REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 98 OF 2016

T.S.S. TRANSPORTERS LTD.....1ST APPELLANT

KENYA GRANGE VEHICLE INDUSTRIES.....2ND APPELLANT

HUSSEIN DAIRY TRANSPORTERS LTD.....3RD APPELLANT

VERSUS

PAMELA AKINYI LIDAMBIZA.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL 97 OF 2016

PAMELA AKINYI LIDAMBIZA.....PLAINTIFF

VERSUS

T.S.S. TRANSPORTERS LTD.....1ST DEFENDANT

KENYA GRANGE VEHICLE INDUSTRIES.....2ND DEFENDANT

HUSSEIN DAIRY TRANSPORTERS LTD.....3RD DEFENDANT

DEVELOPMENT BANK OF KENYA.....4TH DEFENDANT

J U D G M E N T

Outline of background facts and evidence

1. The two appeals were by consent of parties consolidated on the 14/3/2019. The three appellants were the defendant at trial and challenge the decision of the trial court on both liability and quantum. For the purposes of clarity, the entitling by the appellants in 97 of 2016 notwithstanding, **TSS Transporters** and **Kenya Grange Vehicle Industries**, being the clients of **Ms Kairu & McCourt** advocates at trial shall be referred to as the **1st and 2nd Appellants** while **Hussein Dairies Ltd** shall the referred as the 3rd Appellant

2. Even when the appeals are so consolidated, it is important to note that the 1st and 2nd appellants appeal is only on assessment of damages while that by the 3rd Appellant challenges the trial court's findings on liability, assessment of damages as well as finding that the appellants were jointly and severally liable to the respondent. I therefore propose to deal with the appeal on those three broad grounds.

3. The pleadings filed and evidence led on liability at trial was to the effect that on the 7/7/2012, the plaintiff was travelling as a passenger in motor vehicle Registration No. KBN 685N owned by the Appellants in Appeal No. 97 of 2016 *[Tss Transporters Ltd And Kenya Grange Vehicle Industries*, when the said motor vehicle was negligently driven in a manner so as to be caused to ram into the motor vehicle Registration No. KBR 066W towing trailer No. ZC 0040 owned by Appellant in HCC No. 98/016 [HUSSEIN DAIRY TRANSPORT] as a consequence of which the Respondent (as plaintiff before the trial court) suffered severe bodily injuries.

4. Negligence was attributed to the 1st and 2nd Appellants and particulars thereof given at paragraph 6 of the plaint to include over-speeding, failing to exercise sufficient care and control over the motor vehicles and failing to have regard of the passengers by ramming onto the other motor vehicle. For HUSSEIN DAIRY TRANSPORTES LTD the particulars of negligence pleaded were that the motor vehicle was driven and controlled without regard to the safety and regard of other motor vehicle and parking the vehicle on a public road without erecting warning signs to other road user in disregard to the Traffic Rules.

5. At trial Respondent led evidence that the accident occurred at about 5 am in the morning and that he blamed the driver of the bus she was in for overdriving and failing to swerve to avoid the accident and the lorry she blamed for being stationary on the road. In cross-examination by the 1st and 2nd Appellant, she denied knowledge of the speed the bus was being driven but repeated that it was at a speed and that it ought to have swerved or stopped to avoid ramming onto the stationary motor vehicle on the road.

6. When cross-examined by the 3rd defendant the witness said that from her seat, on the 3rd row from the driver's, she could see the stationary vehicle and that the accident would have been avoided by the bus driver taking an evasive action. She then added that both vehicles were to blame. None of the defendants called evidence to challenge or rebut that aspect of the Respondents testimony.

