REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NO. 121 OF 2018

BETWEEN

LENSON PRODUCTS LIMITED.....APPELLANT

AND

MARY WAITHIRA NDIRANGU & JOHN WAINANINA.....RESPONDENTS

(Suing as joint administrators of the Estate of DAVID MWAURA, deceased)

(***Being an appeal from the original judgment and decree of Hon. C.A Otieno-***

***Omondi,Principal Magistrate delivered on 27th August 2018 in Thika Civil Case No. 563 of 2009*)**

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant, who was dissatisfied with the decision of the learned trial court aforementioned lodged this appeal on 27th September 2018 seeking to have the appeal allowed and the judgment of the subordinate court set aside based on the grounds THAT:

> **a) The learned trial magistrate erred in law and in fact that the appellant was 100% liable when there was evidence on record that the plaintiff failed to exercise due care while on board the suit motor vehicle.**
>
> **b) The learned trial magistrate erred in law and in fact in finding that the appellant was 100% liable and awarding damages and costs of Kshs. 1,166,355/- when the suit motor vehicle was actually in the control of the party who was not part of the proceedings of the lower court**
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> **c) The learned trial magistrate erred in law and in fact and misdirected herself by failing to apportion liability accordingly.**
>
> **d) The learned trial magistrate erred in law and in fact by making an award of damages that is inordinately high in the circumstances with undue regard to the appellant's evidence on record and a deviation from existing and established principles on accident claims.**

Background

2. The respondents instituted a suit by way of a plaint in the lower court against the appellant where they sought *inter alia* general and special damages together with costs of the suit and interest on the same arising out of an accident that occurred on 13th September, 2007 involving the deceased, who was a lawfully fare paying passenger in the appellant's motor vehicle registration number KAV 0411G (hereinafter *"the suit motor vehicle"*). The respondents claimed that the accident occurred along Matuu-Thika Road in Thika District, where the appellant's authorized agent and or employee allegedly negligently, carelessly managed and/or controlled the motor vehicle causing the same to overturn several times as a result of which the deceased sustained fatal injuries and his estate suffered loss and damages. The respondents stated that the accident was caused by the negligence or carelessness of the appellant's duly authorized employee, driver, servant and/or agent for which they held the appellant vicariously liable and they particularized the said negligence and loss under the ***Law Reform Act*** and ***Fatal Accidents Act*** in paragraphs 6 and 8 of the plaint.

3. The respondents stated that at the time of his death, the deceased was 32 years of age, enjoyed a happy and vigorous life and that he was self-employed as a businessman operating a grocery shop with an average monthly income of Kshs. 15,000/- and would have worked for another 32 years or so during which he would continue supporting his family.

4. The suit was defended by the appellant who filed a statement of defence dated 14th July 2009 largely denying the contents of the plaint therein and in turn, blaming the deceased for being negligent and solely causing and/or substantially contributing to the accident.

5. The suit proceeded to a full hearing and at the conclusion of the trial the learned trial magistrate held that the appellant was 100% liable for the accident and entered judgment in favour of the respondents as against the appellant in respect of quantum as follows:

a) Pain and suffering Kshs. 20,000/-

b) Loss of expectation of life Kshs. 100,000/-

c) Loss of dependency Kshs. 1,000,000/-

d) Special damages Kshs. 46,355/-

Total Kshs.1,166,355/-

Costs of the suit and interest at court rates from the judgment date until payment in full.

6. It is the said judgment that threw the appellant into a rage hence this appeal. The appeal was canvassed by way of written submissions which are on record.

