REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 28 OF 2015

PZ CUSSONS (E.A.) LIMITED.....APPELLANT

VERSUS

1. FELTON KIMORI

2. FELISINA KIMORI.....RESPONDENTS

J U D G M E N T

Background of facts leading to this appeal

1. On the 11/5/2007 by a plaint dated the same day the two Respondents, in this appeal, sued the appellant and sought damages, both general and special, for the alleged wrongful death of one Donald Mwaendo Kimori pleaded to have occurred on the 13/5/2004 as a consequence of a self-involving accident to the Appellants motor vehicle registration no. KAG 573V along Nyache-ndii road at Mwangoko. The said accident was attributed to the negligence of the Appellants driver and servant in his manner of driving and controlling the said motor vehicle. The particulars of negligence pleaded as; driving at a fast and excessive speed, failing to keep proper lookout thus losing the control of the motor-vehicle and therefore failure to exercise due diligence and skill expected of him. Owing to such shortcomings the Respondent blamed the death of the deceased on the defendant and therefore sought special damages in the sum of Kshs.25,250/= as well as damages under both Fatal Accidents Act and Law Reform Act.

2. It was pleaded that at the time of his death the deceased was aged 62, enjoyed good health and was self-employed with a net income of Kshs.50,000/= per month and was the sole breadwinner for the household and that by his death the dependants named had suffered loss and damage and claimed damages.

3. To that plaint was filed a statement of defence dated 13/6/2007 in which the description as well as ownership of the motor vehicle were admitted together with the occurrence of the accident and the fatal injuries to the deceased. However the legality of the hire of the motor vehicle was denied with a contention that the hire agreement between the deceased and the Appellant's driver was secret, illegal and unauthorized and that the accident was wholly occasioned by the same unlawful acts between the two.

4. Particulars of secrecy and lack of authority on the driver were then set out to include the fact that the arrangement was for the benefit of the two and contrary to instruction to the driver not to carry what did not belong to the appellant; illegally transporting timber; overloading the motor vehicles and taking a difficult, rough and treacherous route to avoid detection by police of the illegal cargo and overloading the front cabin with unauthorized passengers. For those reasons the Appellant pleaded that the driver was not within the scope of authority and authored own misfortunes and the driver having been own a frolic of his own. Lastly negligence on the part of the driver was denied and that even if he were negligence, then the Appellant should not be held liable because the driver was out on a detour of his own.

5. After the pleadings closed, the suit was heard by parties leading evidence at which hearing the Respondents called three (3) witnesses while the Appellant called two (2) witnesses.

The evidence led by the Respondents

6. PW 1, the 1st Respondent, gave evidence of the deceased's death in a road accident as pleaded and produced the grant issued to him and

the mother, 2nd Respondent, as exhibit P1 as well as police abstract and death certificate. He gave evidence that the deceased was a retired teacher but engaged in timber business as well as farming of vegetables, maize and coffee. He was married to two wives and had children including school going ones who depended on him. He produced a receipt of Kshs.10,000/= being cost of coffin and Kshs.15,000/= for grant of letters of administration. On cross examination, the witness said that he never visited the accident scene and had nothing to show the lorry had been hired by the deceased save for the timber recovered from the scene. He denied that the use of the road through the forest was to avoid police and stated that the road is used to transport even vegetables. He confirmed that the record book of the deceased did not disclose his monthly earnings.

7. PW 2 was No. 88391, PC David Masinde of Wundanyi Police Station which received fatal accident report and kept a file. The witness was not at the station on the material day but was given relevant file whose perusal by him revealed that it was an inquiring file into a fatal accident in which the subject motor vehicle had in the driver's cabin; the driver, two workmates and the deceased, thus had one extra passenger in the cabin which would have interfered with the driver's control of the motor vehicles. The investigating officer also blamed the driver of carrying excess timber. He then produced the file as Exhibit P2.

8. In cross examination, the witness said that the investigating officer recommended an inquest which he could not confirm if was held or not. The investigating officer however blamed the driver for the accident. He said the accident occurred at a hilly area where the murram road meanders.

9. PW 3 was the deceased's 2nd widow. He said the deceased had a total of twelve children, six from each of the two wives and that the deceased earned Kshs.100,000/= per month from his business and that all depended on him. She equally gave evidence of the school giving children and that they owed some unpaid school fees. In cross examination, she said that she had no evidence to prove the deceased income and that her children were in public schools. She was then recalled to produce demand notes of fees from the schools.

