IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Musoke Ag V-P & Miller J)

CIVIL APPEAL NO 28 OF 1976

SIMBA CLOTHING FACTORY LTD

SATISH JIVRAS SHAH ……..…..…..…APPELLANTS

VERSUS

BAKSHISH KAUR VIRDEE ….…….....…….RESPONDENTS

(Appeal from Judgment and Decree of the High Court of Kenya at

Nairobi (Madan J.) dated 25th August 1975

in

(Civil Case No 1855 of 1973)

JUDGMENT

This appeal arises out of a claim for damages in negligence filed in the High Court as a result of a fatal motor accident. The respondent is the widow of Kentar Singh Virdee with whom she was traveling in their Volkswagen car KGA 392 driven by her husband when it collided with another car, an Opel KKT 253, owned by the first appellant and driven by Shah, the second appellant. The collision took place at about 9.00 pm on 19th September 1972 at the junction of Park Road and Meerut Road in Nairobi. The respondent's husband died as a result of the injuries he sustained in the collision and the respondent herself sustained injuries. These two factors formed the subject-matter of the respondent's suit in the High Court which she instituted for her own benefit and for the benefit of her five children.

There was no dispute that the collision took place. Each party, however, blamed the other for negligence or for contributory negligence. The trial judge, Madan J, found that the second appellant was solely to blame for the collision and awarded damages of Shs 146,000 to the respondent and the other dependants, and Shs 26,000 to the respondent in respect of her injuries. It is against this decision that this appeal was brought. The respondent cross-appealed against the quantum of damages. Dealing with the main appeal first, the main ground argued by Mr da Gama Rose (for the appellants) is that Madan J erred in his finding that the second appellant was negligent or, alternatively, in failing to find that there was contributory negligence on the part of the deceased. The judge accepted the evidence to the effect that the deceased had been driving along Meerut Road, which was a minor road with a "yield" sign, to join Park Road, the major road. The second appellant was driving along the left half of Park Road at a speed of about 50 mph. The deceased's car had crossed the centerline in Park Road except for the rear wheels when the collision took place. The place of impact was in the center of Park Road and Park Road was straight at this point.

The judge concluded in his judgment:

In my opinion this accident happened … because of both [the second appellant's] fast speed and want of a proper look-out and care on his part. The question is, did the deceased in any way contribute towards it? I have given careful consideration to this aspect of the matter, as indeed to the entire case. I have come to the conclusion that no contributory negligence can be assigned to the deceased. In addition to the admissions made by [the second appellant] in cross-examination …, surely it was not wrong for the deceased to carry on into Park Road after seeing that the other car was 150 feet away. He succeeded in crossing the left lane in which the other car was traveling; only his rear wheels were on the middle line. He was also turning right. The user of a main road has no more right to drive carelessly than a driver coming out of a side or minor road.

In my view there was ample evidence to support the trial judge's finding that the second appellant was negligent. There was evidence that he was speeding and that he could not have kept a proper look-out as he did not see the deceased's car till he was ten to fifteen feet away. With respect to the judge, however, I cannot agree that there was no contributory negligence on the part of the deceased. As observed in this Court in *Zarina Akharali Shariff v Noshir Pirosesha Sethna* [1963] EA 239, 252, per

Newbold JA:

It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be.

The evidence of the respondent on this question was as follows: My husband was driving along Meerut Road towards Park Road. My husband stopped before entering Park Road. He then looked around. I did the same. I saw a car at a great distance coming from Nairobi side. My husband entered Park Road. We were going towards Nairobi … There was a vehicle coming very fast from the opposite direction. It came and hit our off-side rear wheel.

Apparently the "great distance" she was referring to was 100 to 150 feet away. If indeed the deceased looked around as the respondent testified, he must have seen the other car as the respondent did. There is evidence that it was raining or drizzling and it was night time. In these circumstances, the deceased must have taken a deliberate risk to cross the path of the car on the major road, the presence of which was certainly an apparent danger. Whereas I agree with Madan J that the "fast speed of the Opel was a misdeed performed by [the second appellant] …" I do not agree on the evidence that "It would be most unfair to attach blame, even part blame," to the deceased. The judge had said earlier in his judgment that "The user of a main road has no more right to drive carelessly than a driver coming out of a side or minor road". By the same token, in my view, the carelessness or recklessness of a driver from a side or minor road is not absolved by the carelessness or recklessness of the driver on the major road. If anything it would appear that the driver from the minor road had a greater duty of care since the "yield" sign was against him. He had to give way to the traffic on the main road. On this issue the judge said:

I am favourably impressed by the evidence of Sherwin who said 'I think it would be reasonable to proceed into the main road after seeing a car coming at a distance of 150 feet'.

