REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 10 OF 2019

SWALEH FARAJ.....APPELLANT

VERSUS

ARMOGAST MWAMBAYA MWASI & VIVIAN ARMOGERGAS &

VIVIAN AMAGOVE (suing as legal representatives of

the estate of HOPE MKINDENYI MWASI).....1ST & 2ND RESPONDENTS

CONSOLIDATED WITH

SWALEH FARAJ.....APPELLANT

VERSUS

ARMOGAST MWAMBAYA MWASI & VIVIAN ARMOGER &

VIVIAN AMAGOVE (suing as legal representatives of

the estate of MARYANNE CHAO MWASI).....1ST & 2ND RESPONDENTS

LEONARD ALELA KAMENDE

ARMOGAST MWAMBAYA MWASI.....3RD &4TH RESPONDENTS

J U D G M E N T

1. This is an Appeal from the Judgment of the Hon M. Onkoba Senior Resident Magistrate delivered on 21st March 2019 in ***Civil Suit 103 of 2015*** and ***Civil Suit 104 of 2015*** which were consolidated because they both related to the same incident. The Appellant is appealing against both the findings of liability and the quantum ordered. The Appellant is also objecting to the Decree. The Grounds relied upon are set out in the Memorandum of Appeal filed possibly on 28th March 2019. It sets out the Grounds thus:

MEMORANDUM OF APPEAL

The Appellant above named humbly appeals to the High Court at Voi from the judgment of the Learned Senior Resident Magistrate Hon.M. Onkoba in Civil Suit No 103 of 2015 in the Principal Magistrate's Court, Voi (Consolidated with Voi-Pmcc No. 104 of 2015) dated the 21st day of March 2019 against his findings on liability and assessment of quantum of damages and set forth the following grounds of objection to the Decree appealed from namely:-

1. That the Learned Senior Resident Magistrate erred in holding that the Defendant was 100% to blame for the accident which occurred on 3rd October 2013 contrary to the evidence before him.

2. That the Learned Senior Resident erred in dismissing the suit against Third parties and further erred in not holding that considering the totality of the evidence before him that the 1st third party Leonard Alela Kamende was wholly to blame for the accident or alternatively substantially to blame for the accident.

3. That the Learned Senior Resident Magistrate erred in failing to hold that the accident occurred as a result of negligence of the 1st Third Party Leonard Alela Kamende when he opted to overtake a vehicle ahead of him along the main Nairobi-Mombasa Highway without first ascertaining that it was safe so to do and that the road ahead was clear for overtaking.

4. That the Learned Senior Resident Magistrate erred in failing to hold that it was a consequence of the 1st third party reckless driving that caused the accident in which the appellant was also seriously injured.

5. That the Learned Senior Resident Magistrate erred in failing to hold that after the collision motor vehicle Reg. No KBT 880E owned by the 2nd third party spun towards direction of the appellant's motor vehicle Reg. No. KBT 247Y and some of the 2nd third party motor vehicle parts including its battery flew mid air and landed on the windscreen of the defendant's said motor vehicle as a consequence whereof battery acid splashed onto the appellant's eyes causing him severe injuries.

6. That the Learned Senior Resident Magistrate erred in not holding the 2nd third party Armogast Mwambaya Mwasi vicariously liable for the negligence of the 1st third party in driving, managing and controlling motor vehicle Reg. KBT 880E

7. The Learned Senior Resident Magistrate erred in failing to consider or adequately consider all the evidence adduced before him including the evidence of the Traffic Case No.609/17 Republic -Vs- Leonard Alela Kamende preferred against the 1st third party.

8. That the Learned Senior Resident Magistrate erred in failing to consider or adequately consider the evidence of PW1 PC. Nicholas Kosgey in its totality.

9. The Learned Senior Resident Magistrate erred in dismissing the suit against the third parties when there was clear evidence before him of the negligence of the 1st third party from PW1 PC. Nicholas Kosgey and the fact that in the Traffic Case No.609/17 Republic -Vs- Leonard Alela Kamende the 1st Third party has been charged with 2 counts of the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya.

10. That the Learned Senior Resident Magistrate erred in dismissing the evidence of DW3 Samwel Shisha which was credible.

11. That the Learned Senior Resident Magistrate erred in failing to adequately consider or adequately consider all the evidence before him and the written submissions filed by counsel for the Appellant.

