REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E212 OF 2024

FRANK KENDAGOR ……..…….…. APPELLANT

- VERSUS -

ENOCK OKIOMA OMARI (Suing as the Legal Representative

& administrator of the estate of

MAKORO VALENTINE NYAMBEKI – DCD**) ……..… RESPONDENT**

(Being an appeal from the judgment and decree of Hon. M.N. Olonyi RM delivered on the 16/5/2024 in Tamu SPMCC No. E150 of 2023, Enock Okioma Omari (Suing as the Legal Representative & administrator of the estate of Makoro Valentine Nyambeki – DCD) v Frank Kendagor)

J U D G M E N T

1. The respondent filed the primary suit before the trial court vide a plaint dated **13/9/2024** for general damages and special damages as well as loss of consortium for the widower for fatal injuries to the deceased following a road traffic accident.

2. The appellant entered appearance and filed an amended statement of defence dated **28/3/2024** in which he denied the respondent's claim contending that the deceased was not an authorized passenger in the suit vehicle and further that he did not authorize the alleged driver to use the suit vehicle.

3. The matter proceeded to trial and by a judgment delivered on **16/5/2024,** the trial court decreed that: -

    a) Liability at 100% for the plaintiff against the defendant

    b) Pain and suffering - Kshs. 50,000/-

c) ***Loss of expectation - Kshs. 100,000/-***

d) ***Loss of dependency - Kshs. 4,798,134.40/-***

e) ***Special damages - Kshs. 140,000/-***

f) ***Total = Kshs. 5,088,134.40/- capped at Kshs. 5,000,000/- on pecuniary jurisdiction.***

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **18/10/2024** and raised six (6) grounds of appeal as follows: -

a) ***The learned trial magistrate erred in law and in fact in holding the appellant vicariously liable despite the overwhelming evidence adduced in court showing that the deceased driver was not acting as the appellant's servant when the accident occurred.***

b) ***That in arriving at his decision on liability, the learned trial magistrate erred in law in appreciating the meaning of the principle of vicarious liability and proceeded to hold the appellant liable for the negligent act of the deceased driver.***

c) ***The learned magistrate in assessing damages for loss of dependency, failed to take into account, the fact that the deceased's means of income had not been proved and as a result used a multiplicand which was not factual, resulting into an assessment that was inordinately high as to represent an entirely erroneous decision.***

d) ***That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct legal principles and judicial precedent and submissions by parties that he***

made an award under the Law Reform Act and Fatal Accidents Act, that was inordinately high hence an erroneous estimate of damages which the deceased and his estate suffered.

e) That the learned trial magistrate erred in fact and law by holding the appellant wholly liable for the accident without providing reasons and there not existing sufficient evidence establishing the appellant's negligence.

f) In arriving at his decision, the trial magistrate did so in a speculative and cursory manner not guided by law or any set of legal principles and failed to exercise his discretion within the applicable principles of law and the failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.

5. The appeal was disposed off by way of written submissions. The appellant submitted that, having observed that the deceased driver was not the appellant's agent and not acting in the course and scope for his engagement, the court erred in holding the appellant vicarious liable for the accident.

6. That he was not given notice of the Naivasha trip and further did not authorize the deceased to board the suit vehicle and further the vehicle was not being used for its purpose other than the deceased driver's benefit.

7. That the court erred in attributing negligence to the appellant simply because the suit vehicle was a Toyota Corolla with passengers' seats and there being no warning signs "No unauthorised passengers". Reliance was placed on the Court of Appel case of **BM Security Limited v Kibira & Another (Civil Appeal No. 12 of 2019) (2025 KECA 166 (KLR) 7th February 2025.**

8. On quantum, the appellant submitted that the multiplier of 20 years was excessive as the trial court failed to take into account the vagaries and vicissitudes of life whereas a multiplier of between 14 – 15 years would have been appropriate as was held in the cases of **HCCA No 182 of 2003, Nakuru Lotepa Njuguna Mwaura v Builders Dan Limited** & **Awale Transporters Limited v Dorcas Wamaitha Maina & Another (2021) eKLR**.

9. On the other hand, the respondent submitted that the accident being a self-involving accident, it was a classic case where the doctrine of *res ipsa loquitor* applies. Reliance was placed on the cases of **Sally Kibii & Another v Francis Ogaro [2012] eKLR**, **Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd & Another [2014] eKLR** & **Gachanja Thagana v Mwangi Wanjohi [2020] eKLR**.

10. That given the circumstances of the case, the owner of the suit vehicle was liable in negligence since he did not give rebuttal evidence against the allegations of a defective vehicle as pleaded by the respondent nor did he show that the negligence leading to the accident was that of the driver. Reliance was placed on the case of **Titus Kamau Gachanga v Wahogo Edward & Another [2019] eKLR**, **Paul Muthui Mwavu v Whitestone (K) LTD [2014] eKLR**.

11. On quantum, on loss of dependency, it was submitted that the multiplicand of 20 years as applied by the trial court was appropriate. Reliance was placed on the cases of **Evaline Chepkurui (Suing as the Legal Representative of the Estate of the Late Kiprotich Cheruiyot) v Stella**

Asuga & Another [2021] eKLR & **David Kahuruka Gitau & Another v Nancy Ann Waithithi Gitau [2016] eKLR**.

12. That the decision relied on by the appellant, ***Nakuru Lotepa Njuguna Mwaura supra*** was made in 2003 at a time when the retirement age was 55 years and not 60 years and thus the 17 years used as the multiplier in that case was appropriate.

