REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 9 OF 2016

DAVID WANGILA MUTORO..APPELLANT

VERSUS

FRANCIS MUKONOSI PAUL (Suing as legal Administrator of

of the estate of SOLOMON INDIMULI).........................1ST RESPONDENT

DAVISARA INVESTMENTS CO. LTD..........................2ND RESPONDENT

(from the judgment and decree of M. L. Nabibya, SRM, in Butali SRMC Civil Suit No. 79 of 2013 dated 4/1/2016)

JUDGMENT

1. The 1st respondent had sued the appellant at the lower court in his capacity as the administrator of the estate of his late son SI claiming general and special damages after his son was crashed and killed by the appellant's motor vehicle registration No. KTCA 567 Massey Ferguson ZD 6546. The 1st respondent blamed the appellant's driver for negligently driving or controlling the motor vehicle and thereby causing the accident. The appellant took out a third party notice against Davisara Investment Company Limited, the 2nd respondent herein, claiming for indemnity for being the insured, actual beneficiary, equitable and/or possessory owner of the motor vehicle. The trial court after a full trial dismissed the case against the 3rd party and entered judgment in favour of the 1st respondent as follows:-

Liability at - 100%

Pain and suffering - Ksh. 10,000/=

Loss of expectation of life - Ksh. 100,000/=

Loss of dependency - Ksh. 600,000/=

Special damages - Ksh. 63,000/=

T O T A L - Ksh. 773,000/=

2. The appellant was aggrieved by the decision of the learned magistrate and lodged an appeal vide a memorandum of appeal dated 1st February, 2016. The appeal raises the following grounds:-

1. That the learned trial magistrate erred in law and fact when she apportioned liability at 100% as against the appellant under the circumstances.

2. That the learned trial magistrate erred in law and fact when she failed to prefer liability as against the third party after she had properly and correctly found that at the time of the accident the suit motor vehicle had been leased and there was a valid lease agreement to the third party who took out insurance policy in the 2nd respondent's names.

3. That the learned trial magistrate erred in law and in fact to relocate the blame upon the appellant in view of her own findings and the fact that there was a comprehensive insurance cover of the motor vehicle hence failure to include the names of the lease could not have been fatal in view of the obvious transactions that relate to suit motor vehicle at the time the accident took place.

4. That the learned trial magistrate erred in law and fact when she held that the failure to serve a third party notice to one DAVID

OMBOLO JUMA was fatal yet the insurance cover was in his own company name and he could not be sued alongside his company the 2nd respondent.

5. That the learned trial magistrate erred in law and fact when she made huge unconscionable awards which were not proved by any income records or at all in respect of the deceased thereby occasioning serious miscarriage of justice.

6. The learned trial magistrate erred in law and fact when she overlooked contributory negligence attributed to the deceased and instead successfully laid blame upon the appellant thereby reversing her own findings.

7. The entire judgment is contradictory oppressive and unguided by the evidence adduced in court hence ought to be set aside.

3. The appeal was opposed by the 1st respondent vide the written submissions of their advocates, **Abok Odhiambo & Company Advocates**. It was also opposed by the 2nd respondent (third party) vide the written submissions of their advocates, **Mbugwa, Atudo & Macharia Advocates.**

The Evidence

4. The 1st respondent was the only witness in his case. His evidence was that he works at Butali Sugar Mills. That on the 20/9/2012 at 4 a.m. he was at home when he received a report that his son, the deceased herein, had been knocked down by a vehicle. He went to the scene of the accident along Chegulo-Butali road. He found his son dead. His body was lying on the side of the road. The tractor that had crashed him was there. It was loaded with sugarcane. He called the police who went to the scene and collected the body. They took it to Kakamega County Referral Hospital mortuary. He later sued the appellant. During the hearing he produced the following documents as exhibits – the police abstract, motor vehicle search certificate, death certificate, grant of letters of administration and receipt for payment of grant – Exhibits 1 – 5 respectively. The search certificate indicated that the vehicle belonged to the appellant.

5. In his defence the appellant testified that the accident tractor belonged to him as indicated by the log book D.Ex.1. That when the accident took place he had leased it to one David Ombolo Juma with whom he had entered into a lease agreement dated 2/7/12, D.Ex.2. That the lease was to run from 25/6/2012 to 26/6/2013. That the said person is one of the directors of the 2nd respondent (the third party). That the person had taken out an insurance cover for the vehicle in the name of Davisara Investment Limited. Therefore that it is David Ombolo Juma who was liable for the accident. Therefore that the 1st respondent should have sued the said David Ombolo Juma. He admitted in cross-examination that Davisara Investment Limited is not mentioned in the lease agreement.

