REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO 95 OF 2018

HON. ATTORNEY GENERAL.....APPELLANT

-VERSUS-

EMMACULATE MWONGELI (Suing as the personal representative of the estate of)

MAITHYA MUNYOKI.....1ST RESPONDENT

(Consolidated with HCCA No. 96 of 2018 for purposes of liability only)

HON. ATTORNEY GENERAL.....APPELLANT

-VERSUS-

SAVINAH FRANCIS (Suing as the personal representative of the estate of)

PETER MUSEE MUEMA.....2ND RESPONDENT

(Being Appeals from the Judgments of Hon. J. Munguti (PM) in the Senior Principal Magistrate's Court at Kitui, Civil Cases No.s 69 & 70 of 2012 respectively, delivered on 24th October 2018)

JUDGMENT

1. On 02/04/2011, the Respondents were riding a motor cycle along the Machakos-Kitui road when they got into an accident with motor vehicle registration No. GKA 308M assigned to public health Mutomo hospital.

2. The deceased in HCCA No.95 of 2018 *(Maithya)* sustained injuries but later committed suicide on 17/07/2012 which his wife attributed to stress as a result of the injuries. The deceased in HCCA No. 96 of 2018 *(Muema)* died on the day of the accident.

3. Before his death, Maithya sued the Appellant in the lower court seeking general damages for personal injuries sustained from the

accident. He also prayed for special damages, costs of the suit and interest.

4. In a separate suit, the 2nd Respondent sought general damages under the Law Reform Act *(LRA)* and the Fatal Accidents Act *(FAA)* on behalf of the estate of *Muema*. She also prayed for special damages, costs of the suit and interest.

5. The Appellant filed statements of defence in both suits, denied liability and called for strict proof of the claims. The matters proceeded for hearing and separate judgments were eventually delivered. The Appellant was found 100% liable-jointly and severally with co-defendant, Vincent Nzilu Mwikali, who was the driver of the motor vehicle GKA 308M.

6. On quantum the 1st Respondent was awarded Kshs.1,200,000/= plus costs and interest.

7. The 2nd Respondent was awarded Kshs.2,525,000/=made up as follows;

Pain & suffering…….Kshs. 10,000/=

Loss of expectation of life……..…Kshs. 100,000/=

Loss of dependency……...Kshs. 2,400,000/=

Special damages……....Kshs. 15,000/=

Total …… Kshs. 2,525,000/=

8. Aggrieved by the judgments, the Appellant filed separate appeals but raised similar grounds as follows;

a) *The learned trial Magistrate erred in both law and fact by holding the Appellant wholly liable against the weight of the evidence tendered.*

b) *The learned trial Magistrate erred in both law and fact by ignoring the authorities cited in the Appellant's written submissions on the question of liability.*

c) *The learned trial Magistrate erred in both law and fact by failing to appreciate that the burden of proof was at all times upon the Plaintiff.*

d) *The learned trial Magistrate erred in both law and fact by completely ignoring the Defendant's written submissions and all authorities cited whose copies were availed.*

e) *The learned trial Magistrate's award of general damages to the Respondent is so manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered.*

9. Directions were given that the appeals be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

Appellant's submissions on liability

10. Submissions on behalf of the Appellant were filed by litigation counsel Mary Murugi. She submits that the finding on liability was based on misapprehension and failure to take into account the totality of the evidence. She contends that the trial court disregarded the evidence tendered during cross examination and the Appellant's submissions without good cause.

11. She further submits that according to paragraph **5** of the plaint, the Respondents were riding on the right side of the road and that no evidence was tendered to confirm that the GK driver was

charged and fined as alleged. That the version of events given by the Respondents' witnesses is unbelievable.

12. It is her further submission that Pw1 was not the investigating officer, did not visit the scene and did not produce relevant documents such as the police accident investigation file, sketch plan, statements recorded by the police and investigation diary. She contends that in the absence of such documents, Pw1's evidence was totally worthless and at best, inadmissible hearsay.

13. She submits that the learned trial Magistrate shifted the burden of proof to the Appellant and that the finding on liability was not premised on any evidence. She argues that the Appellant's failure to call a witness at the trial cannot be a basis for the finding on liability. She relies on **Henderson –vs- Henry E Jenkins & Sons (1970) AC 282 at 301** where Lord Pearson stated;

> *"In an action for negligence, the plaintiff must allege and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied, the plaintiff's action fails. The formal burden of proof does not shift."*

14. Counsel submits that the Respondents did not tender any evidence on causation hence did not prove the negligence as pleaded at all.