Apart from the fact that his was clearly the opinion of the witness, its wisdom failed as a collision did occur as a result. The deceased may have stopped as a precaution before entering the major road, but he was not required to stop for the sake of stopping. He was required to give way to the traffic on the major road. It is my view that in the circumstances of this case the deceased was not free from blame Mr Gautama, who appeared for the respondent, urged us to hold that this was a misjudgment on the part of the deceased and the greatest share of blame lay with the second appellant as the deceased had almost crossed to his correct side of the road when the accident occurred. I do not agree. I would apportion the blame as to 55 per cent due to the deceased and 45 per cent due to the second appellant. Subject to the results of the cross-appeal, I would reduce the damages awarded in the High Court by 55 per cent representing the share of blame attributable to the deceased. The other complaint against the judgment of

the lower court relates to a lump-sum of £700 "tacked" on to £6,600; the latter sum being the figure arrived at as the total dependency of the widow and the children.

Explaining the additional sum, Madan J said:

In *Mohinder Kaur v Water Resources Development (International) Ltd*, HCCC 1285 of 1973, I quoted from my judgment delivered in *Rose Kalondu v Mohamed Aslam Dar,* HCCC 1465 of 1971, as follows: 'I have worked out the value of dependency in a stereotyped way in the style of *Hayes v Patel* [1961] EA 129. I think the time has come to consider whether in addition to the dependency worked out in that old-fashioned way, taking into account the loss in the value of money and the change akin to an upheaval in the pattern of living of the people of this country, the Court ought to embark upon a new thinking, eg by adding a reasonable lump sum to the amount of compensation calculated under the old formula.'

In *Mohinder Kaur* I further said: 'In so far as I am aware neither the Court of Appeal nor any other judge of the High Court has undertaken such a review. Indeed time has come to give value to the various factors mentioned by me plus the heartrending inflationary trends.' For the reasons stated in both *Rose Kalondu* and *Mohinder Kaur* I would tack on a lump sum of £700 to £6600 already calculated by me making a total of £7300…

As the judge observed, this additional sum is a novel idea. Be that as it may, it is now well settled that damages are intended to put the person wronged in the same position, in so far as money can do it, as he was before the wrong complained of. In this case the respondent complained of the loss of the breadwinner. The judge, quite properly in my view, took into account the income of the deceased at the time of his death which he found to be £1100 per annum. He allowed, out of this, three-quarters as the monthly dependency of the dependants. The deceased was aged fifty years at the time of his death and the judge allowed a multiplier of eight. The resulting figure was £6600 as the total dependency of the dependants. This was the estimated loss to the dependants. It was based on the income of the deceased at the time of his death on 19th September 1972 and the expected period of his support. Judgment was delivered on 25th August 1975, about three years later. The judge does not say whether the additional £700 represents "the loss in the value of money, the upheaval in the pattern of living of the people of this country … plus the heart-rending inflationary trends" between the date of the accident and the judgment or whether it relates to these matters in respect of any other period. Apart from the fact that there is no evidence on these matters on the record, the judge did not say how he arrived at the figure of £700. In my view, the effect of the additional sum would be to put the injured party in a better position, moneywise, than she would have been had her husband lived. The deceased can be said to have lived with the matters mentioned by the judge but his income remained what it was. In these circumstances, I fail to see how these matters should affect the lost dependency. The position would be different if the Court were considering damages awarded in a comparable case, say, for injuries sustained which took place some years back. Inflationary trends may in such a case justify a higher award in comparable circumstances in the latter case. I am not persuaded that the principle is applicable in the instant case and accordingly find no justification of the additional sum of £700.

