REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 22 OF 2019

1. KYOGA HAULIERS K LIMITED

2. DUNCAN KARIUKI.....APPELLANTS

VERSUS

1. JSMK

2. RCN (*Legal representatives of the estate of* MJ.....RESPONDENTS

(Appeal from the Judgment and decree of the Senior Resident

Magistrate at Mariakani in SRMCC NO. 233 OF 2015 by Hon. Ndungi)

CORAM: Hon. Justice R. Nyakundi

Kanyi J. for the Appellant

C. B. Gor for the Respondent

JUDGMENT

This appeal has been filed by the appellant Kyoga Hauliers and Duncan Kariuki who were sued as defendants on the trial court by JMK and RCN as legal representatives of the estate of MJ for general and special damages arising out of a road traffic accident which occurred on 15.11.2014.

Background

The 1st appellant's motor vehicle registration number KAW 955U ZC 4760 was being driven along Mariakani road on 15.11.2014 by the 2nd defendant as its authorized driver when he negligently and carelessly drove, controlled and the subject motor vehicle permitting it to hit and knock down the deceased MJ, a child aged 9 years.

By way of the plaint the respondent, legal representatives to the estate of the deceased pleaded particulars of negligence under paragraph 6 of the plaint. The deceased who died intestate filed the claim against the appellants and through her legal representatives commenced the matter under the Law Reform Act and Fatal Accidents Act.

On the part of the appellants who were the defendants in the primary suit filed their statement of defence denying any liability, loss and damage. The defence filed also alleged that the deceased was wholly to blame for the accident. The defendants also put the respondents to strict proof on the allegations that its driver, agent or employee negligently caused the accident.

Evidence before the trial court

The respondent **JM** testified as **PW 1** and as the administrator issued with grant of Letters of Administration - ***Exhibit 1*** to file the claim for damages on behalf of the estate of the deceased.

The respondent testified that he did not witness the accident, but did learn of it through a telephone call which came in on 15.4.2014

conveying the message on the incident. It followed therefore that PW 1 had to travel to the scene where he confirmed the death of the deceased. He also identified the motor vehicle registration number KAW 956U Trailer ZC4760 on which was owned by the 1st appellant as the one involved in knocking down the deceased.

That upon the necessary investigations being finalized on the accident, the body was released to the family for burial rites. According to the respondent, he incurred funeral, transportation, hiring of equipments and tents prior to the burial for the main function, totaling more than one million.

However, in his testimony in court (PW 1) was able to produce receipts for Kshs.563,300/= as a bundle marked as ***Exhibits 3 (a) and (b), (4) and (5).***

As regards the deceased lifetime ambition and career prospects, the respondent presented school reports as ***Exhibit 9.*** The death certificate and grant of Letters of Administration were also admitted as ***Exhibit 2 and 8 respectively.***

PW 2 – Mvurya Ndume, testified that on 15.11.2014 while crossing Mitangoni highway, he saw two children, who included the deceased on left side of the road but on motion to cross over to the other side. According to PW 2, it was at that time a speeding motor vehicle which he personally identified as KAW 955U Trailer hit the children and fatally crushing them on instantly.

PW 2 blame the 2nd appellant for the accident on grounds of breach of duty of care and driving at a high speed. In his observation, the deceased and his colleague had almost finished crossing the road.

In cross-examination, PW 2 told the court that the children while moving right had paid more attention to the vehicle being driven from Mombasa towards Nairobi. He also denied that the driver attempted to apply emergency brakes.

PW 3 – PC Eugene Masika, attached to Mariakani traffic base testified on the investigations carried out upon a report on this accident was made to the police. He confirmed visiting the scene and the body being removed to Coast General Hospital. Further, PW 3, produced the police abstract, with details of the accident but as at the time of trial nobody had been charged with any traffic offence.

From the record at the close of the respondents case, the appellants applied for several adjournment to have their witness answer the prima facie case put forth by the respondent but the opportunity was lost by non-attendance. The 2nd appellant therefore squandered a golden opportunity to tell his side of the story on the occurrence of the accident. Having considered the evidence and submissions from both counsels, the Learned trial Magistrate pronounced and determined her Judgment in the following terms:-

Liability at 30%: 70%

Pain and suffering Kshs. 50,000/=

Loss of expectation of life Kshs. 220,000/=

Loss of dependency Kshs.1,500,000/=

Specials Kshs. 563,300/=

Costs and interest

Being aggrieved with the above findings and decision, the appellants forwarded the memorandum of appeal against the Judgement of the trial court.