Appellant's submissions on quantum:

15. Ms. Murugi submits that no suicide note was produced to confirm that Maithya committed suicide as a result of the injuries. She contends that suicide is a crime and should not in any way be rewarded.

16. She submits that the authority relied on by the Respondent in the trial court indicated an award of Kshs.800,000/= and contained graver injuries than those suffered by Maithya. It is her contention that the learned trial Magistrate did not cite any authority supporting his award of Kshs.1,200,000/=.

17. She further submits that Kshs.150,000/= would have been more than adequate compensation and relies on **Samuel Kariuki Nyangoti – vs- Johaan Distelberger (2017) eKLR** where the Appellant underwent an operation to fix the fracture, had a surgical scar, would need a second operation to remove the metal implants and would suffer post traumatic osteoarthritis of the joint.

The Respondents' Submissions on Liability

18. The Respondents through Mr. Mwalimu submit that the eye witnesses (Pw4 & Pw5) corroborated the evidence of Pw1 on the issue of conviction and sentencing of the driver of the GK vehicle. They contend that the evidence was not shaken on cross examination and that the Appellant did not call any rebuttal evidence.

19. He submits that the authorities cited by the Appellant are distinguishable in that, the defendants in those cases had adduced rebuttal evidence and the Plaintiff's witnesses had

contradicted one another. They urge this court to uphold the finding on liability.

Respondent's submission on quantum in both HCCA No. 95 & 96/2018

20. The Respondents submit that the Appellant has failed to show that the principles employed by the trial Magistrate, in arriving at the damages payable, were wrong in law or that the court in its discretion considered extraneous issues so as to make the award manifestly excessive.

21. They also submit that the Appeal is defective in form because the GK driver has not appealed yet he was the one who prompted the suing of the Appellant. He contends that the appeal is an academic exercise hence futile.

Duty of court

22. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123; Peter M. Kariuki –vs- A.G (2014) eKLR; Ngui –vs- R (1984) KLR 729**.

Analysis and determination

23. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination.

a. Who was liable for the accident and to what extent?

b. Should the quantum of damages awarded be disturbed?

24. I wish to mention at this point that the claims in the two appeals arose from one accident. I have therefore consolidated the two appeals HCCA No.s 95 and 96 of 2018 for purposes of liability only. I wish to also point out that the judgment entered was against both Defendants jointly and severally. The mere fact that the Appellant's co-defendant did not appeal did not waive the Appellant's right of appeal. So the Appellant is properly before this court. Lastly the issue of quantum will be dealt with separately.

Liability

25. Proceedings were taken in Kitui SPMCC No. 70/2012 which is housed in HCCA No. 95 of 2018. **Pw1** is CPL **Charles Kiprotich** from Kitui traffic office. He testified that on 02/04/2011 *(material day)*, a fatal accident happened at Vinyaa area along Kitui-Machakos road involving motor vehicle GKA 308M, Nissan double cabin of public health Mutomo hospital. Further, he testified that the GK driver was charged for causing death in Traffic case No.4 of 2011 and was convicted and fined Kshs.256,000/= or 6 years' imprisonment in default.

26. He testified that Muema died in the accident and pillion passenger Maithya sustained grievous harm. He produced their abstracts as EXB 1 and 2 respectively. The abstracts show that the accident involved the motor vehicle GKA 308M and a motorbike registration No. KMCL 843N.

27. In cross examination, he agreed that he was not the investigating officer and did not visit the scene. He did not have an investigation diary and could not tell how the accident occurred.

28. He agreed that he did not produce the charge sheet, the proceedings or judgment. He said that the abstract showed that the matters were pending in court in March 2013, and he had not issued another abstract. He confirmed that the rider was unlicensed but the motor vehicle had insurance.

29. **Pw4** is **Harrison Wambua Muthui**, who said that both Maithya and Muema were known to him and were involved in an accident on the material day. That the driver was fined Kshs.256,000/= or six years imprisonment in default. He recorded four statements explaining how the accident occurred and the motor vehicle to blame was GKA 308.

30. In cross examination, he said that the accident occurred at 7.30pm and there was light from the motor bike and motor vehicle. That the GK driver fled after switching off the lights but was pursued by motorbike riders and he eventually abandoned the vehicle at the show ground.