6. In her findings, the trial magistrate found the driver of the motor vehicle to have been negligent and caused the accident that caused death to the son of the 1st respondent. She found that there was no evidence that the deceased contributed or caused the accident. She found that the tractor was leased to David Ombolo Juma who was in actual possession of the motor vehicle on the date of the accident. She found that the lease agreement was valid.

7. The trial court found that the lease was between the 1st respondent and David Ombolo Juma. That no third notice was taken out against the lessee, David Ombolo Juma but were instead taken out against Davisara Investment Limited. That the company and David Ombollo Juma are two distinct identities. Therefore that the 1st respondent was to be held liable for the accident entirely.

Submissions

8. The appeal was on both liability and quantum. On liability the advocates for the appellant, **J. W. Sichangi & Co. Advocates**, submitted that the trial court found that there was a valid lease between the appellant and David Ombollo Juma. That it was not denied that David Ombollo Juma was a director of the third party. That the third party never demonstrated that they had no relationship with David Ombollo Juma as they were at the material time of the accident policy holders and insurers of the suit tractor. The advocates wondered how the third party could have taken out a policy over a vehicle they had no beneficial interest in. That they must have been active as agents or representatives of the lessor. That it was a contradiction for the trial court to say that the lease was valid but that the person or agents in actual possession are not liable for negligence. That even if the lessor had sublet to the third party that could not absolve them from blame as the insurance cover was valid. That once the appellant brought on board the company that insured the suit motor vehicle the burden was upon them to demonstrate their involvement with the suit tractor. That it was therefore erroneous for the trial court to absolve the third party from liability.

9. The advocates for the 1st respondent/plaintiff, **Abok Adhiambo & Co. Advocates**, submitted that it was not controverted that it was due to the recklessness of the appellant and/or its agents/servant/employee/driver that the accident occurred leading to the death of the deceased. That the 1st respondent relied on the doctrine of *res ipsa loquitor*. That the appellant did not call any evidence to show that the deceased contributed or caused the accident. That the 1st respondent was not privy to the lease agreement. That the appellant admitted that the lease agreement did not provide as to which party was to assume liability in case of an accident. That it was therefore proper for the 1st respondent to sue the appellant who was the registered owner of the motor vehicle.

10. The advocates for the third party, the 2nd respondent, **Mbugwa, Atudo & Macharia Advocates**, submitted that the appellant entered into a lease agreement with David Juma and not with the 2nd respondent. That the 2nd respondent is at law a different person from its subscribers and directors as was held in the epic case of **Salomon –Vs- Salomon & Co. (1897) A.C. 22**. The advocates cited the decision of the Court of Appeal in **Victor Mabachi & Another –Vs- Nurturn Bates Ltd Nrb CA Civil Appeal No. 247 of 2005 (2013) eKLR** where it was held that:-

> "*(A company) as a body corporate, is a persona jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.*"

11. The advocates thereby submitted that the 2nd respondent is a separate and distinct entity from David Juma. That the appellant executed the agreement in his individual capacity and not on behalf of the 2nd respondent. That the appellant did not plead that he entered into the lease agreement on behalf of the 2nd respondent. That the court cannot make a finding on matters not pleaded or grant any relief which is not sought by a party in the pleadings.

12. It was further submitted that the privity of contract rule dictates that only parties to a contract are entitled to enforce its terms. That even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him. That failure to enjoin the lessee so as to claim indemnity was fatal to the appellant's case.

13. The advocates further submitted that the appellant failed to prove that liability should be apportioned as against the 2nd respondent as the burden of proof was on the appellant to prove contributory negligence which burden he did not discharge.

Analysis and Determination

14. This is a first appeal. The duty of a first appellate court was explained in the case of **Kiruga –Vs- Kiruga & Another (1998) KLR 348**, where the Court of Appeal observed that:-

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution." See also Selle & Another –Vs- Associated Motor Boat Co. Ltd & Others (1468) EA 123.***

16. The questions for determination are:-

> (1) Whether the learned trial magistrate erred in her finding on liability.
>
> (2) Whether the trial magistrate erred in her award on quantum of damages.