Duty of this Court

7. As a first appellate court, this court is under a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis only bearing in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to: **'*…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.***' The above provision was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

> ***"We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 *(unreported)."***

The appellant's submissions

8. The appellant submitted that it was an error for the trial court to apportion 100% liability to them for various reasons. Firstly, that there was no evidence produced that the deceased had buckled up and that had he belted up, he could be alive like the rest of the passengers. The appellant added that as per the testimony of **Michael Gichuhi Mwaura**, the deceased jumped out of the vehicle when it started losing control as he was not in his seat since he was not a fare paying passenger. The appellant attributed contributory negligence on the deceased's part for this stating that the deceased did not take adequate precautions for his own safety or instructions on safety precautions when travelling. The appellant stated that from the evidence, the deceased alighted from the motor vehicle just before the accident and gave up his seat for a fare paying passenger, meaning the deceased became an excess passenger and this alone ought to have amounted to negligence on his part. The appellant submitted that the trial court ignored this part of their defence.

9. Secondly, the appellant submitted that the trial court never considered the possibility that the accident was inevitable as per the evidence of the police officer who testified as PW3 that the driver of the motor vehicle swerved to the right to avoid a head on collision accident. The appellant added that the fact that the accident was self-involving did not mean that the driver was reckless and that there was no evidence by the respondents that the accident was inevitable. The appellant stated that the trial court adopted hearsay evidence which was not corroborated and failed to consider necessary factors which could have led to a different conclusion on liability.

10. The appellant also submitted that the respondents ought to have sued the driver of the motor vehicle as well as they allegedly blamed him for the accident. The appellant stated that the appellant could not be held liable for actions not proved against his driver and that all questions in the trial suit ought to have been directed to the driver. The appellant submitted that for vicarious liability to apply, negligence against the driver ought to have been proved which was not done in the instant case.

11. The appellant further submitted that the driver of the motor vehicle was never sued for careless driving and/or any other consequential criminal offence, which simply meant that the investigators never found him careless and/or negligent. The appellant added that the police officer and the police abstract never indicated that the driver of the subject motor vehicle was to blame for the accident. The appellant stated that the suit ought to have been dismissed on the issue of non-joinder and there was no need of assessing damages and costs.

12. It was also the appellant's submission that the trial court not only erred in arriving at damages and costs but also deviated from existing judicial principles on Road Traffic Accident claims. The appellant stated that the amount awarded under the head of pain and suffering was too high as the suffering was minimal and the deceased must have lost consciousness immediately from the impact.

13. The appellant added that the global sum of Kshs. 1,000,000/- awarded by the trial court was inordinately high for someone who never had a known source of income in that it was never proved whether he was a conductor or owned a grocery shop. The appellant added that the widow of the deceased stated that she was also a business woman meaning that the deceased was not the only bread winner of the family. It was the appellant's submission that no amount under this head ought to have been awarded.

14. The appellant further stated that the sum of Kshs. 100,000/- under the head of Loss of expectation of life was on the high side and ought to be reduced.

15. The appellant concluded by urging this honourable court to allow the appeal and prayed for the judgment of the trial court to be set aside.

The respondents' submissions

16. On the issue of vicarious liability, the respondents submitted that from the evidence of DW1, a director of the appellant's company, the suit motor vehicle was indeed registered in the name of the appellant and that the driver, Joram Mwangi Kamau was duly authorized to drive and ply the route and that at the time of the accident, the suit motor vehicle was in the care of the said Joram. The respondents submitted that the driver was authorized by the appellant to drive the suit motor vehicle and as such the appellant was vicariously liable for the acts and omissions of its employee, Joram and that the learned trial magistrate made no error in apportioning 100% liability on the defendant.

17. The respondents submitted that from the evidence of DW2: the deceased was a passenger; he was neither a driver nor a conductor; the accident was not caused by the deceased; the vehicle on the material day had begun moving in a zig zag manner and; the driver could not bring the vehicle to a stop on the spot. The respondents submitted that from this evidence, the deceased never contributed to any of the omissions and or commissions in negligence of the said accident and that the accident was caused solely by the recklessness and negligence of the driver.

18. The respondents stated that the appellant never proved to the trial court how the deceased contributed to his injuries and subsequent demise hence their allegations are based on speculation and must fail in totality.