31. In re-examination, he said that the motor vehicle had a tyre burst and he confirmed testifying in the traffic proceedings.

32. **Pw5 Kimwele Mwongela**, a *boda boda* rider, testified that both Muema and Maithya were known to him and that Maithya was a businessman operating a shop. He said that on the material day, an accident occurred at Unyaa and was caused by the GK vehicle. He said he

had testified in the traffic case where the accused was fined Kshs.256,000/= or to serve 6 years imprisonment in default.

33. In cross examination, he said that he was with Pw4 when the accident occurred at 7:30 pm as the motor vehicle headed towards Nairobi. That the accident occurred at a corner and he did not record the registration number in his statement. He testified in the traffic case but did not have the judgment of the case.

34. The Appellant closed his case without calling any witness.

35. From the police abstracts, it is clear that an accident occurred on the material day between motor vehicle registration No. GKA 308M and motor cycle registration No. KMCL 843N. The abstracts also indicate that the driver of the GK vehicle, Vincent Nzilu Mwikali, was charged with *'Causing death by dangerous driving'*. The Respondents' case was that the GK driver was convicted and sentenced in traffic case No.4 of 2011, and fined Kshs.256,000/= or 6 years imprisonment in default.

36. In agreeing with the Respondents, the learned trial Magistrate expressed himself as follows;

> *"Even though the defendant had submitted that since no charge sheet nor proceedings were produced, I find evidence on conviction stands unless proved otherwise and in the premise, I find the defendants were jointly solely to blame for the accident. I therefore enter judgment on liability at 100%."*

37. It is therefore clear that the learned trial Magistrate invoked section **47A** of the **Evidence Act, Cap 80 Laws of Kenya,** which provides as follows;

> *"Proof of guilt*
>
> *A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."*

38. In my view however, conviction is a question of fact and the legal burden of proving the conviction of the GK driver remained with the Respondents. It was not enough for the abstract to indicate that charges had been preferred because being charged does not always result in conviction. Even though Pw1, 4 and 5 testified that the driver was convicted and sentenced, I do not understand what the difficulty was in availing the judgment of the traffic case hence leaving me to speculate on what the outcome was.

39. Further, I note that the plaint in HCCA 95 of 2018 was amended on 27/06/2018 and the issue of conviction and sentence was not introduced. This only compounds the speculation on what the outcome really was. In my view, it was erroneous to entertain the evidence of conviction and to solely base the finding of liability on it.

40. I have however looked at the statements which Pw4 and Pw5 recorded under oath on 20/07/2015. Pw5 adopted his statement as his evidence in chief. He stated that on the material day at around 7.30pm, he was walking along Machakos-Kitui road in the company of Pw4 when two vehicles passed. The vehicle

behind *(a white double cabin)* was trying to overtake at a bend and there was an oncoming motor cycle.

41. The vehicle was at a high speed in order to overtake but could not see the motor cycle due to the bend. The vehicle crashed into the motorcycle and the severe impact caused one of the front tyres of the vehicle to burst. The driver of the motor vehicle then turned off all the lights and sped off.

42. Upon getting to the scene, Pw5 recognized the victims as Muema and Maithya. The motor vehicle was later found abandoned at the roadside near Ithookwe showground and the driver was nowhere in sight.

43. Pw5's statement depicted the GK driver as a very negligent person in the sense that he was speeding and trying to overtake at a bend. The fact that the accident occurred at night and at a corner means that the driver was engaging in dangerous and careless conduct at a time when he was expected to be more careful and to be on the lookout for other road users.

44. The cross examination did not dismantle Pw5's statement and the fact that the Appellant's case was closed without calling a witness means that the Respondents averments were largely uncontroverted. Naturally the driver would have been expected to testify and explain what had happened from his own perspective. In **Nandwa –vs- Kenya Kazi Ltd (1988) KLR 488**, the Court of Appeal observed that: -

> *"……In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial*
>
> *there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendants evidence provides some answer adequate to displace that inference…"*

45. In this case, the Appellant did not only fail to provide an adequate answer, but it did not provide any answer to displace the inference of negligence on the driver's part. In light of the standard of proof in civil matters, it is my finding that the driver of the G.K vehicle was wholly

to blame for the accident at 100%.