Analysis and determination

The salient features of this appeal would be determined within the textual context of the principles, in **Selle v Associated Motor Boat Company Ltd 1968 EA 123 and Peters v Sunday Post Ltd 1985 EA 424** the principles governing the estate of appellate jurisdiction is to review and scrutinize the evidence of the trial court in order to draw its own conclusions and findings on the matter. The jurisdiction is to be borne in mind that the trial court had the advantage of seeing and hearing witnesses to aid in making the key findings on the issues as a trier of the claim.

In light of the above considerations and from both the memorandum of appeal and cross-appeal the following critical issues stand out to be determined in this appeal.

1. Whether that the 2nd defendant/appellant driving the subject motor vehicle on 15.11.2014 he was in breach of the duty of care and negligent resulting in a collusion with the deceased.

2. Whether, the deceased at the material time while crossing the road was guilty of contributory negligence.

3. In sum whether the trial court was right in holding the appellants and deceased on contributory negligence at a ratio of 30%:70%.

If the above cluster of questions is in the affirmative, whether the measure of damages on both limbs assessed by the trial court were the inordinately excessive or low in the circumstances of the case.

The admitted facts from the pleadings and evidence

- ***The 1st appellant was at the material time the registered owner of motor vehicle KAW 955U ZC 4670.***
- ***That on the relevant day and time the 2nd appellant was the authorized driver, agent or and employee.***
- ***That as on the material day on 15.11.2014, along Mariakani Road an accident occurred involving the subject motor vehicle and the deceased.***
- ***That investigations were concluded and nobody had been charged with a traffic offence.***
- ***That the legal representatives JSM and RC did apply and obtain grant of Letters of Administration to file a claim against the appellants on behalf of the estate of the deceased.***

With this in place, I will proceed to determine the appeal on the broad issues of liability and quantum. The definitive issues arising from liability will therefore be addressed together and in conjunction with the evidence on record.

a). Negligence and liability

At the hearing and determination of this appeal, the case for the appellants and respondent will be analyzed in line with the pleadings filed and evidence adduced to prove existence of facts in issue: **(See Section 107 (1) of the Evidence Act).** As stated succinctly in the pursuant case of **Dare v Pucham [1982] 148 ELR**

> ***"Pleadings and particulars have a number of functions, they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it. They define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial."***

Perhaps in the contest of this appeal one of the key issue is that of vicarious liability. The privy council enunciated the following principle in the case of **Rambarran v Garm Charan [1970] ALL ER** where it was observed:

> ***"Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver. That inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact. Additionally, the onus of displacing the presumption is on the registered owner and if he fails to discharge that onus, the prima facie case remains and the plaintiff succeeds against him."***

In this regard, it should be noted that the Court of Appeal in **Kenya Bus Services Ltd v Dina Kawira, Humphrey CA No. 295 of 2000 [2003] eKLR did not deviate from the principles from the above passage by the privy council on vicarious liability.**

With respect to the standard required to proof vicarious liability and tort of negligence, the court in **Veronica Kanorio Sabari v Chinese Technical Team for Kenya National Sports & 2 others HCC NO. 376 OF 1989,** It was held:

> ***"The onus is in the plaintiff to prove his case on the legal standard, in a civil case, the standard is on a balance of probability."***

Having interacted with the record, the most prominent feature of this appeal besides quantum is that of contributory negligence assessed at 30%:70%. For this court to interfere as asked by the cross-appellant it must be shown as to what facts support the deceased negligence acts and the principles on contributory negligence of the deceased who aged below ten years.

The Courts in Kenya have expressed themselves in a clear manner and language on contributory negligence in the case **Bashir Ahmed Butt v Ahmed Khan [1982] IKAR 1981 and in Rahima Tayab & others v Anna Mary Kinanu [1983] KLR 114 & 1 KAR 90**

> ***"it would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness …. A young child cannot be guilty of contributory negligence although an older child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child….***
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> ***Clearly each case must depend on its peculiar circumstances. In the instant case the learned Judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road, and that at the most the plaintiff had committed an error of Judgment for which contributory negligence should not be attributed to him…***
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> ***The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do that act or make the omission…***
>
> ***High speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned. Even***

15 mph may not be a safe speed in the early hours of the morning when children go to school along and across a road which known to the driver as in the instant case, serves an area with several schools in it. In a manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence."