12. That the Learned Senior Resident Magistrate erred in awarding to the Plaintiff in Pmcc No.103 of 2015- Hope Mkidenyi Mwasi aged 3 at the time of her death the sum of Shs.500,000.00 for loss of dependency under the Fatal Accident Act after coming to a finding that no evidence was led before him to show here prospects in life.

13. That the Learned Senior Resident Magistrate erred in awarding to the Plaintiff in Pmcc No.104 of 2015- Maryanne Chao Mwasi aged 9 years at the time of her death the sum of Shs. 700,000.00 for loss of dependency under the Fatal Accident Act after coming to a finding that no evidence was led before him to show her prospects in life.

14. That the Learned Senior Resident Magistrate erred in not deducting the sum of shs. 100,000.00 each awarded by him to the 2 plaintiffs for loss of expectation of life from the figure of Shs.500,000.00 and Shs.700,000.00 awarded by him to the 2 plaintiff's respectively for loss of dependancy under the Fatal Accident Act.

15. That the Learned Senior Resident Magistrate erred in awarding special damages of Shs 78,000.00 to each of the 2 plaintiffs when there was no documentary evidence adduced before him in support thereof.

16. That the Learned Senior Resident Magistrate erred in law in failing:

a. To appreciate the significance of the various facts that emerged from the evidence of the defendant's witnesses.

b. To consider or properly consider all the evidence before him and/or

c. To make any or any proper findings on the aspect of quantum of damages on the evidence before him.

17. That the Learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the Defendant/Appellant.".

2. It is clear from the above, that, in main, the Appellant is not happy with the findings of fact, in particular where the Learned Trial Magistrate preferred the evidence on behalf of the Plaintiffs rather than the evidence on behalf of the Defendant. As this is a first appeal the Court is required to re-consider and re-evaluate the evidence bearing in mind it has not had the opportunity to observe and assess the demeanour of the witnesses. ***Peters v. Sunday Post*** **[1958] E.A. 424 and p. 429 E Sir Kenneth O'Connor P.** said:-

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."**

3. The Parties were directed to file Written Submissions which they did. They have been considered carefully. In accordance with the "Covid-19" Rules on social distancing in force at the time, the Parties agreed to dispense with highlighting of their Submissions.

4. In his Judgment, the Learned Trial Magistrate dealt with the issues that are the subject of the Appeal before the Court in a clear and comprehensive manner. In relation to liability, the Defendant alleged that the accident was caused by the 1st and 2nd Third Parties. In relation the 2nd Third Party, may have been the registered owner of motor vehicle registration number KBT 880E (the Ford) but he was not even present at the incident, therefore it is clear that allegation was made without any consideration of what was the true position. In relation to the 1st Third Party, the Learned Trial Magistrate made certain findings.

5. As for the criticism that the Learned Trial magistrate did not take into account the "evidence from the criminal proceedings". It bears no weight. The Learned Trial Magistrate recorded the evidence and set out his assessment. He said: "PC Kosgey's evidence has be summarized above. In his evidence in chief, he testified that the accident occurred as the 1st Third Party tried to overtake a trailer which was ahead of him. That he could not successfully do so, since there was an oncoming vehicle KBS 247U Isuzu FRR the two ended up in a head on collision. While being subjected to cross examination by Counsel for the 1st Third Party (Mr Jengo), the police officer conceded that the damages (sic) to motor vehicle KBT 880E were concentrated on the rear of the car, the left side in particular. He too conceded that the impact was on the rear side, for the kind of damages as were noted, to be concentrated at that point. The 1st Third Party testified that it was the rear passengers of the car that were injured because the rear seats were damaged due to the rear impact and they fell out of the back of the vehicle. To this extent, it is clear that P.C. Kosgey's testimony in chief was at variance with the testimony he gave while being cross-examined. For the uninitiated that means that the testimony was inconsistent and therefore unreliable.

6. This is a very sad case, it relates to a traffic accident near Kenani where the passengers of the vehicle KBT 880E were seriously injured and in the case of two children that resulted in their death. Notwithstanding that aspect, the rules of evidence and burden of proof remain the same as for any other civil litigation. During the Trial of the Suit the Defendant added two Third Parties, one was the driver of the vehicle and the other was said to be the registered owner of the vehicle who was not present at the scene nor the beneficial owner. He was discharged as 4th Respondent in this Appeal.

