REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 55 OF 2018

MOMBASA MAIZE MILLERS KISUMU LTD.....1ST APPELLANT

MOMBASA MAIZE MILLERS LTD..... 2ND APPELLANT

VERSUS

KT & BMK *(Legal representatives of the estate of* DKK *(Deceased)*..... RESPONDENTS

(Being an appeal from the Judgment and Decree of the Principal Magistrate Hon. S. Wewa made on 5.11.2018 in Malindi CMCC NO. 68 OF 2017)

CORAM: Hon. Justice R. Nyakundi

Ms. Machuka for the Appellants

Ms. Wambua Kilonzo for the Respondents

JUDGMENT

Background

The respondents **KT** and **BMK** sued the appellants on their own behalf and as administrators to the estate of the late **DKK** hereinafter referred as the deceased, seeking compensation under the Law Reform Act and Fatal Accidents Act.

In the claim filed in court dated 16.3.2017, the deceased was on or about 1.5.2015 along Malindi – Lamu Road at Gongoni area lawfully riding motor cycle registration number KMCE 510T when the 3rd appellant so negligently, drove managed and or controlled motor vehicle registration number KBJ 182D that the same lost control, veered off the road and collided with motor vehicle registration number KMCE 510T. As a result whereof the deceased sustained fatal injuries. The respondents alleged particulars of negligence in paragraph 6 of the plaint.

Further by reason of the death, the respondents averred that the estate of the deceased being survived of the following dependents suffered loss and damage:

BMK - Wife aged 62 years

KCT - Wife aged 54 years

SS - Son aged 45 years

KK - Daughter aged 41 years

JK - Son aged 39 years

SK - Son aged 36 years

SM - daughter aged 36 years

ED - daughter aged 32 years

EF - daughter aged 32 years

R K - daughter aged 31 years

KK - son aged 24 years

OD - son aged 24 years

SM - daughter aged 22 years

MD - son aged 20 years

KM - daughter aged 20 years

RM - daughter aged 18 years

SK - son aged 16 years

MM - daughter aged 16 years

MK - daughter aged 14 years

MK - son aged 13 years

Further it was the claimant position that the deceased enjoyed good health going about his activities in life and supporting the dependents who have now been left without a provider and head of the family, hence the claim for lost years.

As a consequence, the respondents prayed for general and special damages against the respondents in causing the death of the deceased through breach of duty of care and negligence.

The appellants in their statement of defence dated 6.6.2017, denied any negligence and breach of duty of care as alleged by the respondents. Further, the appellants even denied occurrence of the accident, ownership of subject motor vehicle registration KBJ 182D and or that the accident occurred in the manner and style averred by the respondent in the plaint.

In the alternative and without prejudice the appellants pleaded contributory negligence against the deceased in paragraph 5 of the statement of defence.

Having heard and considered the evidence, the Learned trial Magistrate held as follows on liability: -

> ***"The driver of motor vehicle KBJ 182D acted negligently when he veered off the road, unlawful Law to that of the rider of motor cycle KMCH 510T. I do blame him at 10% liability on quantum. Loss of dependency Kshs.60,000/=, loss of expectation of life Kshs.80,000/=, funeral expenses of Kshs.100,000/=, specials of 36,850, plus costs and interest."***

Being aggrieved with the entire Judgment, the appellants lodged this appeal seeking a review on both liability and quantum. In essence, the appellants prayed for the appeal to be allowed and respondents claim be dismissed with costs.

The appeal was disposed of by way of written submissions.

Submissions by the appellants Mr. Machuka for the appellants submitted and opposed the findings reached on negligence by the Learned trial Magistrate against the overwhelming evidence to support contributory negligence. In that case, counsel submitted that the two appellants witnesses including the private investigator did rebut the claim on the manner, and surrounding circumstances of the accident to demonstrate contributory negligence by the deceased.

In this regard, making reference to the link in chain of the evidence, counsel proposed an apportionment of liability at 80%:20% to appropriate the finding by the trial Magistrate.