Liability

17. The appellant did not challenge the 1st respondent's case on negligence rather the fact that the 2nd respondent was not held liable for the accident yet he had leased the motor vehicle to the third party. The appellant contends that the learned trial magistrate erred when she failed to prefer liability against the 3rd party after she found that at the time of the accident the said motor vehicle had been leased and there was a valid lease agreement to the third party who had taken out an insurance policy in the name of the 2nd respondent. The appellant contended that the trial magistrate erred when she held that failure to serve a third party notice to David Ombolo Juma was fatal yet the insurance cover was in his own company name.

18. First is to determine as to who was the owner of the motor vehicle at the time of the accident. Under Section 8 of the Traffic Act Cap 403 Laws of Kenya, the person in whose name a vehicle is registered is deemed to be the owner of the vehicle unless the contrary is proved. Nonetheless, the law recognizes several classes of ownership of which there is actual and beneficiary ownership. In **Nancy Ayemba Ngaira –Vs- Abdi Ali Civil Appeal No. 107 of 2008 (2010) eKLR**, Ojwang, J (as he then was) observed that:-

> ***"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question."***

19. The appellant produced the log book of the vehicle that showed that he was the registered owner of the motor vehicle. That proved that he was the actual owner of the vehicle.

20. The appellant adduced evidence that he had leased the motor vehicle to one David Ombolo Juma. He produced an agreement to prove that. This evidence was not challenged. I agree with the findings of the trial court that the petitioner had leased the motor vehicle to the said person who was thereby a beneficial owner to the vehicle.

21. It is not in dispute that the appellant did not take out third party proceedings against David Ombolo Juma. He instead took out the same against Davisara Investments Company Limited whose connection with the case was that they had taken out an insurance cover for the subject motor vehicle. The question then was whether the appellant should have taken out third party proceedings against David Ombolo Juma or against Davisara Investments Co. Limited. The trial magistrate found that David Ombolo Juma and Davisara Investments Ltd were

two distinct entities and therefore that failure to take out third party proceedings against David Juma was fatal to the case.

22. The most important aspect of company law is that a company is a different legal entity from its shareholders. This aspect is captured in the case of **Joseph Kobia Nguthari –Vs- Kegoi Tea Factory Company Limited and 2 others (2016) eKLR** where it was held that:-

> ***"This follows after the greatest legal innovation of separate corporate legal entity which was in the case of SALOMON vs. SALOMON [1897] AC 78, that:-***
>
> ***"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".***
>
> ***This long-standing legal principle is until today true and has been adopted in national legislation and a great number of judicial precedents within the common law tradition including Kenya. I only cite the case of VICTOR MABACHI& ANOTHER vs. NURTURN BATES LTD, CIVIL APPEAL NO. 247 OF 2005 [2013] eKLR, where the Court held that a company***
>
> ***"…as a body corporate, is a persona jurisdica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil''.***

23. I therefore find that the trial court was correct in finding that David Juma and the 2nd respondent (Davisara) are two separate legal entities capable of suing and being sued independently. The appellant's claim was against David Juma and not the 2nd respondent who was a total stranger to the contract between the two. As such no liability could attach to the 2nd respondent.

24. The appellant faulted the trial court for failing to consider contributory negligence attributed to the deceased. The victim of the accident died in the accident. It is the driver of the appellant who knew how the accident took place. Section 112 of the Evidence Act imposed the burden on him to show that the deceased contributed to the accident. The section provides that:-

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

The driver of the appellant's vehicle did not testify in the case. There was then no basis for holding the deceased to have contributed to the accident. I do not find favour with that ground of appeal.

25. In the foregoing the trial court did not error in finding liability on the appellant at 100%. Neither did it error in dismissing the claim for indemnity against the 2nd respondent.

Quantum

26. The 1st respondent testified that the deceased had died at the age of 21. That he had a wife and a daughter. That he was a cane loader with earnings of Ksh. 10,000/= per month. That he was also a farmer.

27. The claim for general damages was under the Law Reform Act and Fatal Accidents Act. On the award under the Law Reform Act the trial court awarded Ksh. 10,000/= for pain and suffering and Ksh. 100,000/= for loss of expectation of life. For loss of dependency under the Fatal Accidents Act it used the minimum wage of Ksh. 5,000/= as the deceased was not in formal employment. It used a multiplier of 15 years and a dependency ratio of $^2/_3$. The loss of dependency worked out to:-

5,000 x 12 x 15 x $^2/_3$ = 600,000/=

28. The advocates for the appellant submitted that the award made was high. They proposed an award of Ksh. 300,000/=.

29. The advocates for the 1st respondent submitted that the multiplicand of Ksh. 5,000/=, the multiplier of 15 years and the dependency ratio adopted by the trial court were justifiable. That the awards for loss of expectation of life and for pain and suffering were also justifiable. That the special damages were proved. Therefore that this court should not interfere with the award.

