent cases of **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR** where a deceased person died instantly and **Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR**.

b) Loss of expectation of life

52. On their part, the 1st respondents proposed a sum of Kshs.150,000/ while the appellant proposed a sum of Kshs.80,000/ and the 2nd respondent proposed any sum between Kshs.20,000/ and Kshs.150,000/. The learned trial magistrate awarded the sum of Kshs.150,000/ drawing guidance from the case of **Henry Waweru Karanja & another** (*supra*) cited by the 1st respondents.

53. I have re-considered the learned trial magistrate's reasoning for awarding the above sum coupled with conventional awards made under this head and I am satisfied that the sum of Kshs.150,000/ is reasonable and justified.

c) Loss of dependency

54. Under this head, only the multiplier and the dependency ratio were brought to question. On the multiplier, it was the 1st respondents' submission before the trial court that 40 years would suit them. The appellant and 2nd respondent suggested multipliers of 16 years and 25 years respectively, each citing authorities to support their proposed years.

55. In the end, the learned trial magistrate argued that considering the vagaries of life, the deceased would have worked for 34 more years, therefore applying a multiplier of 29 years.

56. Going by the evidence which I have re-examined, it is apparent that the deceased died at 26 years of age, was unmarried and had no children. PW1 and PW2 stated that the deceased worked though the nature of his employment was not clearly disclosed. There is nothing to indicate that the deceased was of ill health prior to his passing.

57. I have re-considered the authorities cited by the respective parties and also considered the case of **Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another [2019] eKLR** where a multiplier of 23 years was applied to a 25-year old deceased person and **F M M & another v Joseph Njuguna Kuria & another [2016] eKLR** where a similar multiplier was applied in the instance of a 26-year old deceased person.

58. In the premises, I would substitute the higher multiplier of 29 years with that of 25 years which I find reasonable and comparable to the above-cited authorities.

59. On the dependency ratio, the 1st respondents urged the trial court to apply ½ whereas both the appellant and the 2nd respondent proposed a ratio of 1/3. The learned trial magistrate applied ½.

60. Upon my re-evaluation of the evidence, I noted that PW1 stated that the deceased supported the 1st respondents who are his parents by giving them Kshs.15,000/ every month to meet their basic needs. No evidence to that effect was adduced; nevertheless, it is probable that the 1st respondents one way or another depended on the deceased for financial support, as most parents in the African society do with their adult children.

61. Given that the deceased did not have any family of his own, I am satisfied that the learned trial magistrate correctly applied a ratio of ½.

62. The multiplicand of Kshs.9,780.50 which was applied by the learned trial magistrate was not challenged. I noted that the learned trial magistrate drew guidance from the minimum wages regulations, 2013 which set the minimum monthly wage for a general labourer such as the deceased at Kshs.9,780.50. In the absence of proof of the deceased's earnings, I am satisfied that the learned trial magistrate was correct in relying on the minimum wages regulations.

63. Consequently, my assessment under this head will read as follows:

Kshs.9,780.50 x ½ x 25 x 12 = 1,467,075/

64. On the subject of double compensation which was raised by the 2nd respondent, I take the view that double compensation becomes applicable when it comes to damages for lost years vis-à-vis those for loss of dependency where the beneficiaries are the same. In the present occasion, the respondents sought for damages for pain and suffering, and loss of expectation of life which damages are distinctly provided for under the Law Reform Act and which have no direct correlation with an award for loss of dependency catered for under the Fatal Accidents Act, hence there is no requirement for any deductions to be undertaken.

65. In the end, the appeal succeeds only to the extent of the awards for pain and suffering and loss of dependency. Consequently, the trial court's decision to apportion liability against the 2nd respondent at 50% is hereby set aside. Similarly, the awards of Kshs.100,000/ and Kshs.1,701,807/ for pain and suffering, and loss of dependency respectively are hereby set aside and are substituted with the respective awards of Kshs.20,000/ and Kshs. 1,467,075/.

66. For the avoidance of doubt, the judgment on appeal is as follows:

a) General damages

(i) Pain and suffering *Kshs. 20,000/*

(ii) Loss of expectation of life *Kshs. 150,000/*

(iii) Loss of dependency *Kshs. 1,467,075/*

b) Special damages *Kshs. 37,600/*

Total ***Kshs. 1,674,675/***

Costs of the suit are awarded to the 1st respondents plus interest on general damages at court rates from the date of judgment and interest on special damages at court rates from the date of filing suit until payment in full. The 2nd respondent shall also have costs of the suit.

In the circumstances of this appeal, a fair order on costs is to order that each party meets its own costs of the appeal.

Dated, signed and delivered at NAIROBI this 6th day of February, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondents

.....for the 2nd Respondent