REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 174 OF 2018

TIPPER HAULIERS LIMITED..APPELLANT

-VERSUS-

GLADYS NANJALA NAMULATA & KISACHE KHATIA COLLINS

(Suing as the Legal Representative of

***the Estate of the Late Peter Wafula Kisache)*....................RESPONDENT**

(Being an Appeal from the Judgement/Decree of the Senior Resident

Magistrate's Court of Kenya at Molo (Hon.R. Yator) delivered on the 13th day of September, 2018)

JUDGMENT

This appeal arose from the judgement and decree of the lower court in Molo CMCC NO.381 of 2016, wherein the Appellant, being the registered owner of a trailer motor vehicle KBP 420 Q/ZD 6086, by its driver, along the Eldoret – Nakuru road at Migaa area, negligently and violently knocked motor vehicle Reg. NO. KCD 581/ZF 0506 also a trailer causing the death of the driver, the late Peter Wafula Kisache.

Upon hearing the case, the court made findings that the appellant's driver was wholly to blame for the accident and the consequential damages under both the Fatal Accidents Act and the Law Reform Act that were assessed at Kshs. 1,366,790/= plus costs and interest.

The appeal is premised on seven grounds stated in the Memorandum of Appeal filed on the 6/11/2018, but summarized into two, thus

> *(a) The Learned magistrate erred in law and in fact in holding the appellant wholly liable for the accident despite evidence adduced that the deceased contributed to the occurrence of the accident.*
>
> *(b) Failure by the respondent to prove dependency, the deceased having been 59 years old, and application of 6 years as the dependency ratio, leading to erroneous and excessive damages under the Law Reform Act and the Fatal Accidents Act.*

Analysis and Findings.

As the first appellate court, it is my duty to marshall all the evidence adduced before the trial court, re-examine and re-evaluate it and come to my own findings and conclusions.

Section 78 of the civil procedure Act provides that the court is not bound to follow the trial courts findings of fact if it appears that either it failed to take into account particular circumstances of probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally – see also **Oluoch Erick Gogo Vs. Universal Corporation Ltd (2015) e KLR, Selle & another Vs. Associated Motor Beat Co. Ltd & others. (1968) EA 123,** and **Sumaria & another V. Allied Industrial Ltd (2007) e KLR.**

Two witnesses testified for the Plaintiff/Respondent. **PW1** was the deceased's wife and the representative of his estate, letters of administration Ad litem having been granted to her – Pexhibit

She did not witness the occurrence of the accident. She produced the burial permit and chief's letter stating the deceased's children ranging between 34 years old and 22 years old – Pexhibit 3. Also produced as exhibits were the police abstract and letter from deceased's employer/pays lip stating the deceased salary as Shs.26, 751/= per month – Exhibit 4 & 5. It was her evidence that the deceased was

providing for the children's school fees and upkeep, of whom five were in school.

Ownership of the accident vehicles were proved by records from Kenya Revenue Authority - Exhibit 6(a) and 6(b). It was her testimony that the family incurred about Shs.200, 000/= as funeral expenses, but produced no receipts to support the expenses.

PW2 Samson Anguka Maninwa testified to have been an eye witness to the accident. His evidence was that he was at the bus stage waiting to board a vehicle to Nakuru when he saw a trailer descending at high speed towards Nakuru direction, then it started overtaking other vehicles when it hit vehicle Reg. No. KCD 581 /ZF0506 and two others. It was his evidence that vehicle No. KCD 581(also a trailer) was parked besides (off) the road and that its driver died instantly. He however did not record any statement at the police station. On cross examination, **PW2** reiterated that vehicle KBP 420 Q/ZD 6086 was over speeding and overtaking other vehicles and that the deceased's vehicle was parked off the road though not at a designated parking area, but in a way that it did not cause obstruction. He blamed the appellant's trailer KBP 420 Q/ZD 6086 for the accident.

The police abstract was produced by PW1 with no objection from the appellant's advocates and admitted as PExhibit 4; so are the other documents stated above.

The appellant did not call any witnesses and tendered no evidence but filed written submissions, which I have considered, in relation to the appeal before the court, as well as the proceedings at the trial Court.

LIABILITY

The occurrence of the accident is not in dispute but the manner it happened.

The respondent's evidence was uncontroverted. The appellant in its defence filed on the 5/5/2017 denied all and singular the respondents claim, but in the alternative blamed the driver of the other vehicle for negligence by

> *(a) Driving motor vehicle KCD 581/ZF 0506 at an excessive speed, and thus unable to swerve or stop the vehicle so as to avoid the accident,*
>
> *(b) Failure to keep a proper look out for other motor vehicles on the road.*
>
> *(c) Driving without due care and attention.*
>
> *(d) Failing to observe road traffic rules.*

As the appellant called no evidence, the statements in its defence remain as such, mere statements, of no evidential value.

