REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 17 OF 2017

AMALGAMATED LOGISTIC

INTERNATIONAL LTD.....1ST APPELLANT

DENNIS NTWIGA.....2ND APPELLANT

JACKSON KIRUKU

EUNICE NJOKI (Suing as Administrators of

the Estate of EMMANUEL MUROKI).....RESPONDENTS

(Being an appeal from the Judgment of Honourable

G. Onsarigo (MR) Resident Magistrate on 30th January, 2017, in Kikuyu SRMCC No. 198 of *2011)*

J U D G M E N T

1. This appeal emanates from the judgment of Onsarigo, Resident Magistrate in Kikuyu SRMCC No. 198 of 2011. By the Plaint filed on 1/9/2011, the Plaintiffs in the lower court and now the Respondents had in their capacity as the personal representative of the estate of Emmanuel Muroki (deceased) sued the Defendants, now the Appellants, claiming compensation in respect of fatal injuries sustained by the deceased on 5th December, 2010. They averred that while the deceased was travelling as a lawful passenger in motor vehicle registration number **KAZ 084F** along **Nairobi-Limuru Road**, the 2nd Appellant so negligently drove motor vehicle /trailer registration number **KBJ 015Y/ZC8935** that the said vehicle/trailer hit motor vehicle registration number **KAZ 084F** from behind. That following the collision, the deceased sustained fatal injuries.

2. The Appellants filed their defence on 2nd December, 2011, denying any liability for the accident. In particular, the 1st Appellant denied being the registered owner and that the 2nd Appellant was the driver thereof.

3. The matter proceeded to a full hearing. The trial court in his judgement found liability as against the Appellants. On quantum, the trial Magistrate entered judgment as follows:

a. Pain and suffering Kshs. 50,000/ =

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

c. Loss of dependency Kshs. 800,000/=

d. Special damages Kshs. 100,755/=

Total Kshs. 1,030,755/=

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present appeal based on the following grounds:-

"a. That the Learned Trial Magistrate erred in Law and in Fact in assessing damages at Kshs. 1,030,755/= plus costs and interest of suit and finding the Defendants 100% liable for the accident in total disregard of the evidence and testimony adduced in Court thereby arriving at a wrong conclusion.

b. That the Learned Trial Magistrate reached a wrong decision in law and fact contrary to the weight of evidence before when assessing liability.

c. That the Learned Trial Magistrate erred in law and fact in failing to consider and mis-appreciating the pleadings, evidence, submissions and case law by the Defendants and thereby arrived at a wrong conclusion of law.

d. That the Learned Trial Magistrate erred in law and practice in awarding a manifestly excessive quantum of damages which was not commensurate with the nature of injuries suffered and/or loss proved.

e. That the Learned Trial Magistrate erred in law and fact in failing to be guided by similar relevant authorities and case law in assessing quantum and therefore arriving at a wrong conclusion.

f. That the Learned Trial Magistrate erred in law and fact by mis-directing himself and acting on a wrong principal of law in assessing liability".

5. The Court directed that the appeal be disposed of by way of written submissions. In their written submissions, the Appellants contend that the trial Magistrate did not give reasons why he disregarded the Appellants' testimony that formed the basis of liability in this matter. It was their contention that the police were categorical in their findings that the accident was occasioned by the Respondent's motor vehicle following a tyre burst and that no evidence was availed to controvert this fact.

6. Reliance was placed on the case of **Nancy Oseko vs Board of Governors Masai Girls High School (2011) eKLR** where it was held that there was a presumption of negligence where vehicles sway and overturn without apparent cause, and the defendant ought to offer an explanation. It was submitted further that the 2nd Appellant was not the driver of the trailer and that the trial court erred in holding him jointly and/or severally liable for the accident. Consequently the 1st Appellant could not be vicariously liable for the acts of the 2nd Appellant there was being no relationship between the 2nd Appellant, a mere turn boy and the 1st Appellant

7. Counsel contested the damages awarded terming them as excessive. He cited the case of **West (HI) & Sons Limited vs Shepherd (1964) AC326** where it was stated that judges ought only award reasonable compensation as money cannot renew a physical frame that has been battered and shattered through an accident.

8. In regard to quantum under the Law Reform Act, counsel submitted that an award of Kshs. 30,000/= is adequate compensation for pain and suffering and as for loss of expectation of life, he submitted that Kshs. 70,000/= would be adequate. As for damages under the Fatal Accidents Act, a global sum of Kshs. 300,000/= was suggested for lost dependency. Reliance was placed on the case of ***P I v Zena Roses Ltd & Another (2015) eKLR***.