On damages Learned counsel submitted that the award on life expectancy was exaggerated and punitive contrary to the evidence and facts of the case. In view of the age of the deceased, vicissitudes of life and that he was enjoying his last years having retired from Military service.

On the question of damages for loss of earnings and dependency, Learned counsel submitted and contested the multiplier of 5 years and multiplicand of Shs.700 as daily income earned by the deceased from the boda boda business. In support of the appeal, counsel relied on the following authorities **Bundi Makube v Joseph Onkoba Nyamuro CA No. 8 of 1983, Simon Taveta v Mercy Muititu Njeru CA No. 26 of 2013 Nyeri.**

Mr. Wambua, on behalf of the respondent put in submissions opposing the appeal and stated that the appellants have not laid any new material evidence for the court to interfere with the Judgment of the trial court.

On quantum, counsel submitted that the trial Magistrate applied the right principles on assessment of damages and did exercise the discretion correctly.

I have considered the record, and submissions from both counsels on the issues to be decreed in this appeal. The way I see it, liability and quantum are both contested by the appellants.

Analysis

The starting point is to remind myself the principles and duty of the 1st appellate court as propounded in the cases of **Selle v Associated Motor Boat Co. Ltd EA 123 and Peters v Sunday Post [1958] EA 424.** From the grounds in the memorandum of appeal, they can be reformulated and distilled into two main issues.

> **a).** ***Whether the Learned trial Magistrate erred in Law and fact in apportioning liability in negligence at 10% against the appellants?***
>
> ***b). Whether in quantifying general damages under the Law Reform and Fatal Accidents Acts the Learned trial Magistrate erred in Law and fact and did arrive at an erroneous and excessive award in the circumstances of the case.***

It is trite Law under Section 107 (1) of the Evidence Act that the burden bearer has the duty to substantially call evidence to proof existence of a fact if he desires to obtain Judgment in his favor. The standard of proof in civil cases is so far settled to be that of a balance of probabilities. Just like in criminal cases the burden of proof never shifts to the defendant save that when a prima facie case has been made out by the plaintiff. It therefore follows that if the plaintiff's claim is based on negligence and against the defendant as a tortfeasor under the doctrine of vicarious liability the defendant who pleaded contributory negligence may further call evidence to proof such plea on contribution.

Time is now ripe to delve into the issues and the evidence on record to determine whether the appellants have an appeal on the merits.

Liability

The Law

The claim on negligence somewhat pauses certain challenges in establishing with precision who between the two tortfeasors was to blame for the accident. In the view of this the court in **Stapley v Gypsum Mines Ltd [1953]** the court observed:

> ***"To determine what caused the accident from the part of legal liability is a most difficult task. If there is any valid logical scientific theory of causation it is quite irrelevant in this connection***."
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> ***In a court of Law this question must be decided as a properly instructed and reasonable jury would decide it. The question must be determined by applying common sense to the facts if each particular case, one may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regarded as having been caused by the faults of all of them."***

In **John Warungi v Rubesh Okumu Otiangala CA No. 24 of 2015** The court further held:-

> "***Vicarious liability is not pegged on legal ownership of a vehicle but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor."***

In considering the burden of proof in respect to negligence in **Mzuri Muhhidin v Nazzor Bin Self [1960] EA 201 and Menezes v Stylianides Ltd (Civil Appeal No. 46 of 1992 unreported)**

> ***"As I understand the law as set out by these two Judgments of this court, where the circumstances of the accident give rise to the inference of negligence the defendant, in order to escape liability, has to show, in the words of SIR ALISTAIR FORBES , that there was a probable cause of the accident which does not create negligence' or in the words which I have previously used 'that the explanation for the accident was consistent only with an absence of negligence.' The essential point in this case, therefore, is a question of fact, that is, whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence."***

Having set out the rival arguments and the principles with respect to the burden of proof it is now convenient to express my appreciation of the matter.