It is trite that uncontroverted evidence bears a lot of evidential value and weight as stated in the cases **Janet Kaphiphe O & another Vs. Marie Stopes International Kenya – HCC NO.68 of 2007, James Kihara Wanjohi Vs. China Road & Bridge Corporation Ltd (2015) e KLR, and Phyllis Wairimu Chacharia Vs. Tim Teg Factory (2016) e KLR.**

Further **Section 107-109 of the Evidence Act (Cap 80)** places the burden of proof on the person who pleads and asserts.

An accident may be caused by several factors. Stated in the plaint are the particulars of the appellant's driver's negligence among them;

> *(1) Driving at an excessive speed in the circumstances.*
>
> *(2) Driving without due care and attention.*
>
> *(3) Failure to slow down, swerve or in any other way to control the vehicle so as to avoid the accident.*
>
> *(4) Failure to apply brakes on time.*

PW2 testified to the manner the accident occurred. He saw the appellant's vehicle descend on high speed and overtaking other vehicles, and knocking the respondent's vehicle that was parked outside the road with other two vehicles causing the death of its driver, the deceased.

The driver of the offensive vehicle ought to have known dangers of driving the heavy vehicle at excessive speed and without due care and attention which must have caused the vehicle to veer off the road as a failure to have full control of the same and knock down the vehicle parked off the road.

The appellant has urged that the vehicle the deceased was driving was parked on a no parking zone. No evidence was called to confirm such allegation. In any event, even if the vehicle was parked at a no parking zone, that, on its own, would not have been a reason for the appellant's driver to overtake other vehicles lose control and veer off the road and knock down vehicles parked off the road. It is not clear how that could have contributed or caused the accident. No evidence was adduced to prove any of the particulars of negligence attributed to the deceased driver.

However, as held in the Case **Kenya Power & Lighting Co. Ltd Vs. Nathan Karanja Gachoka & another (2016) e KLR.**

"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it to be truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not".

The appellant, in my view, has failed to show that the deceased's vehicle caused and or contributed to the occurrence of the accident, in any manner or at all.

Likewise, I find no fault with the trial courts findings on negligence, as none has been demonstrated by the appellant that would persuade me to interfere with the holding that the appellant was wholly to blame for the accident. I uphold the said finding.

Quantum of damages.

In a claim for damages under the Fatal Accidents Act, the deceased representative must prove dependancy, as a matter of fact.

Section 8 of the Act (Cap 32) Laws of Kenya provides that for an action under the Act, the plaintiff is required to state full particulars of the persons for whom and for whose benefit the claim is brought, and the nature of the claim in respect of which damages are to be recovered.

I have looked at the respondent's plaint as drawn and filed. At paragraph 6, the deceased's dependants are stated as the wife 55 years and six children – whose ages range between 34 and 22 years.

In its submissions, the appellant states that the deceased children were all adults, and further that no prove was tendered that they were children of the deceased as no birth certificates were provided.

I stated earlier in this judgement that the chief of the area where the respondent resides, by his letter stated the children and dependants of the deceased.

It is trite and of common knowledge that it is not only a birth certificate that can authenticate fatherhood or motherhood of children. There are many persons in our society who do not have or possess birth certificates, but are known by their local administration, be it the area chief, village elder, school or Church, that the children belong to their father/mother having been born and raised in the locality.

In my very considered view, a chief's letter is a document that, for all purposes and intent, can authenticate dependants of a resident in the area. It is common knowledge that it is only recently in Kenya that it has become mandatory for all school going children to obtain birth certificates to enable them register in the schools. It was never a mandatory requirement.

I therefore find and hold that the chief's letter - PExhibit 3, sufficiently proved the deceased. I decline to accept the appellant's submission to the contrary effect.

The trial court adopted a dependancy ratio of 2/3 and a multiplier of 6 years. The deceased was 59 years old and a driver at the time of his death. The appellant faults the trial court stating that the deceased's children were all grown up and thus did not depend on the deceased as no prove was demonstrated of either school fees payment and thus proposes a ratio of 1/3.

To buttress the assertion, the appellant cited the case **Benedeta Wanjiku Kimani Vs. Changwon Cheboi & another (2013) e KLR** stating that

"--------- there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case".

On Multiplier,

The court continued to state

"In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependents, the life expected, length of dependency, the vissitudes of life and factor accelerated by payment in lump sum-----"

I agree with the mode of establishing both the **dependency ratio** and the **multiplier**, as stated in the above decision.

The deceased's wife was a house wife and the deceased took care of the children's financial wellbeing. It is not uncommon in Kenya to have children in school up to 25 years and beyond. It is also not uncommon to have children unemployed, or not engaging in income generating ventures even at 30 years old, with the youth unemployment statistics in the country.

I therefore find and hold that the deceased was the sole bread winner of his wife and the younger children, three of whom were 21 years old having been triplets.

There was no evidence tendered by the appellant to contradict the above and thus the factual evidence remained uncontroverted – **Peasant View School Ltd Vs. Rose Mutheu Kithui & another (2017) e KLR.**

Multiplier

The deceased died at 59 years old. He would have worked as a driver beyond the Government retirement age of 60 years for civil servants. No evidence was adduced that he was not of good health. The trial court adopted a multiplier of 6 years, and earnings of Shs.22, 630/= net monthly income.