30. The advocates for the 2nd respondent supported the award on damages save for the dependency ratio of $^2/_3$ adopted by the magistrate and the award on special damages. They submitted that there was no proof of any dependants and the extent to which they depended on the deceased. That a dependency ratio of $^1/_3$ would be appropriate. That the only expenses proved are for taking out of letters of administration which amounted to Ksh. 30,000/=.

31. The assessment of damages is a matter of discretion of the trial court and an appellate court will hardly disturb an award unless sufficient cause is shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja –Vs- Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:-

> ***"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an***

> ***award of damages unless it is so inordinately high or low as to represent an 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 at a figure which was either inordinately high or low. The court 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 high that it must be a wholly erroneous estimate of the damages."***

32. The trial magistrate made an award of Ksh. 10,000/= for pain and suffering and Ksh. 100,000/= for loss of expectation of life. The deceased had died on the spot. In the case of **Sukari Industries Limited –Vs- Clyde Machimbo Juma HB HCCA No. 68 of 2015 [2016] eKLR,** the court observed that:-

> ***"[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable"***

In my consideration the award made by the trial court of Ksh. 10,000/= for pain and suffering is justifiable. A convential award of Ksh. 100,000/= for loss of expectation of life has been awarded in many cases. There is no basis for interfering with the award made under the Law Reform Act.

33. Though the 1st respondent stated that the deceased was earning Ksh. 10,000/= per month he did not produce any documents to prove so. In the absence of such proof the trial court was justified to be guided by the minimum government wage.

34. It should be noted that the failure to prove the deceased's income was not fatal to his case as was held in the case of **Jacob Ayiga Maruja & Another V Simeon Obayo CA167/200 [2005] eKLR** where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated as follows:-

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

The trial court adopted a multiplier of Ksh. 5,000/=. I find the same to have been suitable.

35. The trial court adopted multiplier of 15 years. Although this, in my view, appears to be low there was no counter-appeal. I will therefore not interfere with it.

36. The deceased had a wife and one child. The advocates for the 2nd respondent submitted that the court should have adopted dependency ratio of $^{1}/_{3}$. However, the dependency ratio of $^{1}/_{3}$ is usually used where the deceased was unmarried. In **Samwel Kimutai Koriri (Suing as Personal and legal representative of Estate of Chelangat Silevia –Vs- Nyanchwa Adventist Secondary School & Another [2016] eKLR**, where the deceased was aged 21 years and unmarried the court stated that:-

> ***"The deceased was a young lady aged 21 years undertaking a teachers training course at the 2nd defendants college. She had no child and was not yet married. Her parents had reasonable expectations that she would take care of them upon graduating and securing employment as a P1 teacher. Under those circumstances, it would be expected that the deceased would spend 2/3 (two thirds) of her earnings on herself and 1/3 on her parents."***

In this case where the deceased had a family it would be expected that he would use $^{2}/_{3}$ of his earnings on his family. The dependency ratio of $^{2}/_{3}$ was therefore justified.

37. On special damages the trial court awarded Ksh. 30,000/= towards taking out letters of administration, Ksh. 3,000/= for demand notice to the appellant and Ksh. 30,000/= for funeral expenses. It is trite law that special damages should be specifically pleaded and strictly proved – See **Hahn –Vs- Singh (1985) KLR 716**. A receipt of Ksh. 30,000/= was produced in proof of taking out of letters of administration. A receipt of Ksh. 3,000/= was produced for demand notice to the appellant. Though no receipts were produced in proof of funeral expenses the award of Ksh. 30,000/= was minimal. I see no need to interfere with it.

38. In the foregoing the trial court did not err by entering liability against the appellant at 100%. Neither did the court err in its award on quantum. The appellant did not prove that he was entitled to indemnity from the 2nd respondent. In the premises the appeal is dismissed in its entirety with costs to the respondents.

Delivered, dated and signed in open court at Kakamega this 12th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for appellant

Mr. Indimuli holding brief for Abok for 1st respondent

No appearance for 2nd respondent

Parties - absent

Court Assistant - George

30 days right of appeal