7. In his judgment the trial court said:-

> **"None of them testified to rebut this evidence. As held in the case of Trust Bank Ltd vs Paramount Universal Bank Ltd and 2 others (Nairobi) Milimani HCCC NO. 1243 of 2001 cited among other decisions by Counsel for the third defendant, pleadings are mere statements if no evidence is called to substantiate them. The third defendant alleges in its statement of defence that the first and second defendants caused the accident but offered no evidence in proof. As observed hereinabove, it also failed to call evidence to counter the plaintiff's evidence. The third defendant's advocates' submissions exonerating his client from blame are therefore dismissed. As a passenger in the bus no negligence can be attributed to the plaintiff. The driver of the bus is thus found culpable for driving with speed and failing to control the vehicle thereby colliding with the trailer. The driver of the trailer is equally liable for parking on part of the road and thus causing obstruction and contributing to the collision.**
>
> **There is no evidence that the drivers of the bus and the trailer were on frolics of their own at the time of the fateful collision. They are deemed to have been driving for the purposes of the first, second and third defendants there being no evidence to the contrary. The three defendants are hereby held vicarious liable for their drivers tortious acts".**

8. It is that finding on liability which the 3rd Appellant challenges to have been erroneous for finding it liable and for failing to apportion liability between it and the 1st and 2nd Appellants. The appellant also contends that the finding of a '*joint and several*' judgment was erroneous. In determining that aspect of the appeal, I will seek to determine whether any negligence was established against the Appellants or any of them and if there was any error or propriety in the decision in entering a joint and several judgment.

Proof of negligence

9. The fact of occurrence of the accident on the material date and that the same was a result of the 1st and 2nd appellants motor vehicle ramming onto the motor vehicle owned by the 3rd Appellant is not in dispute. In this appeal there is also no dispute as to ownership of the two motor vehicles because none of the parties has raised that as a ground of appeal. The only question is whether the evidence adduced did prove the claim as pleaded and presented by the Respondent against the Appellants.

10. The Respondent having pleaded that the lorry was parked on the road contrary to the Traffic Rules, it was upon the court to establish whether that fact could just be ignored or whether it was a relevant fact. Being a court of law, the need to appreciate the law whether cited to court or otherwise presents no options[1]. There was ample and uncontroverted evidence that the 3rd Appellants motor vehicle was parked on the road. Whether it was in the middle or partly on the road would still mean it was on the road. That fact being uncontroverted or explained placed the 3rd Appellant to have been on the focus of whether or not there had been compliance with obligations a driver under Section 53 of the Traffic Act. The Respondent having led evidence that the lorry was in the road and made to reiterate same upon cross examination, I do find that the evidentiary burden shifted to the 3rd Appellant to explain that the motor vehicle even if parked on the road the safety of the road users had been taken regard of erecting the warning signs as dictated by subjection 3 of Section 53, Traffic Act. That burdened was never discharged by the 3rd appellant who opted not to lead any evidence.

11. Accordingly therefore that Appellant could not wholly escape liability for the causation of the Accident. I say so because to leave a motor vehicle on the road in a manner that causes danger or presents risk to other road users, is to commit an offence under the traffic act [2]. There having been evidence, prima facie, that the 3rd Appellants motor vehicle was left on the road in an obstructive manner, it would be an act of turning a blind eye to the law to wholly absolve such a driver. I do find that the 3rd Appellants driver had a portion of blame to shoulder for the accident and the consequent Respondent's injuries.

12. But it is also in evidence that the motor vehicle was stationary even if not wholly on the road. It was not in a position to hit any other motor vehicle by its movement if not from the obstruction. It therefore follows that even if in such obstructive position the vehicle that rams into it from behind, and on straight road as confirmed by the evidence by the Respondent is to blame more. On the facts pleaded and evidence produced at trial, I do find that the 3rd Appellant was liable up to 20% while the 1st & 2nd bear 80%. In coming to this conclusion, I have taken the persuasion from the decisions in ***JACKSON MUTYETHUMO VS MARY MENZE MUTHUKU [2009] eKLR*** where the court said:-

> **"The fact that the school bus rammed into the lorry was not in dispute. The main reason for this is obviously the fact that the lorry was an obstruction on the path of the school bus. The situation was made worse by the fact that it was at night, and**

there were no warnings placed near the lorry. Nevertheless, the school bus had head lights and the driver of the school bus was expected to be alert. The school bus driver therefore ought to have seen the lorry if he was indeed maintaining due care and attention as he was driving, particularly because the lorry was said to be on a straight stretch of the road. Therefore the school bus driver was also negligent to some extent. The trial Magistrate was wrong in failing to apportion any negligence against the school bus driver. I would apportion liability at 80% as against the 2nd appellant and 20% as against the school bus driver".