In the instant appeal, negligence and breach of duty of care on causation of the accident on 1.5.2015 was given by the key witness **Juma Kahindi, Bodaboda rider (PW 2).** In that case PW 2 who was on the material day also operating his motor cycle on the said road like the deceased observed a lorry being driven along the same road with no lights. According to PW 2 the vehicle while navigating to avoid a pothole ended up knocking the deceased. As PW 2 watched the events of the collision the deceased being pushed to the ground as the driver of the motor vehicle drove off in high speed. In answer to this facts and evidence by PW 2 the appellant witness **Ali Abubakar** denied that the accident was solely caused by negligence or breach of duty on his part. He argued and blamed the deceased for the collision as a result damage to his motor vehicle was occasioned by negligence of the deceased. In his testimony he said that after the accident he drove out of the scene fearing members of the public who would have taken advantage of the situation and cause damage to his vehicle. In support of DW

1 version on the manner in which accident occurred the appellants also summoned DW 2 **George Gisheen** an insurance investigator. The evidence by **(DW 2)** was that it was the deceased who drove his motor cycle carelessly resulting in a collision with the appellants motor vehicle. According to (DW 2), the deceased was the one who owed him a duty of care by exercising reasonable care to avoid acts of negligence on that particular day.

After recording evidence from witness statements and making a visit to the scene DW 2 further told the trial court that the motorcyclist (deceased) was wholly to blame for the accident. He produced the investigation report with attachments to demonstrate the source of his findings and recommendations.

In this case, the trial court was faced with two narratives on causation and blameworthy. It seems to me this was a case to be evaluated between direct testimony of PW 2 and the 3rd appellant who drove the motor vehicle which collided with the deceased. The trial Magistrate blamed the third appellant for acting negligently and veering off the road, his lawful lane to that of the rider of motor cycle registration number KMCH 510T. It is admitted that the 3rd appellant was acting in the cause of his duties and as a servant of the 1st and 2nd appellant.

My opinion is that the factual circumstances, the nature of the location, the speed at which the vehicle was being driven by the 3rd appellant is instructive from the testimony of PW 2. DW 2 on the other hand during the course of his investigation established that there was no liability on the part of the 3rd appellant. The general principle under Section 48 of the Evidence Act on expert witness provides a basis of role played by experts in an adversarial litigation process. Is a person who is expected to be skilled in his field in which he is called upon to assist the court on the issues in dispute which require expert opinion. Whether therefore the trial court admits the form of evidence as expert is purely a question of fact for the court to decide depending on the circumstances of the case. Indeed, the admission and reliability of expert evidence upon which it's reliance lies by the decision maker was clearly stated in the case of **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR** held that:

> ***"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called. While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account [11] Four consequences flow from this.***
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> ***Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework of the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones [12]."***

However, there is need for caution as held in the case of **Kemp Properties (UK) v Dentsply Research and Development Corporation [1991], the Court of Appeal of England** that an expert primary duty is to the court and secondly to his profession and not at all to the person engaging him and further the court held thus:

> ***"It is sad feature of litigation that expert witnesses, particularly in valuation cases, instead of giving evidence of their actual views as to the true position, enter into the arena and, as advocates, put forward the maximum and minimum figure as best suited their side's interests. If experts do this, then they must not be surprised if their views carry little weight with the judge."***

With respect to the testimony of DW 2 I think this a case which was be ruled on the sufficiency of evidence tendered by PW 2 on behalf of the respondent case and DW 1 the driver of the offending motor vehicle. The opinion as to who was to blame for the accident as stated by DW 2 cannot supersede the testimony of PW 2 and DW 1 on the trier of facts in issue of this matter. Looking at the evidence of **DW 2** it appears to me it was an investigation whose content was aimed at influencing the litigation in favor of the appellants.