19. On the issue of the third party notice, the respondents submitted that they had rightfully sued the appellant and had no obligation to enjoin the driver of the said motor vehicle. Instead, the respondents stated that the onus was on the appellant to apply to the court for a third party notice to enjoin the owner of the said motor vehicle as a co-defendant.

20. On quantum, the respondents submitted that the court awarded damages that were proportional and in accordance with past decisions, the evidence produced by the parties as well as the injuries that had been suffered. The respondents added that the trial court acted on the correct principles of law and exercised discretion in accordance with the law.

21. The respondents submitted that the amount awarded was not inordinately high as alleged by the appellant and they urged this honourable court not to interfere with the amount taking into consideration the facts in issue

22. The respondent concluded by urging this court to dismiss the appeal with costs as the appeal lacks merit

Issues for Determination

23. After carefully going through the record and written submissions together with the authorities cited by both parties, the judgment of the learned trial court and the grounds of appeal, the following are the issues for determination:

a) Whether the appellant was vicariously liable for the actions and omissions of the driver of the suit motor vehicle.

b) Whether the respondents ought to have filed a third party notice to the owner of the suit motor vehicle or the driver of the suit motor vehicle.

c) Whether the trial court erred in finding the appellant 100% liable for the accident.

d) Whether the trial court applied the correct principles in law in awarding the quantum of damages to the respondents.

Whether the appellant was vicariously liable for the actions and omissions of the driver of the suit motor vehicle

24. The Court of Appeal, in the case of ***Paul Muthui Mwavu v Whitestone (K) Ltd [2015] eKLR (***OKWENGU, MAKHANDIA & SICHALE, JJ.A) held as follows:

> ***"[21] Moreover, even assuming that the issue of vicarious liability was an issue for determination, in the Nuthu case, this Court applied Morgans v Launchbury & Others [1972] 2 ALL E R 607 in which it was stated:-***
>
> ***"In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner…"***

[22] In the same Nuthu case the Court restated the law on vicarious liability adopting the statement of Newbold P in Muwonge vs A.G. of Uganda [1967] E A 17 as follows:

"The law, is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."

25. In the instant case, the first issue is to establish the agency/employer-employee relationship between the driver and the owner of the suit motor vehicle and then secondly establish whether the driver was driving the suit motor vehicle at the owner's request or authority, express or implied. **Harrison Kamau Mwangi** testified as DW1 and stated that he was one of the directors of the appellant and that the suit motor vehicle was owned by the appellant company and that the driver, Joram Mwangi Kamau was duly authorized to ply the routes. DW1 went further and stated that at the time of the accident the suit motor vehicle was in the care of his driver, Joram. **Michael Gichuhi**, testified as DW2 and stated that he was the conductor of the suit motor vehicle which was owned by the appellant company and that the driver, Joram Mwangi was the driver at the time of the accident. Corporal Peter Munyao, testified as PW3 and produced the police abstract as *Pexhibit 2* which indicated that the owner of the suit motor vehicle was the appellant, a fact which was not disputed.

26. From the evidence above, there can be no doubt that the appellant company was the owner of the suit motor vehicle and that the driver, Joram Mwangi was their duly authorized driver. There was an express agency relationship between the appellant company and the driver, Joram who was driving the suit motor vehicle and that he was under the delegated instruction of the appellant company and as such, any act and/or omission by him, whether negligent or not would be deemed to be the action and/or omission of the appellant company and the appellant company would be held vicariously liable for any of his negligent acts or omissions.

