REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 16 OF 2018

JOSEPH NDEGWA.....1ST APPELLANT

SAMUEL WANYOIKE MBUI.....2ND APPELLANT

VERSUS

JAPHET NDUNGU MUBORO the Legal Representative of the Estate of late

DISHON IRUNGU NDUNGU.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO 20 OF 2018

BETWEEN

JAPHET NDUNGU MUBORO The Legal Representative of the Estate of late

DISHON IRUNGU NDUNGU.....APPELLANT

VERSUS

JOSEPH NDEGWA.....1ST RESPONDENT

SAMUEL WANYOIKE MBUI.....2ND RESPONDENT

(Being an appeal and cross appeal from the judgment of the Honorable Z Abdul (R.M)

delivered on the 26th October 2018 in Naivasha CMCC No 18 of 2013)

JUDGMENT

Background

1. The Appeal and cross appeal herein emanate from the same lower court case. The subject matter is an accident involving three vehicles leading to several fatalities, including the death of one Dishon Irungu Ndungu. The deceased was a passenger in vehicle registration number KBN 939M Toyota Matatu, owned by the first appellant/ defendant and driven by the 2nd Appellant/defendant. The manner in which the accident occurred was disputed. However, it was not disputed that two other vehicles registration Numbers KST 410 and KAX 760 G were involved, a finding also made by the trial court.

2. At the hearing, the trial court heard the two witnesses for the plaintiff (deceased's estate). They were Japheth Ndungu (PW1), the deceased's father and Inspector Charles Gitele based at Lari Police Station where the accident was reported. The sole defence witness was Corporal Thomas Obonyo, also based at Lari Police Station.

3. The trial court found 100% liability against the 1st and 2nd Appellants and awarded the deceased's estate damages as follows:

Loss of dependency Kshs 3,971,869.00

Loss of expectation of life Kshs 150,000.00

Pain and suffering Kshs 50,000.00

Special damages Kshs 106,500.00

Total Kshs 4,278,360.00

4. In the main appeal **No 16/2018**, the appellants – the defendants in the lower court – have challenged the trial court's judgment on both liability and quantum. In essence, they argue that the evidence demonstrated through P. Exhibit 1, the Police Abstract, showed that blame was assigned to the driver of the third vehicle Registration Number KST 410, pursuant to OB Extract No 9 of 3/12/2011. They argue that their vehicle, Registration Number KBN 939M, was not to blame at all and there was no real evidence of such blameworthiness. Thus, liability at 100% was wrongly decided against them contrary to the evidence adduced.

5. Further, the appellants urge that the trial court misdirected itself and applied wrong principles by awarding damages under both the Fatal Accidents Act and the Law Reform Act. In addition, they challenge the award of dependency based on a period of 25 years when the deceased was aged 29 at the time of his death.

6. In the cross appeal, **No 20/2018** the deceased's estate appeals against the quantum of damages awarded as being inordinately low. They seek the enhancement of the award.

7. The issues arising therefore concern: Which party was liable for the accident; Whether the award of damages was justified or improperly made.

8. It is now trite that the duty of the court in a first appeal is to subject the evidence in the trial court to re-appraisal, being careful to note that this court did not have the opportunity of seeing and hearing the witnesses first hand. This position was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally" (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

9. With the above principles in mind, I also note that it is not open to the court on first appeal to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Liability

10. There was no eyewitness evidence adduced in the trial court. The case on liability rests entirely on the evidence of PW2 and DW1 the two police officers from Lari Police Station. It is undisputed that neither of the officers was the investigating officer, and that the accident investigations were incomplete at the time of the trial. The driver of the matatu was not called to give evidence.

11. PW2 Inspector Charles Gitele testified that the accident was reported on 3rd December, 2012, with fatal injuries, that occurred along Nairobi Maai Mahiu road at Kiruri area. He stated that he based his evidence on the original police file. He explained that on the material day three vehicles were climbing the escarpment towards Nairobi. KAX 760 G Mercedes Benz lorry with trailer TZC 6867 was ahead followed by Isuzu lorry KST 410 and then KBN 939M Toyota Matatu.

12. The first vehicle trailer KAX slowed down and so did lorry KST 410. The matatu KBN in which the deceased was travelling, then overtook and noticed an oncoming vehicle. The driver tried to return to his lane and attempted to squeeze into the space between the lorry and trailer. Lorry KST tried to avoid the matatu squeezing in ahead of it and swerved to the left hitting the matatu on the rear left side. The impact pushed the matatu into the trailer ahead of it. The driver of lorry KST lost control and landed in a tea plantation whilst the damaged matatu stopped in the middle of the road.