9. The Respondents also filed their written submissions, asserting firstly, that that the police investigator's claim that the saloon car suffered a tyre burst was implausible and was an attempt to cover up for the truck driver. Counsel relied on the case of **George Kanyuthu vs Francis Ngugi –HCCC NO. 141 of 2002** where it was held that where an approaching vehicle collides into the rear of a car ahead of it, that fact itself is enough to establish liability on the part of the driver of the former.

10. Concerning the evidence by the police investigation officer as to which driver was at fault, counsel relied on the holding in the case of **David Kayogi MMugaa vs Francis Muthomi (2012) eKLR** that such evidence being in the nature of opinion could not be taken as conclusive proof of liability. Further, counsel argued that in the event the 2nd Appellant was found not to be the driver of the 1st Appellant's motor vehicle, the said Appellant cannot escape liability as there was ample evidence showing that the vehicle was being driven by a person duly authorized by the 1st Appellant and for their benefit. To support this proposition, counsel cited the case of **Tabitha Kinyua vs Francis Mutua & Ano (2014) eKLR** where it was stated that it is enough to prove that the accident vehicle was being used under the authority of and for the benefit of the owner.

11. In regard to quantum, counsel submitted that the awards on the various heads are not excessive. Counsel reiterated the guiding principles when an appellate court is considering whether or not to interfere with a trial court's assessment of damages as stated in the case of ***Sino Hydro Corporation Ltd vs Daniel Atela (2016) eKLR.***

12. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123; Williams Diamonds Limited v Brown (1970) EAI I.**

13. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"

14. Two broad issues fall for determination on this appeal, namely, liability and quantum. On the first question, it is well to restate the words of the Court of Appeal in **Antony Francis Wareham t/a A.F. Wareham and 2 Others v Kenya Post Office Savings Bank [2004] e KLR :**

"Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of

those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."

15. The Respondents' case through his pleadings and evidence was that while driving along Limuru/Nairobi road, he noted that his vehicle **KAZ 084 F** had developed a puncture, and that as he slowed down intending to go off the road, the 1st Appellant's vehicle which was approaching at a high speed hit him from the rear. The Appellants' evidence through their sole eye witness, the turn boy of the vehicle **KBJ 015Y/ZC 8935 D**W1 was that the vehicle driven by the **PW2** (1st Respondent) lost control after a tyre burst, left its lane on the left and proceeded to hit the Appellants' vehicle which was travelling on the right lane.

16. Although the police **OB** abstract of the accident appeared to support DW1's narrative, these matters were nowhere pleaded in the defence statement of the Appellants. On this appeal, the Appellants have reiterated the contents of the **OB** entry and the finding contained in of the copy of the abstract issued to the Appellants both which blamed the driver of the vehicle **KAZ 084 F (PW2)** for the accident. With respect, the **OB** entry and abstract while ordinarily cannot be a substitute eye witness accounts. The officer who made the entry regarding the material accident did not witness its occurrence. Similarly, the contents of the OB abstract were by a person who did not witness the accident.

17. In addition to the foregoing, the assertions therein are inconsistent with the motor vehicle inspection reports produced by **PW4**. The proceedings at the inquest held in the lower court were produced at the trial in this case. The proceedings show that the maker of the **OB** entry one **PC Mbori (PW6 in inquest)** was unable during his testimony to reconcile his record of the accident and findings with the motor vehicle examiner's reports which showed no damage to the rear of the trailer which position he had claimed to be the point of impact with the vehicle **KAZ 084 F**. On the other hand, the evidence by **PW1, PW2** regarding the occurrence of the accident was corroborated by motor vehicle inspection reports produced by **PW4,** and the sketch plans drawn by **PC Mbori** and produced as exhibit **7(a) and (b)** at the Inquest No.7 of 2013.

18. More poignantly**, DW1's** version was inconsistent with the averments contained in the particulars of negligence attributed to **PW2** at item **iv**) and **v)** of the Defence, which suggest that **PW1'**s vehicle *stopped suddenly* and or *caused an obstruction in the way of the Appellants' vehicle.* It is also inconsistent with the record of damage to the two vehicles contained in the motor vehicle inspection reports and the sketch plan drawn by **PC Mbori.**

19. The findings of the learned trial magistrate upon considering the two versions of the accident offered at the trial were well founded. On my part, having reviewed the available evidence, I can find no reason to fault these findings. Before leaving this issue, it is necessary to observe that **DW1** was admittedly the turn boy in the 1st Appellant's vehicle while the driver was **Daudi M. Kimutai**. The confusion may have arisen from the **OB** abstract dated 10th May 2011 and issued by the police to **PW2** which indicated that the Appellant's driver was **Dennis Ntwiga (DW1).** The **OB** entry made on the date of the accident clearly identifies **David M. Kimutai** as the driver of the 1st Appellant's vehicle.