I have considered the evidence and submissions by both counsels on this contested issue on liability on the principles of proof of negligence, laid down pursuant to the persuasive authority, in the case of **Henderson v Harry Jenkins [1969] 3 AER 756 – 766** where the court held: -

> ***"In the action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the dependants. That is the issue throughout the trial, and in giving Judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendants and if he is not satisfied, the plaintiff action facts."***

In this appeal, the trial court emphasis on causation and blameworthy was based on the testimony of PW 2 and DW 1. It seems to me that this was a case to be evaluated between direct testimony of PW 2 and that of the 3rd appellant who drove the motor vehicle stated to have been the deceased. The accident occurred on 1.5.2015 and the scene was visited by the investigator from the Insurance company a month

later since the actual accident. The court held that the 3rd appellant was to blame for veering off the road. The record before me shows that the Learned trial Magistrate considered the evidence by the respondent and that of the appellants, though the evidence by the respondent was challenged by the appellants, the Learned trial Magistrate in her considered view held that there was no contributory negligence.

I have reviewed the evidence in its totality more so, the photographic impression of the alleged road where the collision took place. Given the width of the road and the surrounding of the scene, one ought to ask the question whether a reasonable man in the shoes of the deceased would have hurt himself by knocking the motor vehicle as alleged by the 3rd appellant and his witness DW 2.

It is more plausible to arrive at a conclusion that the merit of the case depended on the testimony of PW 2. It must be remembered that in cases of this nature depend on difficult task of proving negligence the defendants aware of the consequences tend to lean towards where they can be absolved of full responsibility for the loss and damage.

Therefore, borrowing a leaf from the principles of **Selle and Peters cases** on the duty of the 1st appellate court that I have no advantage to assess the demeanor and credibility of the witnesses. However, on evaluation and scrutiny of the evidence on record, the appellant has not shown the inadequacy of facts or any collateral matter taken into account by the Learned Magistrate to render the decision on liability wrong in principle.

In this particular case I find no ground to persuade me to interfere with the findings on liability as determined by the Learned trial Magistrate. This ground of appeal therefore fails.

On the question of damages as the 1st appellate court, the task is as set out in the case of **Butt v Khan KARI** where the Court of Appeal held that:

> ***"An appellate court will not interfere with an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate; it must be such that the Judge proceeded on wrong principles or that he misapprehended the evidence in same material respect and so arrived at a figure which was earlier inordinately high or low."***

The respondents filed a claim against the appellants for damages on behalf of the estate of the deceased pursuant to the Law Reform and Fatal Accidents Act. These statutes provide that in every action such damages so claimed resulting from such death may respectively be paid to such persons whose benefit such action has been brought for compensation. The amount so received after deducting costs and other expenses shall be divided amongst the dependents in such a share as the court may deem fit. The duty of the trial court was therefore to estimate reasonably the period the deceased could have lived for the dependents listed in the statement of claim to continue to benefit from the support and dependency as beneficiaries before the death occurred. That amount under the Fatal Accidents Act is considered as an amount of the dependency available in each year within the period taken as a multiplier.

In the instant appeal, the Learned trial Magistrate established that the deceased was a retired Military officer aged 68 years. He was survived by his spouses and children. It was estimated that the deceased could have lived for a further 3 years considering any possibilities that may occur at what I call the journey of life. In her exercise of discretion a multiplier of 3 years and income of Kshs.5,000/= was used for purposes of dependency.

This court takes judicial notice that the head of a family like the deceased never retires from providing maintenance and wellbeing of his family during his life time. There was no evidence to show that despite his retirement from military service, he had ceased to provide assistance to his family. There is no doubt that the tragic death the family was deprived of that benefit. On the basis of the award made, the appellant has not demonstrated that it was arrived at by the Learned Magistrate applying wrong principles or facts to the case which sum was so manifestly excessive as to warrant a reduction or increment by this court.

Bearing that statement of principle in mind and taking into account are more other factors present at the trial of this case, I know there is no proper basis to exercise discretion to interfere with the decision of the trial court. I need to emphasize as stated in the case of **H. West & Sons Ltd v Shephard [1964] A. C. 326 at page 353**

> ***"the assessment of damages is basically a matter of judicial discretion and remembering that in this sphere there are inevitably differences of view and opinion."***

With this consideration and for the foregoing reasons, I would dismiss the appeal on liability and general damages with costs to the respondent.

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

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwadilo: I seek stay of execution

Court: Interim stay of 14 days to the respondent