Applying the above principles to the decision by the Learned trial Magistrate to the instant appeal a synthesis of the evidence reveals as follows: The star witness **(PW 2)** gave evidence on the occurrence and the chain of events on the material day in his testimony in essence on oath was that alleged appellant's motor vehicle was being driven at a high speed. That the road was clear and normal traffic flow but the 2 nd appellant according to PW 2 drove his motor vehicle without due care and attention knocking the deceased and his colleague almost at the tail end of road crossing-over to the other side.

While on this road, PW 2 further testified that there was clear visibility and the circumstances were one could clearly observe the surroundings on both sides of the scene. This is a case where there were other road users on the same highway whom the 2 nd appellant was expected to drive reasonably paying special attention for any other traffic or pedestrian using the road at the time of the incident.

Based on the evidence it can be implied that the appellants motor vehicle was driven in a manner that was fast and at a high speed making it impossible to take any evasive steps to avoid the collision.

Further, the sketch plan drawn by the investigating officer who testified as **PW 3** also confirmed on the observation made when he did visit the scene immediately upon receipt of the report on the occurrence of the accident. He testified and gave probative evidence which the trial court could have taken into account. PW 3 pointed out that the point of impact was almost at the edge of the road. Another point that PW 3 corroborated in court was the part of the vehicle that hit the deceased. He was categorical that the appellant knocked the deceased by front near side.

The fact that a nine year old victim was fatally injured with the appellant's vehicle outstretched towards the edge of the road and failed to notice his presence would not have safely exonerated his contributory negligence to a mere factorial of 70%.

The legal test to be applied on contributory negligence has already in the Court of Appeal case of Butt and in addition to the persuasive authority in the case of **Moyne v Royner [1975] RTR 127 and the case of Butt v Khan (supra)** render the findings by the trial Magistrate doubtful that she may take into account irrelevant evidence and applied wrong principles in exercise of discretion. In this later case of Moyne the English Court affirmed the position in law on this issue of contributory negligence as follows:

"The test to be applied to the facts was this: Would it have been apparent to a reasonable man, armed with common sense in and experience, of the way pedestrians particularly children are likely to behave in the circumstances such as were known to exist in the present case, that he should slow down or sound his horn."

I pause the question is there evidence that the 2nd appellant horned his motor vehicle to warn the deceased of the danger of the oncoming vehicle? Is there evidence that he took evasive i.e. applying brakes diverting the motor vehicle to avoid the risk of colliding with the deceased? As regard to these contentions which were extremely critical to controvert the disposition on oath by PW 2 the appellant never attempted to call any evidence to that effect. The events of that day took place in a sequence that the burden of proof which rest with the respondent was discharged requiring the defendant to adduce sufficient evidence to rebut the presumption. That the only inference that can be drawn is that the failure by the appellants not to recall any evidence was that the conduct of the driver or agent was in violation of the provision in question on the duty of care and careless driving.

There is prima facie evidence that the respondent discharged the burden of proof on this key fundamentals requiring an answer from the appellant. Therefore, in the circumstances of the evidence on record and given the age of the deceased stated to be of nine years old it is not foreseeable that he could still be held liable on contributory negligence at ratio of 30%.

The commanding principles on this issue is to be found in the already cited authorities and the restatement of law by **Charles Worth and Percy in** their text book on negligence **10th Edition** where the Learned authors had this to state:

"Accordingly, while the fact that the claimant is a child does not prevent a finding of contributory negligence, the crucial points are the child's age and understanding, infancy as such is not a status conferring a right. So that the test of which is contributory negligence is the same in the case of a child as of an adult. That test is modified, duly to the extent that the degree of care to be expected must be apportioned to the age of the child. The degree of care it is appropotionate to expect of a child is a matter of fact for decision on the incident in the particular case."

My findings from the above principles and their application to the facts of this case leads me to hold the view that the contributory negligence of 30% against the deceased was not supported by any material evidence. In the Judgment of the trial Magistrate he seemed to have considered extraneous evidence to just apportion the degree of contributory negligence against the deceased without first establishing whether there exists cogent evidence against the deceased to explicitly denote such a percentage of contribution. The relevance of the evidence by the plaintiff on the proximate cause and blameworthy presents a case that was beyond the basic threshold of the balance of probabilities which remained unchallenged throughout the trial.