Whether the quantum of damages should be disturbed;

HCCA 95 of 2018

46. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR** it was held that;

> *"An appellate Court will not disturb an award for damages unless it is 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.*

47. The accident happened on 02/04/2011 but Maithya died one year and 3 months later on 17/07/2012. His wife Pw2 testified that he committed suicide due to stress after getting injured. The learned trial magistrate agreed with her and expressed himself as follows;

> *"In my view, the plaintiff suffered massive injuries leading to stress and eventual suicide. I find an award of Kshs.1,200,000/= to be the comparable award as general damages for pain and suffering."*

48. **Section 226** of the **Penal Code**, Cap 63 Laws of Kenya criminalizes suicide by stating that; *"any person who attempts to kill himself is guilty of a misdemeanor"* **Section 36** provides the general punishment for misdemeanors and provides that; *"When in this Code no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."*

49. I totally sympathize with Pw2 if indeed Maithya committed suicide as a result of the subject accident. In my view this would be a mental health issue where some treatment record should have been placed before the court. No such record was availed. The law is as it is and I agree with the Appellant that courts should not be seen to be rewarding conduct which has been criminalized. I therefore find no connection between the death of Maithya and the accident herein.

50. The injuries sustained by Maithya as a result of the accident were pleaded as follows;

a) Blunt injury to the right lower limb.

b) Cut wound on distal femur.

c) Fracture distal femur and mid shaft tibia.

51. No medical report was produced but the P3 form *(exhibit 4)* confirmed the injuries. In her submissions before the trial court, the Appellant agreed that Maithya sustained a fracture of the

femur and proposed an award of Kshs.200,000/=. She relied on the **Samuel Kariuki case *(supra)*** and **Nairobi HCCC No. 265 of 2004: Kinyanjui Wanyoike –vs- Jonathan Muturi Choga** where the plaintiff was awarded Kshs.100,000/= for a fracture of the right femur and various soft tissue injuries.

52. On the other hand, the 1st Respondent relied on **Nyeri High Court Civil Appeal No. 102 of 2011 Florence Njoki Mwangi –vs- Peter Chege Mbitiru (2014) eKLR** where the Appellant was awarded Kshs.800,000/=

53. I have also looked at several other cases as follows;

a) **NRB HCCA No. 475 of 2012; Ibrahim Kalema Lewa –Vs- Esteel Company Limited [2016] eKLR** where the plaintiff sustained an inter trochanteric fracture of the left femur, was admitted to hospital for 2 months and his physical disability assessed at 25%. The doctor noted that he would not attain normal functional capacity of his limb. The High Court upheld an award of Kshs.300,000/=.

b) **NRB HCCA No. 193 of 2012; Kenyatta University –Vs- Isaac Karumba Nyuthe [2014] eKLR** where the Plaintiff sustained a fracture of the right femur, soft tissue injuries to the head and bruises on the right knee. One year after the accident he was still walking in crutches. He was hospitalized for 2 months where fixation was done. His permanent incapacity was 20%. He was awarded Kshs.350,000/=.

c) **NRB HCCA No. 503 of 2009; Bhachu Industries Limited –Vs- Peter Kariuki Mutura [2015] eKLR** the Plaintiff suffered an injury on the chest, thigh and a fractured femur which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/=.

54. It is evident that injuries sustained by the Plaintiffs in the above cases were more serious than those sustained by Maithya yet they attracted lesser awards. I have also looked at the **Florence Njoki case *(supra)*** which the 1st Respondent relied on. The Appellant in that case suffered broken femurs bilaterally and two degloving injuries of the right knee and the right ankle. She was admitted in hospital where a k-nail and plate were inserted thus necessitating an award of future medical expenses to remove them. Evidently, the injuries in this case were

more severe.

55. The general approach in assessment of damages is that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. My considered view is that the learned trial Magistrate considered the extraneous factor of suicide and arrived at a figure that was inordinately high.

56. Looking at the injuries sustained by Maithya *vis-a vis* the decided cases, and the value of the shilling, I find an amount of Kshs.450,000/= to be adequate compensation.

57. The upshot is that the award on general damages was excessive. I hereby set aside the judgment entered on 24th October, 2018 and substitute it with a judgment in favour of the Respondent (Maithya) for Kshs.450,000/= plus costs and interest at court rates. The Appellant gets costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 7th day of May 2020, at Makueni High Court.

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H. I. Ong'udi

Judge