Whether the respondents ought to have filed a third party notice to the owner of the suit motor vehicle or the driver of the suit motor vehicle

27. Having found that the appellant was vicariously liable for the actions and omissions of its duly authorized agents, and that the same was pleaded and proved by the respondents, I find that there was no need for the respondents to file a third party notice to the driver of the suit motor vehicle. In any case, the mere fact that the driver of the suit motor vehicle was not enjoined in the claim against the appellant arising from his driving was not fatal as was claimed by the appellant. (See the Court of Appeal cases of ***Selle & Another V Associated Motor Boat Company Limited & Others [1968] EA 123 (ibid); Mwonia V Kakuzi [1982] KLR 46 (CAK); Lake Flowers v Cila Francklyn Onyango Ngonga & another [2008] eKLR; and Samuel Gikuru Ndungu V Coast Bus Company Ltd [2000] eKLR***).

28. Furthermore, the appellant company was the owner of the suit motor vehicle as per the evidence and as such, they could not therefore claim to be third parties to the suit.

Whether the trial court erred in finding the appellant 100% liable for the accident

29. From the record, PW3 stated that he was a police officer at Thika Police station and on the material day, the accident involving the motor vehicle was reported at the station. PW3 stated that the accident was self-involving and the driver was trying to avoid a head on collision with an oncoming vehicle, where he was forced to swerve to the right side but lost control. PW3 stated that the deceased was a passenger in the suit motor vehicle and that from the details of the OB, it did not show that the driver was careless. PW3 stated that he blamed the driver of the suit motor vehicle for the accident.

30. In their defence, the appellant through DW1 stated that he was informed that the deceased was not a lawful passenger in the suit motor vehicle and that he jumped out of the vehicle when it was involved in the accident. DW1 added that the deceased was negligent. While giving further testimony, DW1 stated that the deceased was neither a conductor nor a driver and that all persons who weren't driver or conductor were passengers.

31. DW2 stated that he knew the deceased as a conductor and that on the material day, the deceased had asked if he could tag along as a conductor to which DW2 agreed. DW2 stated that the deceased was not paying any fare as he was being trained as a conductor. DW2 further stated that as the journey progressed one passenger alighted in Makongeni but they picked up two passengers and that the deceased gave up his seat for the passenger. DW2 stated that he asked the deceased to alight but he insisted on proceeding with the journey, and that along the way the suit motor vehicle started moving in a "**zig zag manner**" and that the deceased then jumped out of the vehicle. DW2 stated that the driver was driving at a moderate speed and that it was only the deceased who jumped out of the vehicle and that was the reason why he died. DW2 further testified that he was the conductor of the suit motor vehicle and that the deceased was a passenger. DW2 stated that the zig zag manner in which the suit motor vehicle moved was not caused by the deceased and that the deceased must have jumped out in an attempt to save his life. DW2 added that the driver lost control of the vehicle after he tried to evade an obstacle.

32. From the totality of the evidence, I cannot see any way in which the deceased was liable for the accident that occurred on the material day. Whether he was a fare paying passenger or not, the accident was not due to his action of jumping out of the vehicle. I am of the considered opinion that it was instinctive of a reasonable person foreseeing an accident and attempting to save his life. The deceased could not be blamed for taking this action in the face of an impending accident going by the movement of the suit motor vehicle. The only person who could have given a clearer picture in evidence as to how the accident happened was the driver, but since he did not testify, the evidence of the respondents on negligence on the part of the driver remained unchallenged. The driver was best placed to explain how a vehicle that is presumably well maintained and serviced and did not have any mechanical problems as per the evidence of DW2 could start moving in a zig zag manner and cause an accident. As the Court of Appeal observed in the cases of ***Kenya Bus Services Ltd V Dina Kawira Humphrey CA 295/2000*** and ***Nairobi CA 179 of 2003 Rahab Micere Murage estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR***:

"Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers

without any explanation. Well driven motor vehicles do not just get involved in accidents…..”

33. However, from the evidence of DW2 it seems the deceased was not in his seat when the accident happened and I find that this is what even made it easy for him to jump out of the suit motor vehicle just before the accident occurred. As a passenger, the deceased had no business not being in his seat and belted up for that matter. I do not think the deceased can escape partial liability for this because who knows, maybe if he had not given up his seat for another passenger and remained strapped to his seat, he could have survived, just as the other passengers did. No one forced the deceased to give up his seat for another passenger and as DW2 stated, the deceased even declined to alight after being asked by DW2 to do so. For this reason, I would apportion partial liability of at least 20% to the deceased.