13. Two passengers from the matatu died on the spot and two others, including Dishon Irungu, died whilst undergoing treatment at Kijabe Hospital. According to PW2 investigations were concluded and it was recommended that the driver of matatu KBN 939M be charged for causing death by dangerous driving. He produced the Police Abstract as P. Exhibit 1.

14. In cross examination he admitted that the matatu driver had not been charged at the time of the hearing, and that the P. Exhibit 1 showed that the accident was still pending under investigation on the date of its issue. The police file was not produced as an exhibit.

15. On his part, DW1 Corporal Thomas Obonyo gave evidence on 5/12/2017 evidence and stated that lorry- trailer KAX 760 G was ahead driving towards Nairobi. It was followed by Matatu KBN 939M – driven by the appellant Samuel Wanyoike Mburi – which was followed by lorry KST 410. According to DW1, lorry KST rammed into the rear of the matatu KBN, which in turn rammed into trailer KAX, after KAX had slowed down. Some passengers died as a result. He produced Police Abstract D. Exhibit 1 which stated that the lorry KST 410 was to blame. This document was not put to PW2 during his evidence nor had it been marked for identification. PW2 said he relied on the Occurrence book which contained the initial report, and Police abstract

16. In cross examination, DW1 said he was standing in for the investigating officer Corporal Purity. He admitted that the report was not conclusive and was subject to further investigations. He further said he was not the maker of the Police Abstract, and admitted that the information in it blaming the accident on KST appeared to be inserted at a later date, and he could not tell who inserted it.

17. I have carefully evaluated the evidence. Both witnesses agree that lorry KAX was in front headed to Nairobi and that it slowed down; that at the time of the accident the matatu was behind the lorry KAX and behind it was lorry KST. The divergence in evidence is as to whether the matatu overtook to get into that position or whether the lorry behind it slammed into the matatu's rear when the lead lorry KAX, slowed down.

18. I have carefully perused both exhibits produced by the witnesses. P. Exhibit 1 is a duplicate Abstract dated throughout as having been issued on 3/12/2012, and indicates that the accident occurred on 3/12/2012 although the '2' in '2012' is overwritten in original ink. The dating may have been a mistake but the same was not corrected in evidence. The Abstract was collected and signed for on 3/12/2012 by one Nidah, apparently counsel from the plaintiff's side as per the proceedings. It shows that three passengers died in the accident. PW2, however, testified that two passengers died on the spot and another two died at hospital.

19. D. Exhibit 1 is a scan or photocopy of a Police Abstract. It is dated 13/12/2011 and refers to an accident that occurred on 3/12/2011. It has writings in a different hand indicating that *"KST 410 to be blamed for ramming into matatu KBN 939M"*. This is the inscription in respect of which DW1 could not assign the author. This was despite the fact that PW1 testified that he was standing in for the Investigating officer. Further, although PW1 said he could not tell the date of the inscription, the exhibit on record clearly shows the date as 9/9/2017, almost three months before the witness testified, giving the impression that the statement was written in so as to be ready for the giving of testimony.

20. In my view, where a document is filled in by hand, and one section of such document is alleged to be in handwriting that visibly differs from the rest, it is incumbent on the person producing it, or the party relying on it, to give an explanation for the difference. Absent such explanation, the information in it that is sought to be relied upon is unreliable. It thus suffers disregard in terms of its probative value.

21. Both plaintiff and defence Exhibits indicate that the investigating officer was one Corporal Purity. She was not, however, called to give evidence, and both exhibits indicate that the accident was pending under investigation.

22. In light of the foregoing, I am unable to assign full liability upon either party on the basis of the evidence given, and in the absence of the police file and the initial report and occurrence book. I am not persuaded by the evidence of DW1. The evidence is that the vehicles were driving up the escarpment towards Nairobi. It does not make sense that the lorry behind the matatu would have been driving at such a high speed uphill as to be capable of ramming the vehicle in front of it so forcefully as to cause it to so seriously ram into the vehicle in front of it and cause the death four passengers and injury to others.

23. The story of PW2 appears to me more plausible. The matatu which was behind the other vehicles was overtaking them thus has increased its speed, when it was suddenly forced to squeeze in between the lorry KAX and KST by an oncoming vehicle. Being at overtaking speed, and forced into the tight space to avoid a head on collision, the matatu had to simultaneously apply its brakes to get behind KAX. In the action of braking, the lorry behind rammed into it forcefully also causing it to ram the lorry ahead. This story appears to me rational and makes sense. I accept it.