7. The Appeal is opposed by the Respondents. The Parties were directed to file Written Submissions and they agreed to dispense with highlighting. The First and Second Respondents are jointly represented through their Guardians ad Litem and the Third Respondent (the driver) was separately represented. Both have filed their Submissions. The Respondents all oppose the Appeal and support the Award made by the Learned Senior Resident Magistrate (as he then was).

8. The Appellant is in the position that he has to demonstrate to this Court that in relation to factual findings the Trial Court was plainly wrong (***Kiruga v. Kiruga & Anor 1988***) to justify this Court's jurisdiction to act on the findings made.

9. Ground 10 complains that the Learned SRM erred in dismissing the evidence of DW-3 Samwel Shisha. That statement provides an interesting conundrum in that the Learned Trial Magistrate is expected to have considered something that did not exist. DW-3 was in fact a Faiza Tahir Faraj who appears to have described himself as a Muslim. His witness statement presents an identical perception of the accident to his brother who was driving notwithstanding they were in different parts of the car. Although he did contradict DW-1 (the driver) when he said, it had been impossible to over-speed because there were so many trucks on the way. He confirmed he heard a loud bang, suggesting it was the vehicle he was travelling in that was initially involved in the collision. He said that when the accident occurred the Defendant was charged. In 2017 the 1st Third Party was charged.

10. In fact, a Samuel Sicha was DW-4. He called himself an investigator. He did not visit the scene until 5th October, that is two days after the accident. He did not observe the scene as represented in the diagram produced in evidence. In fact, the diagram seems to have been prepared by someone else, a director and therefore his boss. The diagram was then also signed by DW-4. He did not observe what was denoted there but he formed "the opinion" that the diagram was a true reflection of what had happened previously. That means, from an evidential and/or probative perspective the diagram is not a true reflection of what DW—4 saw. The Diagram also completely omits the trajectory of the third vehicle involved in the accident. Therefore, it is clear to this Court that the Learned Trial Magistrate treated the evidence and diagram as hearsay and therefore of no evidential value whatsoever. That was not an error. The Trial Court is entitled to place the appropriate weight on the evidence before it.

11. It is clear the LTM applied the weight he thought appropriate to the evidence of PC Kosgey on which the Defendant relied. It should be borne in mind that PC Kosgey was not the officer at the scene, he was not the investigating officer, he did not visit the injured in hospital. He was someone who seems to have created and/or was involved in the creation and prosecution of a duplicate criminal file about 4 years after the event. As for the evidence from the criminal proceedings generally, they would have to be introduced into evidence in the civil trial to form part of the deliberations of a trial magistrate. In this case they were introduced by PC Kosgey. The Learned Trial Magistrate also recorded that PC Kosgey spoke only of a collision between the Ford and the Canter. There was no mention of the Defendant's vehicle. By contrast the Defendant said that the Ford collided (head-on) with his motor vehicle, KBW 247Y and the battery flew out and smashed his windscreen causing the injuries alleged. That may have happened but was it the cause of the accident?

12. In submissions the Appellant relies on the authority of ***Peter vs Sunday Post***. The Appellant has failed to demonstrate that the LTM acted on a misapprehension of the evidence or on a wrong principle for being skeptical about the inconsistent testimony. The totality of PC Kosgey's evidence was that it was inconsistent, illogical and unbelievable. In the circumstances, it is clear that the Learned Trial Magistrate did consider the evidence and gave it the weight it deserved. The Appellant has failed to demonstrate that was an error.

13. It is worth noting that, in relation to the criminal case commenced in 2017 against the driver of the Ford, KBT 880E, the Learned Trial Magistrate records that the Defendant called the Executive Officer from the Lower Court to produce the file, instead of making an application for the file to be produced. In any event it was clear that the prosecution witnesses had not attended and there were **no findings made** at that stage. Therefore, a criticism that the Learned Trial Magistrate did not take into account something that does not exist can only be described as a waste of this Court's time.

14. It was the Defendant's case that the vehicle that was rammed from the back was to blame. As that is against the normal order of things according to logic and the Highway Code, the burden of proof was on the Defendant to explain how the car in front was to blame. (***Section 100*** of the ***Evidence Act*** – he who asserts must prove.) DW-3 gave some inkling of the attitude of Defendant in the Toyota Premio, namely that the car in front was not overtaking quickly enough. How that would have caused the accident without the intervention of the Defendant has not been explained. Neither side investigated that further in cross-examination.

