IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 82 OF 2018

BETWEEN

TABITHA MORAA MARUBE suing as legal representative of the estate of

LEONARD MOGAMBI NYAMWAMU (Deceased).....APPELLANT

AND

ESTHER MUCHIRI.....1ST RESPONDENT

ESTHER MIGIRO NDEGWA.....2ND RESPONDENT

SAMWEL OKARI OCHAMBA.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. S. Lutta, CM

dated 29th August 2013 at the Magistrates Court

in Kisii in Civil Case No. 216 of 2013)

JUDGMENT

1. According amended plaint filed in the subordinate court, the deceased, Leonard Mogambi Nyamwamu, was a passenger in a motor vehicle registration number KBB 817W ("the motor vehicle") owned by the 1st and 2nd respondents while driven by the 3rd respondent. It was alleged that on 16th July 2010, the 3rd respondent was driving the motor vehicle was driving along the Kisii-Kilgoris road when he negligently caused the vehicle to lose control and as a result the deceased suffered fatal injuries. The deceased personal representative claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

2. While a statement of defence was initially filed on behalf of all the respondents, it was later amended to reflect that the 1st and 2nd respondents had filed a joint defence. The appellant was directed to serve the 3rd respondent directly but it is not apparent from the record that the 3rd respondent was served with process or interlocutory judgment entered against him. Nevertheless, the 1st and 2nd respondents denied the accident, particulars thereof and the allegations of negligence against them. In the alternative they denied that the 3rd respondent was their driver and pleaded that the motor vehicle had been hired out by 2nd respondent's Company, Porto Consultancy to one *Mr Cyprian Nyamwamu* from 15th to 19th July 2010 under a contract in which the said *Cyprian Nyamwamu* understood that he was the only authorised driver of the motor vehicle and that he had no authority to permit the 3rd respondent to drive the motor vehicle hence the 1st and 2nd respondents were not liable.

3. For ease of reference, I shall refer to the 1st and 2nd respondents as the respondents unless the context demands otherwise.

4. After hearing the matter, the learned magistrate found the respondents fully liable and awarded the appellant the following damages:

Pain and Suffering	Kshs.	10,000/-
Loss of expectation of life	Kshs.	100,000/-

Loss of dependency	Kshs.	978,000/-
Special damages	Kshs.	25,000/-
Total	**Kshs.**	**1,172,325/-**

5. The appellant has appealed against the award of damages while the respondents have cross-appealed against the finding on liability. Although the memorandum of appeal dated 6th September 2018 is rather prolix, it concerns the manner in which the trial magistrate assessed the multiplicand for the award of loss of dependency under the ***Fatal Accidents Act***. The appellant contended that trial magistrate erred in law and fact by disregarding the deceased's payslip and demanding that it had to be certified in order to constitute proof of employment. Mr Masese, counsel for the appellant, submitted that the respondents did not object to production of the payslip and it was admitted in evidence hence the trial magistrate erred in disregarding it and awarding damages based on the minimum wage.

6. In the cross-appeal, the respondents contended that not only did the appellant fail to prove her case but also that they were not vicariously liable for the acts of the 3rd respondent. The cross-appeal flows from the fact that the trial magistrate found the 1st and 2nd respondents vicariously liable for the act of the 3rd appellant. Mr Mainga, counsel for the 1st and 2nd respondents, advanced the view that the 3rd respondent was not an agent of the 1st and 2nd respondents as the motor vehicle had been hired out to a 3rd party in accordance with a contract that did not permit the 3rd respondent to drive the motor vehicle. He submitted that the 3rd respondent was fully liable.

7. Being the first appellate court, I am required to re-evaluate the evidence independently and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123*** and ***Kiruga v Kiruga & Another*** **[1988] KLR 348**). With this principle in light, I will deal with the issue of liability raised in the cross-appeal first before I tackle the appeal on quantum for good order.

8. There is no doubt that the accident took place on 16th July 2010 involving the motor vehicle in which the deceased was a passenger. The trial magistrate found as a fact that the accident took place based on the police abstract and held the appellant had proved her case on the balance of probabilities as the respondents did not produce any evidence to contradict her case. The appellant (PW 1) did not give direct evidence on how the accused occurred, her testimony was that when she was alerted about the accident, she went to the scene and found the deceased had been taken to hospital. DW 1 testified that it is *Cyprian Nyamwamu* who called him and informed him about the accident.

9. Did the appellant prove liability in these circumstances? **Sections 107**, **108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the appellant to prove liability on the balance of probabilities. PW 1 produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that the deceased was a passenger and that he died. Since it was produced without objection, it was sufficient evidence of the fact and particulars of the accident (see ***Joel Muna Opija v East African Sea Food Limited*** **KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR**).

10. Neither witness testified on how the accident took place. The appellant pleaded that the 3rd respondent was driving at an excessive speed in the circumstances, that he failed to keep any or any proper lookout and that he failed to have any or any proper control of the vehicle, that he failed to swerve, slow down or control or manage the vehicle in such a manner as avoid the accused, that he failed to apply brakes sufficiently or in time or at all and that he failed to have due care and attention for other road users and passengers. The appellant did not call any witnesses to prove the particulars of negligence pleaded or who could explain how the accident occurred. It is our law that in order to succeed in its claim, a plaintiff must prove fault on the defendant's part. In ***Kiema Muthuku v Kenya Cargo Handling Services Ltd*** **[1991] 2 KAR 258** Omolo Ag. JA., captured this principle as follows;

> [I]t was for the appellant to prove, of course on a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault. The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed.