The last complaint was that the damages awarded to the respondent were excessive. I accept Mr da Gama Rose's submission that Madan J erred in taking into account, in awarding damages, shock of the respondent in seeing her husband killed. This matter was neither pleaded nor alluded to in the evidence. It appears also that the judge accepted the evidence of the respondent as regards her injuries, notwithstanding the apparent disparity between that evidence and the medical report. Be that as it may, the report confirms that the respondent had a scar on the right side of the nose, the right external nose is depressed due to fracture of nasal boned, the airway through her nose is restricted on the right side, she sustained a whiplash injury to her cervical spine and soft tissue injuries to her right chest and right knee, and suffered a great deal of pain and discomfort as a result of the accident. I would probably have awarded a little less than Shs 26,000 as damages but I do not think that this sum is so high as to merit interference. I would allow the appeal to the extent indicated in this judgment, but would otherwise dismiss it.

I must now turn to the cross-appeal. It is argued for the respondent that the damages awarded were

manifestly inadequate so as to make it an erroneous estimate of damages to which the respondent was entitled. I refer to this ground only to dismiss it as showing no merit. Mr Gautama has referred us to a number of foreign cases and tables relating to multipliers which must be in totally different circumstances and consequently of little assistance to us. I do not think that the damages awarded are so manifestly low as to merit interference by this Court. Except as indicated earlier in this judgment, Madan J applied correct principles in arriving at the sum of £6600 awarded. As regards the damages awarded to the respondent for her personal injuries, I have already dealt with this matter and I do not think any grounds have been disclosed to the effect that the sum awarded is so low as to merit interference. In the result I would dismiss the cross-appeal. For the reasons I stated in this judgment I would set aside the award of damages to the respondent and substitute therefor a sum equivalent to 45 per cent of the damages awarded by Madan J for the death of the deceased and for the respondent's personal injuries, and as both Musoke Ag V-P and miller J agree, it so ordered.

Musoke Ag V-P delivered the following Judgment. I agree with the judgment of Wambuzi P, and concur in the proposed order. The evidence before the trial court clearly disclosed a case of contributory negligence, and Madan J was wrong in holding that the appellants were solely to blame for the collision. In the circumstances of this case, I am in full agreement with the view that the deceased, who decided to drive on to the major road from the minor road when it was not safe to do so, should share 55 per cent of the blame.

Miller J delivered the following Judgment. I agree with the judgment of Wambuzi P and add the following in relation to the cause of the accident. It is clear that the provisions of the Traffic Act and the Highway Code cast concurrent and corresponding duties of care upon the drivers of both vehicles involved in the accident. As counsel for the respondent correctly observed, the second appellant proceeding along the major road could not claim, as it were, a "divine right" of progress thereon to the exclusion of the rights of others using or intending to enter the major road. It is not a matter of giving priority to either driver on the facts of this case. It is an obvious and necessary conclusion from the evidence that the accident would not have occurred had the deceased not unfortunately placed his vehicle somewhere in the path of the vehicle using the major road. There is no evidence that, for example, the vehicle proceeding along the major road was careering from side to side along that road in the accident area. The crucial indications of blame for the accident on the part of the second appellant are that he was driving at a speed of at least 50 mph and that he admitted that he did not see the deceased's vehicle until he was about 10 to 15 feet from it. On the other hand, the deceased was emerging, or had just emerged, from the minor road into the major road. He unfortunately died as a result of the collision. The respondent who was sitting beside him testified that he obeyed the "yield" sign at the junction of the road by actually coming to a halt and that she saw him look at the second appellant's vehicle which she saw approaching the junction area with the major road at a distance of about 150 feet away; and he then entered the major road. No matter how charitable or sympathetic a view is applied, I do not think that it can be concluded that the deceased, like his wife, also assessed the distance of the second appellant's vehicle to have been 150 feet. Moreover, it was the deceased who was in control of the vehicle, the egress on to the major road being a matter for his personal judgment, ability and reactions. It was he who had to decide if and when it was safe to relinquish observance of the "yield" sign and proceed. In the events as they turned out, it is clear to me that the deceased misjudged the speed and distance of the second appellant's vehicle and thereby contributed to the cause of the collision. I also agree with the percentage of apportionment of blame for the accident.

Dated at Nairobi this 19th Day of November 1976

S.W.W.WAMBUZI

……..…….

PRESIDENT

J.S. MUSOKE

……..……

Ag VICE-PRESIDENT

C.H.E. MILLER

……...…

JUDGE