Evidence by the Appellant

10. DW 1 was the appellant's personnel and administration supervisor who recalled a telephone call to the effect that the delivery van had been involved in an accident and the driver and two occupants had died and that one of the occupants survived. He visited the scene and it took him 3 hours to reach it as the road is steep meanders and not well done.

11. He said the motor vehicle Registration No. KAG is a van designed to carry cosmetics and soap, goods of light category. At the scene he found timber by the side of the motor vehicle which was badly and extensively damaged to the extent of being unrecognizable.

12. He added that the company made deliveries to Wundanyi once every month and the designated route was Voi, Mwatate – Wundanyi road and back which was not the road on which the accident occurred. He denied that the vehicle could be contracted to carry any goods other than their own. He termed the carriage of the timber as an unauthorized task as the driver did not have the authority from the company. He said the vehicle was mechanically sound having been inspected at the motor vehicle inspection unit as evident by DEXH 2.

13. On cross examination, the witness said that he was in Nairobi when the accident occurred but admitted the vehicle belonged to his employer and that the driver and two other died in the accident. He admitted that the motor vehicle was the material time in custody of his employer's driver but blame the said driver for irresponsibility, need and greed. When shown the investigations report in re-examination he said the report confirmed that driver was on an illegal venture.

14. PW 2 was the private investigation who was commissioned by the Appellant's insurer Ms. Real Insurance Co. Ltd. He went to site on 21/5/2004 a saw a 2 ½ ton motor vehicle used for delivery which had been towed to Wundanyi police station. He spoke to the investigating officer who took him to the scene of the accident which he described as steep, hilly and rough road which meanders and it was at one such sharp bends that the motor vehicle lost control and crushed by ploughing through the bushes down-hill. He interviewed the only survivor of the accident one Mr. Mutsosi who said that on impact the timber tore into the cabin and crushed the occupants who died on the spot.

15. He said that his investigations revealed that the last delivery was at 5pm and the driver should have used the tarmac road on his way back which is wider smoother and shorter than the murram road where the accident occurred. He concluded that the timber was too heavy for the vehicle and was carried therein without authority of the Appellant. He then produced his report containing photographs and a receipt for Kshs.5,000/= he was paid for travel and accommodation expenses.

16. In cross examination he said that the timber was removed by the deceased's people when the investigating officer left the scene to get a breakdown to tow the motor vehicle. He said that he did not have any document dictating the route the vehicle should have taken, not even the duty work ticket. On the load on the motor vehicle he was unable to say what the tonnage of the timber was and therefore unable to say if the vehicle had been overloaded or not but he blamed the driver for over loading the vehicle.

17. After both cases closed, the parties filed written submissions and in his reserved judgment dated 26/5/2014, the trial court found that the deceased was a lawful passenger in the motor vehicle but apportioned liability at 65.35 in favour of the deceased against the appellant. He then awarded an aggregate sum of Kshs.1,670,250/= to the respondents. That is the judgement this appeal challenges on the 10 grounds of appeal in the Memorandum of Appeal.

18. Even though crafted as 10 grounds, the grounds can be clustered into three as follows:-

i. The finding and apportionment of liability was erroneous.

ii. The award of damages was erroneous for having been based on a multiplicand of Kshs.30,000/= when there was no evidence of earnings.

iii. The trial court committed an error by ignoring the pleadings, the evidence and submissions offered.

19. I propose to deal with the 1st and second complaint jointly because both are intertwined and only thereafter will one delve into the third issue on quantum of damages.

Liability of the defendant

20. The entirety of the evidence led by the Respondents at trial did not avail an iota of evidence to counter the pleading in the defence and evidence by PW 1 that the driver was on a frolic of his own. Granted that the employment of the deceased driver by the Appellant was expressly admitted in the defence and thus became a non- issue for the court, in this matter, the plaintiff specifically pleaded that the driver was authorized to drive the motor vehicle and carry the deceased.

21. The law in this area is that for vicarious liability to arise the driver or servant must be demonstrated to have acted within the cause of employment scope and authority of his employer. Where there is a diversion from the cause of duty, the employer is not liable unless it be shown that the employer had set in motion a chain of events which make him liable from the end result. The action of the employee or servant must be construed to have been in furtherance of the employer's trade, business or interests in the cause of his business.