13. It is this apportionment the trial court was to undertake because the two drivers were never joint tortfeasors. Since the part played by each of the defendant was distinct and severable there was neither basis nor justification to enter a '*joint and several judgment*'. A *joint and several judgment* can only be entered where the liability of two or more tortfeasors is joint.

14. In the matter before me the liability between the appellants was clearly severable and it was not a proper case to hold them jointly and severally. To that extent I do set aside the judgment of the lower court in so far as it found the appellants jointly and severally liable. I thus substitute in place of that finding, a finding that each shall be responsible to the extent of its contribution.

Assessment of damages

15. Both appeals as consolidated challenge the award assessment of damages as being too high and without foundation. There is however a difference on the grounds upon which each appeal is framed. In the Memorandum of Appeal filed in HCCA No. 97/2016, beyond the general ground that the trial court failed to award convention damages in comparable cases, there were three other grounds faulting the judgment for awarding damages that were too high and without regard to the evidence adduced, failure to make an award for diminished earning capacity and instead awarding damages for loss of earnings and thus adopting an erroneous multiplier leading to a bloated award and lastly for awarding a sum to meet the costs of a helper having made an award for prosthesis.

16. On the other side the memorandum of Appeal in 98/2016 faults the award for cost of hiring a helper when the same had not been pleaded and for awarding those damages when the same had been compromised by an award for corrective surgery and prosthesis. In short, the memorandum of appeal in No. 98/2016 only challenges the award under the headings costs of hiring a helper and costs of prosthesis.

17. From the judgment, the following were made under the stated distinctive heads:-

General damages for pains, suffering		
and loss of amenities	**-**	**2,000,000.00**
Loss of earnings	**-**	**1,520,000.00**
Cost of hiring a helper	**-**	**1,996,000.00**
Future medical care	**-**	**100,000.00**
Cost of prosthesis & maintenance	**-**	**169,000.00**
Special damages	**-**	**43,000.00**

18. Having perused that judgment, the only challenged head of damages must remain; loss of earnings, cost of hire of a helper and costs of prosthesis. I take that view because grounds 1 and 2 in the memorandum of appeal filed in HCCA No. 97/2016 are overbroad and not in sync and compliance with the requirement of Order 42 Rule 1(2) of the Civil Procedure Act. None of those grounds can be taken to challenge the award of general damages for pains, suffering and loss of amenities.

19. There being no concise ground challenging the award for general damages for pains, suffering and loss of amenities and having conducted re-appraisal and re-evaluation of the entire evidence while noting that assessment of damages is a difficult task and falls for the judicial discretion of the trial court, I do find no merit in any challenge on that head of damages. I also find that there is no challenge on a word of special damages and costs of future medical care and the same thus do not call for my consideration.

Award of loss of earnings

20. In the plaint filed, the Respondent had pleaded this loss as follows:-

"The plaintiff was a business lady earning/making profit of Kshs.18,000/= which she claims since she is a widow educating her children who have since dropped out of school or discontinued school due to the accident and the injuries she sustained"

21. That pleading was denied by both appellants in the defenses filed dated 26/6/2013 and 29/6/2013 respectively. It was thus a contested matter calling for evidence and determination by the court.

22. In evidence, the Respondent said that she was emerged in the business of selling clothes and *omena* between Mombasa and Kisumu and that as a consequence of the accident she was rendered incapable of continuing with the business. On that evidence no cross-examination emerged from the appellants. The consequence is that the evidence remained unchallenged.

23. In his analysis the trial court agreed with the defence that the income was not strictly proved and opted to adopt a monthly sum of Kshs.10,000/=. No basis is laid for that sum but one may infer that is the figure the court considered reasonable. As a first appellate court, I see no wrong approach taken by the trial court. Maybe, the trial court would have taken the minimum wage as the generally acceptable and statutory founded threshold but I do consider that the sum opted for is itself not far off from the reigning minimum wage at the time.