20. The Respondents have correctly observed that the said matter was not included in the grounds of appeal. There was no dispute as to the fact that the 1st Appellant's vehicle was under the control and being driven by the authorized driver on the material date, with the and for their benefit. A proper claim would not be defeated even by the fact that the driver of the accident vehicle was not enjoined as a defendant alongside the owner of the accident vehicle. In the circumstances of this case, nothing turns on the misjoinder of the 2nd Appellant so as to affect the liability of the 1st Appellant for the accident. The court therefore found no merit in grounds 2, 3, 6 and ground 1 (as it relates to liability)

21. The remaining grounds are 1, 4 and 5. The Appellant's chief complaint appears to relate to the damages under the Fatal Accidents Act. In **Kemfro Africa Ltd t/a Meru Express Service & Another v A. M. Lubia & Another (1987) KLR 30** the Court of Appeal stated that:

"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages." see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.**

22**.** In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance"*

23. The Appellants view the award of KShs.800,000 as inordinately high and citing the High Court decision in **P. I v Zena Roses Ltd and Another [2015] e KLR,** urge that the award be reduced to KShs.300,000/=. The Respondents had urged a multiplier approach which the trial court properly rejected, and on this appeal, have sought to rely on new authorities not placed before the trial court. This practice is to be frowned upon as an appeal is essentially a review of the material tendered at the trial. Contrary to the Respondents' submissions on this appeal, the deceased in this case was 3 years old at the time of death as per the death certificate tendered by his father, **PW2.**

24. The case of **Kenya Breweries Ltd v Saro Mombasa C.A. No. 144/1990 [1991]eKLR** was cited to support the award in respect of lost dependency by the Respondents at the trial . In that case, the Court of Appeal laid out some basic considerations by stating that:

> **"... in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen-year-old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in a case of a four-year-old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or low that an application of wrong principles must be interfered."**

25. The Court went on to consider awards made on this head between 1982 and 1990 before concluding that an award of KShs.100,000/= in 1990 could not be taken to be so inordinately high that the application of a wrong principle must be inferred. The Court concluded by stating that:

> **"While we would express the view that damages on this head must be kept relatively low, we do not think that the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less had we been the trial judge but that is not a reason to warrant us interfering."**

26. The deceased in the Kenya Breweries case was aged 6 years at the time of death. It appears that the trial court in the instant case relied on that decision in settling on an award of KShs.800,000/=. The Respondents had relied on the case of **Mercy Wanjiru Muiruri v Robert Barasa and Another [2015] e KLR** where the deceased was aged 20 years at death. The trial court herein was justified to ignore this authority relied on by the Respondents in urging a multiplier approach.

27. The deceased in **P. I v Zena Roses** was aged 6 years at the time of death and an award of KShs.300,000/= was made in 2015 in respect of lost dependency. The case of **Albert Odawa v Guchu Gichanji** cited in the trial and on this appeal by the Appellants was not furnished to the court, nor citation supplied. The record of the evidence of the father of the deceased herein reveals scanty material regarding the deceasd child, beyond the statement that he attended **KAG** school and was in good health. Under cross-examination **PW2** admitted that he had no proof that the deceased attended school.

28. The learned trial magistrate did not consider these matters in his discussion of the award nor is there evidence that he considered the entire counsel in the **Kenya Breweries** case or the authority of **P. I v Zena,** cited by the Appellants. The deceased was a child of very tender years and there is no evidence that he was in school. Considering these facts and the authorities cited by the parties at the trial, it is my view that the award of KShs.800,000/= was arrived at without a full consideration of the facts of the case and application of all the legal precedents cited. Thus, the award is in my view too high in the circumstances. An award of KShs.500,000/= in this case is in my considered view adequate compensation under the Fatal Accidents Act. I do therefore set aside the award of KShs.800, 000/= and substitute therefor a sum of KShs.500,000/= (Five Hundred Thousand) as general damages for lost dependency.

29. Regarding awards made under the Law Reform Act, these are in my view consistent with conventional awards, and the Appellants have not provided any justification for interfering with them. These awards are upheld. In the result the appeal has succeeded in part as follows.

30. The appeal on liability is dismissed. The court allows the appeal against the assessment of damages in respect of loss of dependency under the Fatal Accidents Act, to the extent that the award of KShs.800,000/= has been set aside and replaced with an award of KShs.500,000/= (Five Hundred Thousand). The court upholds the awards under the Law Reform Act (i.e. for pain and suffering and loss of expectation of life) amounting to KShs.150,000/= [One Hundred and Fifty Thousand]. The total award is therefore KShs.650,000/= [Six Hundred and Fifty Thousand]. The Appellant is awarded half the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

C. MEOLI

JUDGE

In the Presence of:-

Mr. Mwangi holding brief for Mr. Omondi for the Appellants

Mr. Olaka holding brief for Mr. Chirchir

Court Assistant - Nancy