24. Having said so, and given the evidence, which is undisputed, of the fact that lorry KST 410 rammed the rear of the matatu in front of it, I also think that shows some level of inattention and carelessness on the part of the driver of lorry KST. I would attribute some blame on him. Accordingly, I find and hold that the blameworthiness of the defendants should be attributed at 80% and that is the ratio of liability I attribute to them. The driver of KST would be liable for up to 20% of the blame, had he been a party to this suit, but he is not a party.

25. I have come to the forgoing conclusion despite the appellants' argument that each party should bear equal liability based on the position reached by the Court of Appeal in the case of **Hussein Omar Farah v Lento Agencies [2006] eKLR.** There, the Court stated:

> ***"The trial court, as we have stated, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could be establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame"***

26. In that case, the drivers testified, giving different versions. Here, the matatu driver is one of the appellants and he failed to testify. Secondly, I have viewed the evidence of DW1 as discredited for two reasons: First, he failed to explain the variance of the information as to blameworthiness inserted into DExb 1 as late as 9/9/2017, despite standing in for the investigating officer; and second, there is the implausibility of his story as to how the accident occurred.

Quantum

27. On quantum, only two issues are under dispute in both appeals: the award on dependency and whether damages are awardable under both the Fatal Accidents Act and the Law Reform Act. I will thus deal with only those aspects. The parties' positions are as follows.

28. In the Appeal No 16, the 1st and 2nd Appellants fault the trial magistrate for:

> ***"4. ….[applying] the wrong principles of law when he awarded damages under both the Fatal Accidents Act and the Law Reform Act and in fact failed to consider that the defendants under the Fatal Accidents Act as pleaded were still the same beneficiaries under the Law Reform Act"***

29. They also fault the trial court for:

> ***"5. ….awarding a dependency period of twenty five (25) years and without consideration of the submissions made by the Appellants counsel on dependency…." .***

30. In cross Appeal No 20, the appellant seeks enhancement of the award of damages on loss of dependency. They had claimed dependency in the amount of Kshs 6,529,300/=. The appellant asserts that the trial magistrate applied an erroneous multiplicand that was so inordinately low as to be erroneous. In the trial court they sought a multiplicand based on a net salary of Kshs 65,293 they argued the deceased received. The court in fact used a multiplicand of Kshs 39,718, being the total deductions from the salary as submitted by the respondents in the cross appeal.

Fatal Accidents Act and Law Reform Act

31. On awards under the Fatal Accidents Act and the Law Reform Act, the position is as follows. An award for loss of dependency is for the benefit of the deceased's dependants. They are defined under **section 4(1)** of the Act as the wife, husband, parent and child whose death was caused.

32. Under the **Law Reform Act, section 2** provides for recovery by the estate of a deceased person arising from any cause of action, for the benefit of such estate. In particular, **section 2(c)** provides that the damages recoverable for the benefit of the estate of that person:

> ***"(c) 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***

33. And **section 2(5)** provides that:

> ***" 2(5) The rights conferred by this Part for <u>the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act</u> or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."*** (underlining added).

34. Clearly, therefore, and it is common practice, awards under both the Fatal Accidents Act and the Law Reform Act can be made by the court. In **Kenfro Africa Ltd via Meru Express Services 1976 & Another v Lubia & Another (No.2) [1987] KLR 30**, the Court of Appeal held:

> ***"An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.***
>
> ***The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.***
>
> ***The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction. The deduction of the entire amounts made under the Law Reform Act in this case was erroneous once again, we have to interfere with the final award of damages."***

35. The above position has given guidance to the courts for many years in respect of conflicts raised concerning the two statutes. In light of the above, I am unable to see any error made by the trial court in regard to making awards under both the Law Reform Act and the Fatal Accidents Act.

Dependency

36. On dependency, the trial court's award was Kshs 3,971,860/= made up as follows: *39,718 x 25 x 12 x 1/3 = 3,971,860/=*. The trial magistrate took the retirement age as 60 years, in reliance on the case of **Gakuri Gathuri (suing as the representative of the Estate of James Kinyua Gachoki v John Ndiga Njugi & 2 Others [2015] eKLR**. There, the deceased died at the age of 29 years and Muchemi, J, adopted a multiplier of 25 years. The parties were in consensus on the dependency ration of 1/3.

37. Similarly, in **Silas Mugendi Nguru v Nairobi Women's Hospital [2014] eKLR** Waweru, J, also dealing with a matter in which the deceased was aged 29 at the time of death, used a multiplier of 25 years.