In my view there was a shared sense of liability but not quite to the degree assessed by the Learned trial Magistrate. This Court must therefore interfere with the apportionment of liability by setting it aside and substituting it with 10% ratio against the deceased.

The second issue to be considered is **whether the Learned trial Magistrate erred in awarding Kshs.1,500,000/= for loss of dependency** The principle which apply under this head of damages is a calculation of the loss suffered to the estate of the deceased by loss of earnings of the deceased on the basis of the years between the accident and death. In assessing general damages for lost years thereafter factor is that of death necessitating calculation be made as from the time of death of the deceased. See Section 3 of the Fatal Accidents Act. Whereas the Law Reform Act under Section 2 of the Act which provides that:

> ***"Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included."***

Concerning the award under the Fatal Accident Act the principles laid down by **Ringera J** in the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another** though persuasive it still remains to be good Law on this issue. The Judge in that case stated inter alia as follows:

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the defendants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

In the instant appeal, it is claimed by the appellant that the damages under the Fatal Accidents Act was inordinately punitive and excessive occasioning an erroneous award. The appellant counsel forcibly argued and submitted that being guided by the provisions of Section 4 of the Fatal Accidents Act and the dictum in the case of **Kibet Langat and Miriam Wairimu Ngugi 2016 eKLR** and the case of **Chen Wembo and 2 others vs K.K. & another 2017 eKLR** this court ought to exercise discretion to intervene to reduce the sum awarded of 1.5 Million.

The Law on calculation on loss of dependency to the estate of the deceased who happens to be a minor it is our jurisprudence that a two pronged tier approach under this head is applicable. First, there is jurisprudence for those who advocate for dominant principle for global sum award. Second school of interpretation on the provisions of the law gives effect to a multiplier and multiplicand mode of assessment. There is considerable jurisprudence out there of a concurrent nature in the terms of the application in terms of provisions of Section 4 and 5 of the Fatal Accidents Act in particular the loss of dependency when it comes to the deceased minor.

On my part I will say at once that it is unlikely any approach applied in exercise of discretion by various courts to the circumstance of each specific case would occasion unfair or unjust assessment.

The appeal before me concerns the deceased aged 9 years at the time of his death. The fact of the matter is that he had just started school. His dreams and prospects of a career were still at incubation stage of self-actualization. The question as to whether he will turn out to be an engineer, medical doctor, teacher or a successful businessman or remain permanently unemployed is a matter for the future. There may be other intervening factors that may deal a blow or frustrate realization of any such vision or dreams.

In the claim before the trial court the learned trial Magistrate adopted a global sum approach based on the principles in the **Kenya Breweries Ltd v Ali Kahindi Saro CA 144 of 1990.** In considering this appeal, I have reviewed the evidence and a number of relevant authorities including the **Kenya Breweries Ltd case (supra)** that have been considered mostly recently on the claim under loss of dependency adopting a global sum approach. In the case of **Gladys Mutenyo Bitali** suing as the administrator of the estate of **Linet Simiyu v Chabdiya Enterprises 2018 eKLR** the court awarded loss of dependency to the deceased aged 9 years a sum of Kshs.700,000/=. In the case of **Chen Wembo and 2 others (supra),** in this case the deceased aged 12 years was awarded a sum of Kshs.600,000/=. These authorities project the award of 1.5 Million for loss of dependency to be inordinately high that it will require interference of this court to have it varied and substituted with a sum of Kshs.750,000/=.

In accordance, with the guidelines once the claimant has satisfied damages under the Fatal Accidents Act he is deprived of the benefit under the Law Reform Act to avoid double compensation and benefit. So the remainder of the claim under the Law Reform Act will not receive attention from this court.

In respect to special damages, of Kshs.563,300/= I find no evidence to fault the learned Magistrate as they were specifically pleaded and specifically proved. I have no hesitation in arriving at the conclusion of this appeal with the following declarations:

> **a). the issue on liability is interfered with and substituted with the ratio of 10% against the respondent the defendants to shoulder 90% on contributory negligence.**
>
> **b). General damages on loss of dependency is Kshs.750,000/=**
>
> **c). Special damages Kshs.563,300/=**
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> **d). Cost of this appeal be borne equally by the appellant and respondent.**
>
> **e). The respondent claim on general damages to attract interest from the date of judgment of the lower court while special damages shall attract interest from the date of filing suit.**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Anyango for C. B. Gor for the respondent

Shujaa for Kanyi J. for the appellants