34. On the submission by the appellant that the driver was never charged with any criminal offence and was thus blameless, this court has on many occasions held that the decision to charge or not to charge for the offence of careless driving is usually at the discretion of the police and the mere fact that a driver is not charged does not necessarily mean that they were not liable at all. (See the cases of Charles ***Ocharo Momanyi v United Millers Limited [2017] eKLR; P N M & another (the legal personal Representative of estate of L M M v Telkom Kenya Limited & 2 others [2015] eKLR***).

35. For the foregoing reasons, I find that the respondents were able to largely prove liability on the part of the appellant to the required standard on a balance of probability but then again, the deceased partially contributed to his death for not being in his seat as he was supposed to. I am thus in agreement with the appellant that the deceased should be held partially liable for the accident. I have apportioned 20% liability to the deceased.

Whether the trial court applied the correct principles in law in awarding the quantum of damages to the respondents

36. On quantum, this court is meant to find out whether the learned trial magistrate awarded the same based on the correct principles of law. (See the Court of Appeal decision of ***Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727)***. In the said case **Kneller J.A**. held that:-

> ***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419.***
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> (Also see the Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*** and ***Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012”) .***

37. In the instant case, the trial court awarded Kshs. 20,000/- for pain and suffering after considering that the deceased died on the spot. The appellant submitted that Kshs. 7,000/- is what ought to have been awarded. In my assessment, Kshs. 20,000/- is nominal and standard compared to awards made in the past under this head in respect of persons who died instantly. (See ***Jennifer Odhiambo and Another*** *v.* ***Elizabeth Mbuka Acham & Another*** *and* ***Meneza Adhiambo*** *v.* ***Agnes Susan Wairimu & others*** where Kshs.20,000/= and 30,000/= respectively was awarded more than 10 years ago).

38. The trial court awarded Kshs. 100,000/- under the head of loss of expectation of life noting that this was a conventional award under this head. The appellant submitted that the court ought to have awarded Kshs. 50,000/-. I find the trial court’s award to be principled and consistent with most comparable awards under this head and I see no reason why this court should interfere with the same.

39. The trial court applied the ‘global sum’ award under the head of loss of dependency noting that the occupation of the deceased was not proved and was inconsistent and proceeded to award the sum of Kshs. 1,000,000/- further taking into account the award under the Law Reform Act and the decision in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 – 88) 1 KAR 727*** **(supra)**. The trial court further took into account the age of the deceased and the fact that he took care of his family. The appellant submitted that this was inordinately high for someone who never had a known source of income. In light of the factors taken into account by the trial court, I find the same to be principled and relevant and the amount of Kshs. 1,000,000/- was thus reasonable in the circumstances.

40. From the foregoing I find that the trial court’s decision on the quantum of damages as whole was sound and judicious as it was founded on the correct principles and factors required by the law and as enunciated by the Court of Appeal in the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** **(supra)** on the assessment of damages.

Conclusion and Disposition

41. In conclusion, it is my finding that the appellant was vicariously liable for the negligence of his driver in causing the accident and is largely to blame for the accident to the extent of 80%. It is my further finding that the deceased was guilty of contributory negligence for failing to be seated and belted up for the entirety of the journey and should share at least 20% of the blame and liability.

42. In light of the foregoing, this appeal partly succeeds on the issue of liability but fails on the issue of quantum. The decision of the trial court on the final award of Kshs**. *1,166,355/-*** be and is hereby set aside and substituted with a global award of **Kshs. 933,084/-** after subtracting 20% of the deceased’s liability from the amount awarded by the trial court.

43. As for costs, each party in this appeal shall bear its own costs.

44. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 11th day of June, 2020

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CHRISTINE W. MEOLI

JUDGE