38. The evidence on dependency was as follows. It was not in dispute that the deceased was aged 29 years at the time of his death. He worked with the National Bank of Kenya and even received work commendations from the Managing Director for exceptional achievement. There is no allegation that he would not have retired whilst working with the bank. No specific retirement age was indicated in the evidence and the trial court used a retirement age of 60 years used in the other cases herein. I see no reason to depart from the trial court's position.

39. PW1 stated that the deceased was a banker at the time of his death employed by the National Bank of Kenya. That his gross salary was Kshs 84,122/=, and that he assisted the witness and his wife, also paying fees for their son Martin Mwangi.

40. The deceased's Payslip was exhibited as P. Exhibit 10. It confirms that the deceased's gross salary was Kshs 84,122/=. After tax deduction (Kshs 18,309/=) and other deductions including: NHIF, Pension scheme, NSSF, Emergency loans, Co-operative shares, Risk Management fund, Fringe Benefit tax, University loans and Co-operative loan (all of which deductions amount to Kshs 44,403.40), the payslip shows a Net pay of Kshs 39,718.60/=.

41. The plaintiff in the lower court submitted, in reliance on the case of **Hellen Gesare Ayoti v P.N. Mashru [2016] eKLR** that, as held by Mulwa, J:

> ***"…the net salary of a person's earnings is gross salary including allowances, less statutory deductions (PAYE, NHIF and NSSF). It is also my finding that any other deductions towards union dues, contributions and Sacco loans and any other loans are assumed to be so deducted for the benefit of the family, that goes to the improvement of the living conditions for the family".***

In that case, the High Court overturned the lower court's finding that the deceased was earning a net salary of Kshs 14,526/= after deductions were made from his gross of Kshs 53,275/= and the learned Judge held that:

> ***"…the deductions from the salary were in fact a benefit to the dependants. My conclusion is that the Net salary of the deceased after the statutory deductions stated on paragraph five above ought to have been Kshs.38,748/90 per month."***

42. I am persuaded by the argument that non statutory deductions are in essence for the benefit of the family. In the present case, the statutory deductions that are not for the benefit of the family are:

i. Tax deductions Kshs 18,309.00

ii. NHIF Kshs 320.00

iii. NSSF Kshs 200.00

iv. Fringe benefit tax Kshs 14.05

v. University Loans Kshs 3,489.30

Total deductions from Gross Kshs 22,332.35

These deductions cannot be included in the deceased's net salary.

43. The deductions for aspects that the deceased voluntarily subscribed to such as the Pension scheme, Emergency Loans, Co-operative shares, and Co-operative loan are deductions which form part of his earnings and are a benefit to his estate that cannot be withheld from his net earnings.

44. I therefore think that the proper calculation of the deceased's net salary would be Kshs 84,122.00 – 22,332.35 = 61,789.65, and I so hold that this is the appropriate multiplicand.

45. As for the multiplier used of 25 years, the appellant felt this was too high. As stated earlier, the deceased died aged 29 years. The appellant argued, relying on **FMM & Another v Joseph Njuguna Kuria & Another [2016] eKLR** that:

> ***"….In determining the multiplicand, 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 purchases. 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 dependants and the chances of life of the deceased and dependants. The sum arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received as a lump sum and would if wisely invested yield returns of an income nature."*** (per Ringera, J (as he then was)).

46. Taking all the foregoing into account, I see no reason advanced to deviate from the multiplier of 25 years used by the trial court. I would retain the same.

47. Accordingly, the calculation of dependency would be:

61,789.65 x 25 x 12 x 1/3 = 6,178,965.00

From this amount the contribution of the defendants was 80% as earlier found, and that must be taken into account.

Disposition

48. I thus come to the conclusion, that the award of the trial court must be set aside set aside and substituted with the following award, as I hereby do:

Loss of dependency Kshs 6,178,965.00

Loss of expectation of life Kshs 150,000.00

Pain and suffering Kshs 50,000.00

Special damages Kshs 106,500.00

Sub-total Kshs 6,485,465.00

Less 20% contribution (third party) Kshs 1,297,093.00

Total Award Kshs 5,188,372.00

49. Each party won an aspect of the appeal and I consider these to be proper cases in which to order each party to carry its own costs

50. Orders accordingly.

Dated and Delivered at Naivasha this 9th Day of December, 2019.

.....

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for the Appellants in the Main Appeal and Respondents in Cross Appeal

2. Wairegi holding brief for B. G. Wainaina for the Respondent in Main Appeal and Appellant in the Cross Appeal

3. Court Clerk - Fred Kamau