22. In this matter there was no evidence that the hire fees was to be remitted to the appellant. DW 1 was adamant and remained unshaken in evidence that the driver had no business to divert from the tarmac road and onto the steep, hilly, rough and treacherous route he took and met the accident and his own death. But that is not all. In the matter the onus f proof was upon the respondents to prove every element of their pleading and cause of action including vicarious liability within the balance of probabilities. In so far as proof of vicarious liability was concerned no attempt was made and no iota of evidence was availed. Where no proof is availed by the person whose duty it is, it follows that the burden remain undischarged and the person whose burden it was must fail[1]. Here I find that there was no proof of liability against the Appellant and that alone was enough to have the suit dismissed. The trial court having found otherwise, he so found contrary to the evidence on record and therefore committed an error that invites interference by this court. I do set aside the finding on liability and in its place I substitute an order that the Respondents' suit against the Appellant be dismissed.

23. In addition, in his apportionment of liability at 65:35, the trial court made the following comment which I find to have been openly erroneous. He said:-

> ***"The motor vehicle was clearly not for the driver personal use as at the material time. However, there was no proof that the driver had been expressly prohibited from carrying passengers nor any other luggage on the way back".***

24. In doing so, the trial court shifted the burden of proof upon the Appellant to prove lack of authority when in fact the evidentiary burden had not been shifted by the Respondents own evidence. In doing so, the trial court erred and based on that error that apportionment of liability cannot be left to stand but must be set aside. I do set it aside and in its place substitute an Order that the driver was acting on a frolic of his own and was therefore not within the course of his employment and scope of authority but was acting for own benefit and interest bereft of the interests of the employer and the Appellant as such employer cannot be held vicariously liable. On that additional account, I would allow the appeal and declare that the Respondent suit at trial be dismissed with costs to the Appellants.

25. On quantum of damages, I must be guided by the established principles that special damages must not only be specifically pleaded but also strictly proved while for general damages, the same are assessed and awarded in the discretionary jurisdiction of the court and that an appellate court can only interfered with such a decision when it is demonstrated that in coming to it the trial court took into account an irrelevant factor or failed to take into account a relevant fact and thus reached an outrightly erroneous conclusion[2].

26. In his award of general damages, I have seen nothing unreasonable with the awards under the headings pains and suffering as well as loss of expectation of life. I will leave those awards intact.

27. However in assessing damages for loss of dependency, the trial court adopted a multiplier of 10 years, a multiplicand of Kshs.30,000 and a dependency ratio of 2/3.

28. What concerns me of those thresholds is the multiplicand, because I am prepared to accept the other two are within the acceptable brackets. The fact or earnings or income is a matter of evidence and where there is no definite evidence of monthly earnings a resort is made to the statutory minimum wage. In this case however, the deceased was a retired man. He must have been earning pension beyond his alleged engagement in the timber business in and farming activities. However, there was no evidence that he was even a licensed timber dealer or even a single business permit to show that he carried any lawful business. That however is not to say that he earned totally of no income from such activities. He could as well have had a reasonable income but the duty was upon respondents to prove what income it was.

29. The income was not proved to have been Kshs.30,000 per month. In the absence of definite evidence of income, I make the opinion that the trial court should have gone for the basic minimum wage for those in the agriculture and related fields. I would therefore take a sum of Kshs.10,000 as the multiplicand with which sum the calculation for loss of dependency works out as follows:-

10,000 x 100 x 12 x 2/3 = Kshs.800,000/=

30. On special damages the plaintiff pleaded the sum of Kshs.25,000/= which is the sum PW 1 gave evidence upon. That is the most the court could have awarded to the Respondents. To the extent that the court awarded a sum more than pleaded and proved, the trial court erred and has invited an interference from this court. With the interference, the aggregate sum the Respondent would have been entitled to, had liability been proved, would work out as follows:-

- Loss of expectation of life - Kshs. 200,000.00
- Pains and suffering - Kshs. 30,000.00
- Loss of dependency - Kshs. 300,000.00
- Special damages - Kshs. 25,000.00

Total **Kshs.1,055,000.00**

31. However based on my finding on liability, the appeal succeeds and in place of the lower court judgment apportioning liability at 65:35, is substituted an order dismissing the Respondents suit against the Appellant with costs.

32. Costs of the appeal are awarded to the Appellant.

Dated and delivered at Mombasa this 18th day of February 2019.

P.J.O. OTIENO

JUDGE

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[1] *S.J. -v- Francisco Di Nello & Another [2015] eKLR*

[2] Robric Limited & another v Kobil Petroleum Limited & another [2018] eKLR