11. Since no explanation emerged from the evidence how the accident took place, the trial magistrate erred in not dismissing the claim. The appellant pleaded the doctrine of *res ipsa liquitor* to make the case that the respondents were liable. In ***Nandwa v Kenya Kazi Limited*** **MSA CA Civil Appeal No. 91 of 1987 [1988] eKLR**, Court of Appeal (Gachuhi JA) cited, with approval, a portion ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALL ER 392**, **393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:

> The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.

12. The Court of Appeal explained that a plaintiff had to establish a prima facie case, before the defendant is called upon to discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on the it part. In this case, apart from the fact that the accident took place, there was no evidence as of how the accident could have occurred which would lead the trial court to conclude that the respondents were prima facie liable. The trial magistrate did not deal with this aspect of the case and therefore erred in finding the respondents liable.

13. Assuming that liability was established, the respondents further contended that the trial magistrate erred in finding that the respondents were vicariously liable for the acts of the 3rd respondent. The respondent's witness, Peterson Ndegwa Wachira (DW 1), testified that the 1st

respondent was his wife and that the 1st and 2nd respondents were one and the same person. According to his statement, the motor vehicle belonged to his wife and that they ran Porto Safari Consultancy which hired the motor vehicle to *Cyprian Nyamwamu* on the date it was involved in an accident. He produced a *Self-Drive Hire Contract* signed by the said Cyprian Nyamwamu who hired the vehicle for the period 15th to 19th July 2010.

14. The general principle regarding vicarious liability was summarized in ***Pritoo v West Nile District Administration*** **[1968] EA 428**, it was held:

> Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible.

15. The question then is, on the facts, did the respondents rebut the presumption? The respondents produced a contract showing that the motor vehicle had been hired by a third party. The terms of the *Self Drive Hire Contract* were that only the hirer was authorised to drive the motor vehicle unless the owner expressly authorised him to permit another person to drive the motor vehicle. This evidence was not controverted by the appellant. A similar situation arose in the case of ***Anyanzwa v Gasperis*** **NRB CA Civil Appeal No. 31 of 1981 [1981]eKLR** where the Court of Appeal considered a case where the owners of a motor vehicle were absolved from vicarious liability where it had been hired by a third party. The court observed as follows:

> It follows from all this that in my view the microbus had been hired out to Hansmax to be used for purposes in which the owners had no interest or concern; it was not being driven for the owner's benefit, or on the instructions or at the request of the owners; the owners had not delegated any task or duty to the driver and had no right of control or direction over him. The appellants as owners are not, in these circumstances, vicariously liable for the driver's negligence.

16. Based on the above principle I have cited and the facts of the case, I find and hold that the learned trial magistrate erred in failing to consider the relationship between the respondents and the 3rd party and thus arriving at an erroneous conclusion that the respondents were vicariously liable.

17. Notwithstanding that I have come to the conclusion that the appellant's case ought to have been dismissed, for completeness of the record I must consider the issue of damages raised by the appellant. The jurisdiction of this court to intervene in an award of damages by the subordinate court is circumscribed by the principle that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see ***Butt v Khan*** **[1982-88]1KAR 1** and ***Mariga v Musila*** **[1982-88] 1 KAR 507**).

18. As I stated elsewhere, the appellant challenged the trial court's finding in awarding the multiplicand under the ***Fatal Accidents Act***. The appellant pleaded as follows in paragraph 8 of the plaint;

> The suit is brought by the Plaintiff as the Widow of the deceased aged 45 years. He was working with the National Convention Executive Committee (NCEC) as a program officer earning a monthly salary of Kshs 85,000/-.

19. At the hearing, PW 1 adopted her witness statement in which she had stated that the deceased was working with an NGO earning salary of Kshs 112,000/=. The payslip for the month of June 2010 was produced in evidence was from *Carenet Societies International* showing the deceased gross monthly pay was Kshs. 120,000/-. On this evidence, the trial court took the following view:

> An income of Kshs. 120,000 per month is submitted by the plaintiff which I find is unproven since the payslip produced by the plaintiff is not certified as a true copy of the original, does not bear the name of the organization and the plaintiff on oath did testify contradictory evidence denying the pay slip and stating that the deceased used to work for an organization called Youth Agenda Nairobi and not NCEC as pleaded in the amended plaint.

20. The proceedings show that the plaintiff adopted her statement and produced documents including the payslip but did not give further evidence in regard to the deceased's payslip. Although I accept the trial magistrate erred by insisting on a certified copy of the payslip when it was admitted without objection, the more fundamental issue is whether the evidence established that the deceased was working for *National Convention Executive Committee (NCEC)* as pleaded or working with a NGO as stated by PW 1 in her testimony. The evidence of the payslip was obviously inconsistent with the pleading. Moreover, PW 1 did not make any effort to explain the relationship between NCEC, the NGO and *Carenet Societies International*. On that basis the trial magistrate was entitled to have recourse to the applicable minimum wage in line with the principle stated by Asike-Makhandia J., in ***Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another*** **Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where he observed, *"In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005 …."* [Emphasis mine]. I therefore do not find any error committed by the trial magistrate relying on ***Regulation of Wages (General) (Amendment) Order, 2013***.

21. For the reasons, I have set out above, the appeal is dismissed while the cross-appeal is allowed. In the result there shall be an order that the judgment of the subordinate court is set aside and substituted with an order dismissing the suit against the 1st and 2nd respondents with costs to them. The respondents shall have costs of appeal assessed at Kshs. 40,000/- only.

DATED and **DELIVERED** at **KISII** this ***14th*** day of **JUNE** 2019.

D.S. MAJANJA

JUDGE

Mr Masese instructed by Omwoyo, Masese and Company Advocates for the appellant.

Mr Mainga instructed by Kiarie Kariuki and Associates Advocates for the respondent.