15. On the question of relative speed and care in driving the Defendant said he was driving at a sensible pace but the 1st Third Party was speeding and driving recklessly from the time he was first observed. The Learned Trial Magistrate then, rightly asked the question, how the Defendant managed to keep pace with the 1st Third Party all the way from Kibwezi to Ndii if their driving speed was at variance to the extent alleged. Clearly, the version of events put forward by the Defendant and his brother are not plausible. The Defendant also confirmed that the very first police assessment – which was contemporaneous to the accident was that he should be charged. The Defendant agreed to that. The subsequent contradictory charge brought in 2017 against the 1st Third Party was placed before the Court and the Learned Trial Magistrate came to the conclusions that he recorded together with his reasons for doing so.

16. In the circumstances, all the evidence points to the Appellant's car ramming the Respondent's vehicle from the rear and at considerable speed. The impact was from the rear so he had no opportunity to assess or avoid the collision. The consequence of the impact was that the Ford after being hit on its left rear was shunted or propelled into the path of oncoming traffic. The impact to the rear was so great that it resulted in the rear seat being damaged and causing the death of two young children as well as injuries to all the passengers in the rear of the car. There were no injuries to the occupants of the front of the car.

17. On the question of quantum, the Learned Trial Magistrate set out his calculations after hearing submissions from all the Parties. For pain and suffering, he awarded Kshs.100,000/= for each of the Deceased. The Appellant objects to that. However, it is in keeping with the contemporaneous authorities.

18. On the issue of causation of damage, the LTM said, "..it is clear that the deceased minors were seated at the back seat of motor vehicle KBT 880E. They both died as a result of the accident. Vivian Amagove and Leonard Alela Kamande were occupying the front seat. They survived the accident, as it is clear that the first impact was at the rear side of their vehicle, and not the front.

19. At Ground 14 the Appellant states "That the Leaned Senior Resident Magistrate erred in not deducting the sum of Shs.100,000 each awarded by him to the 2 Plaintiffs (that should be the two Deceased) for loss of expectation of life from the figure of Shs.500,000.00 and Shs.700,000.00 awarded by him to the 2 plaintiff's respectively for loss of dependency under the ***Fatal Accident Act***. As the Appellant, his insurers and advisers must be fully aware, that criticism has no basis in fact and/or law. Loss of expectation of life is a claim brought on behalf of the Deceased in his or her own right through his/her respective guardians ad litem (***guardians ad colligienda bona)***. Due to the death, the benefit passes to the Estate. The claim for loss of Dependency under the Fatal Accidents Act is a claim brought by current or future dependents. Further, ***Section 2(5) of the Law Reform Act (Cap 26)*** provides:

> *"(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act…. ". (**Emphasis added**)*

Ground 14 therefore has no legal basis.

20. In this case it is clear that the Learned Trial Magistrate made an assessment of both heads separately and differently. In light of the young age of the two Deceased Children, this Court feels a higher award for loss of expectation of life is appropriate. The comparables cited and relied upon relate to adults. These were children. However, given that there is always some degree of unpredictability in life expectancy, a discount could be appropriate. In the circumstances, it cannot be said that the Learned Trial Magistrate erred in principle to the extent that would justify this Court's intervention. ***Butt –vs- Khan [1981] KLR 349, Law J.A*** at page 356 held,

> ***"****an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."*

21. Similarly, the Learned Trial Magistrate has worked in the variable of dependency into the circumstances of this family. The amounts are within the parameters of the current authorities of that time. The Parents would be the dependants but they are not elderly nor was it argued by the Defendant that they were elderly and therefore their period of dependency would be short. In the circumstances, the Learned Trial Magistrate's award is within the bands of the Submissions put before him. It is not on the high side. The Appellant has not satisfied this Court that this case reaches the threshold for an appeal court to interfere with the Award.

22. Appeal dismissed with costs. Interest to run from the date of the first decree. Any stay ordered is lifted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed and Dated and Delivered at the High Court in Voi this the 9th day of July 2020

In the Presence of:

Court Assistant: Josephat Mavu

ICT Officer: Ryan Maina

Remotely: Mr Adede Holding Brief for Mr Gor (Appellant); Mr Mwangombe (1st and 2nd Respondents; Mr Jengo (3rd Respondent).

Judgment delivered on-line using the MS-Teams platform and disseminated electronically using email at the request of the Parties in accordance with Corvid-19 Directions prevailing at the time.