I have considered propositions and the method stated in the ***Benedetta Wanjiku Kimani Case (Supra)*** as well as the uncertainty of life of a human being. I am persuaded that the deceased would have lived a fruitful work life for more 10 years. I find no reason to interfere with the multiplier of 6 years applied by the trial court.

Thus, there being no contestation on the deceased's net income at Shs.22,630/= per month, I uphold the trial court's assessment of damages under the Fatal Accidents Act, as Kshs. 22,630 x 12 x 2/3 x 6 = 1,086,240/=.

Damages under the Law Reform Act.

From the evidence adduced and on record, the deceased died on the spot. He therefore may not have suffered intense pain and suffering before death. Nevertheless, the damages are awardable based on the physical and mental anguish caused to the deceased before his death. I have considered a few decisions.

In James **Gakinya Karienye & another** (suing as the legal representative of the Estate of **David Keris Gakinya (deceased) Vs. Perminus Kariuki Githinji (2015) e KLR,** for instant death, a sum of Shs.10,000/= was awarded.

In **P.I Vs. Zane Roses Ltd & another (2015) e KLR,** a sum of Shs.10, 000/= was awarded in **Stella Kanini Jackson Vs. KPLC (2012) e KLR,** the court awarded. **In Stella Kanini Jackson Vs. KPLC (2012) e KLR,** the court awarded Shs.20, 000/= for pain and suffering for instant death.

In **Kimunya Abednego alias Abednego Munyao Vs. Zipporah S. Musyoka & Shs.20, 000/=** was awarded in an instant death.

The trial court awarded Kshs.20,000/= under this sub-head. I find no reason to interfere with this award. It is not too high as to be an erroneous estimate of damage but within comparable awards. I uphold it.

Loss of expectation of Life.

In her discretion, the trial court awarded a sum of Shs.150, 000/= under this sub-head.

The deceased was 59 years old as earlier stated. The length of a human being's life cannot be estimated, as it is beyond human knowledge. However, there are set parameters, health of the individual, risk factors as age, nature of work, and an individual's life style.

Awards under this sub head are normally conventional, and in the bracket of Shs.60,000/= 200,000/= depending on the above factors.

In **Kenya Wildlife Services Vs. Geoffrey Gichuru Mwaura (2018) e KLR,** a sum of Shs. 150,000/= was granted.

In **Wembo & 2 others Vs. TKK (2017) e KLR**, a sum of Shs.100,000/= was awarded.

The court in **Easy Coach Bus Services Ltd & another Vs. Henry Charles Tsuma & another (2019) e KLR,** a sum of Shs.80,000/= was awarded.

Bearing in mind the Principles stated in **Kemfro African Ltd Vs. Lubia & another No. 2 1987,** and **Butt Vs. Khan (1982-88) 1KAR** that an appellate court will only interfere with trial court award if it is in ordinately high or low, and or if an irrelevant factor was taken into account or a relevant one left out when arriving at the decision, and not readily available to interfere with the court's discretion in the assessment of damages I am of the considered opinion that the sum of Shs.150,000/= loss of expectation of life is not too high or out of tune with comparable awards as to call for my interference. The award is therefore sustained.

Special Damages.

The Plaintiff/Respondent pleaded a sum of Shs.75, 000/= in her plaint as a special damage. A sum of Shs.35, 000/= was stated as fees for application for letters of Administration Litem. No receipts were produced to prove this expenditure.

It is trite that special damages must not only be specifically pleaded but also proved – **Capital Fish Kenya Ltd Vs. KPLC (2016) e KLR.**

A sum of Shs.75, 000/= is pleaded as funeral expenses.

The trial court allowed a sum of Shs.110, 000/= under this item, including the Shs.35, 000/= alluded above, on the basis that with or without production of receipts, funeral expenses cannot be wished away.

I totally agree, but find and hold that the sum of Shs.35, 000/= ought not to have been allowed without prove, as it is an expense that ought to be specifically proved.

It is now trite that reasonable funeral expenses need not be strictly proved where the claim has been pleaded. It will suffice that a reasonable sum is allowed upon taking into account relevant factors. It matters not, in any view, whether the funeral expenses were paid by the plaintiff or the plaintiff's family or through help by friends. It is a necessary expense. To that end, set aside the sum of Shs.110, 000/= allowed, and reduce the same with Shs.35, 000/= as stated above. **Thus a sum of shs.75,000/= is allowed as a special damage, being funeral expenses.**

The appeal has essentially succeeded in part.

Each party shall bear own costs. I order no costs on the appeal.

The awards shall therefore be as here below:

- **Liability – 100% against the appellant.**
- **Damages for**
    - **(a) Pain and suffering – Shs.20,000/=**
    - **(b) Loss of expectation of life – Shs.50,000/=**
- **Loss of dependency – Shs.1,086,240/=**
- **Special damages – Shs.75,000/=**

TOTAL Shs.1,331,240/=

- **Each party to bear own costs on the appeal**.

Orders Accordingly.

DELIVERED, Delivered, dated and signed electronically at Nairobi this 13th day of May 2020

J.N. MULWA,

HIGH COURT JUDGE.