24. In calculating the sum lost, the court chose a multiplier of 19 years having taken into account the age of the Respondent at 39 and the usual vicissitudes of life. From the memorandum of appeal and the submissions, it is the choice of multiplier which is said to have resulted in an overly high sum awarded.

25. In the submissions before the trial court, the Respondent proposed a multiplier of 24 years while the 1st and 2nd Appellant proposed 12 years with the 3rd Appellant proposing 10 years. Choice of a multiplier as a threshold when a court adopts the multiplier principle is also a matter at the discretion of the court. Being in that realm it calls for a strong case for an appellant court to justify interference. The interference cannot be on the sole reason that had the appellate court sat, at trial, it would have made different choice. The only time an appellant court can interfere is where there is an obvious misapprehension or lack of appreciation of the applicable principles or where there is wholly no evidence to support the findings. Those grounds are lacking here and I see no basis to interfere. That being my finding, that challenge upon the judgment equally fails and the ground of appeal is thus dismissed.

Future nursing care

26. In the plaintiff this was made specific pleading and prayer and in evidence, the Respondent said:-

> **"I cannot perform any work now. Some one helps me out in domestic chores. I pay Kshs.7,000/= per month. My relatives help pay salary by contributing**.

27. Even this aspect of evidence was never contested or challenged upon cross examination and there having been no evidence offered by the Appellant, there was evidence prima facie and on a balance of probabilities for the court to make the award it did. I find no basis to interfere with the trial court in that regard. Having found that the multiplier of 19 years was reasonable in respect of loss of earnings the same thus ought not to be different here.

Costs of Prosthesis

28. In making an award of Kshs.169,000 for prosthesis and its costs of maintenance, the trial court took into account the evidence by the two doctors who prepared medical reports and chose to rely on the Appellant's portion of the evidence that it was by a specialist orthopedic surgeon. It must be observed that a decision of a trial court must be based on evidence adduced and when in consonance with such evidence there is no room for an appellate court to interfere.

29. In addition both side at the trial agreed that there was need for the Respondent to seek and use the prosthesis. During the trial no suggestion was made to the respondent by any of the Appellants on the needlessness of prosthesis in comparison with the nursing care and vice versa. In fact in the submissions at trial the 3rd Appellant urged the court to award the sum of Kshs.150,000/= while the 1st and 2nd Appellants made no submissions at all.

30. The point raised by the 3rd appellant that both should not have been awarded at the same time is a matter being raised on appeal for the first time. It is thus not a matter that is properly due for determination in this appeal.

31. However, even if it had been raised at trail post-evidence, it would have amounted to asking the court to exalt the submissions to take place of evidence. That is not acceptable because submissions are never evidence but views of the party or counsel making them

32. The upshot is that while the appeal on liability and its apportionment succeeds to the extent that the same is apportioned at 80:20 between the 1st and 2nd Appellants on one hand and the 3rd Appellant on the other hand, respectively, and the appellant being bound to the extent of their contributions, the appeal on assessment and award of damages is wholly dismissed.

33. Since the appeal has succeeded only partially at the instance and industry of the 3rd Appellant, I make the following orders on costs:-

- Between the 3rd Appellant and the Respondent, each shall bear own costs.

- Between the 1st & 2nd Appellant and the Respondent, the 1st and 2nd Appellant shall pay to the Respondent the costs of the Appeal.

Dated and **delivered** at **Mombasa** this **18th** day of **October 2019**.

P.J.O. OTIENO

JUDGE

---

[1] As per court of Appeal in **Kwanza Estates Limited v Dubai Bank of Kenya limited (in liquidation) & another [2016]e KLR**

"The learned Judge, in our considered opinion properly relied on the provisions of **sub-section 3**. A Judge in determining a dispute is not restricted only to the provisions of the law cited by a party. **Sub-section (2)** which the appellant relied on cannot be read in isolation from the rest of the section".

[2] Sec. 53 traffic Act