13. This being a first appeal, the Court is duty bound to evaluate the evidence tendered before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

14. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

> ***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect."***

15. Before the trial court, the respondent testified as **Pw1**. He adopted his written statement dated **9/12/2023** as his evidence in chief. He testified that his wife died while coming back from Nairobi when she was given a ride by a colleague, which vehicle suddenly lost control, veered off the road and

collided onto a rock. That his wife called him on phone and informed him that they had gotten into an accident, how it occurred and that she was going to die. That immediately he heard people murmuring in the background one of whom informed him that his wife had died.

16. The appellant testified as **Dw1.** He adopted his witness statement dated **15/4/2024** as his evidence in chief. He testified that he was the registered owner of the suit vehicle registration number **KAV 222W** Toyota Corolla. That he bought the vehicle purposely for use at his rural home as a private car and entrusted his late brother, Wilfred Litei, with it for the said purpose.

17. That on **14/10/2023,** he learnt that his late brother had used the suit vehicle to travel to Naivasha for work and on his way back was involved in a road traffic accident which took his life. That he learnt that his late brother was carrying people who were not family members some of whom passed on and others sustained serious injuries. That his late brother's negligence on the day of accident, if at all, cannot therefore be linked to him. In cross-examination, he stated that he could not tell if the other occupants of the suit vehicle paid any fare.

18. From the foregoing, the grounds of appeal may be summarized into two as follows: -

    a) **That the trial court erred in apportioning liability at 100% against the appellant.**

    b) **That the trial court erred in accessing loss of dependency by using a multiplier that was excessive thus resulting into an award for loss of dependency that was excessive.**

19. On the issue of liability, it is evident from the record that there is no evidence as to what could have caused the suit vehicle to lose control on the material day. The evidence adduced only proves that an accident occurred. In the circumstances, this accident qualify for the application of the '***res ipsa loquitur'*** doctrine.

20. There are legions of authorities that have held that '***res ipsa loquitur***' does not have to be pleaded. In **Nandwa v Kenya Kazi Ltd, Civil Appeal No. 91/1987,** it was held that evidence is not to be pleaded. Also in **Bennet v Chemical Construction (GB) Ltd 3 All ER 822,** the court emphasized that:

> ***"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"***

21. The respondent pleaded in paragraph 6 of his amended plaint regarding the particulars of negligence of the appellant's driver, that the driver was driving a defective vehicle, at a speed which was excessive, failing to heed the presence of other road users.

22. In support of this allegation, the respondent testified that his wife called him immediately when the accident occurred and explained to him how the accident occurred. This was not controverted in the testimony offered by the appellant.

23. It is trite that, when careful drivers are driving vehicles that are not defective and are driving carefully at reasonable speed and with care and attention, they would not ordinarily lose control of the vehicles they are charged with. Where such loss of control occurs without any negligence on the part of a driver, the driver has to explain what led to such loss of control of the

vehicle and where no such evidence is forthcoming it must be presumed that the driver was negligent.

24. In **Samuel Mukunya Kamunge v John Mwangi Kamuru Nyeri HCCA No. 34 of 2002,** it was held that: -

> ***"Where the deceased was a passive passenger in the motor vehicle and the evidence adduced shows that the accident was caused by a tyre burst and that the driver lost control of the motor vehicle, without an explanation how the accident occurred, the evidence was sufficient to establish on a balance of probabilities that there was negligence on the part of the respondent's driver hence his inability to control the vehicle as a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the vehicle is being driven at a reasonable speed with due care and attention."***

25. It is clear that vehicles do not ordinarily lose control and veer off the road without any reasonable explanation. In this case, the respondent's wife was not the one in control of the vehicle and as was held in **Boniface Waiti & Another v Michael Kariuki Kamau [2007] eKLR**: -

> ***"It is now trite law that a passenger has no control over the manner of driving of a vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of the vehicle."***

26. It is thus clear that the driver of the suit vehicle was negligent for causing the accident that led to his own death as well as the death of the respondent's wife.

27. The question that follows is whether the appellant can thus be held liable for the actions of his deceased brother who was driving the suit vehicle.

28. The appellant contended that he bought the suit vehicle for private use at his home in Baringo and charged his brother, the deceased driver herein to use it for the said purposes. That on the date of the accident, he had not authorized his brother to use the car to travel to Naivasha or carry the said passengers.

29. On his part, the respondent agreed with the holding of the trial court that the appellant was vicariously liable for the actions of his late brother who was driving the suit vehicle on the date of the accident.

30. **Salmond on the Law of Torts 17th Edition at pg. 466** opines:

> ***"A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master's business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it."***

31. In **Muwonge v A.G. of Uganda [1967] EA** the court held inter alia that '*The master is exempted only when the servant was on his own business.'* While in **Selle & Another v Associated Motor Boats Co. Ltd*(supra)*** the circumstances under which an owner can be held liable for an agent's negligence were found to be that: -

> ***"Where, however a person delegates a task or duty to another, not a servant or employs another, not a servant, to do something for the benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the***

negligence of that other in the performance of the task, duty or act as the case may be."

32. Similarly, in **Joseph Cosmas K. v Gigi & Co. Ltd & Another Civil Appeal 119 of 1986 KLR** it was held: -

"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied on his instructions and was doing so in performance of the task or duty delegated to him by the owner."

33. On vicarious liability, the Court of Appeal in **Kaburi Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR** stated as follows: -

"Where the issue for determination was among others, what level of control over the negligence acts of person B who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the court of appeal held – vicariously liability arises when the tortuous act is done in the scope or during the course of one's employment."

34. The appellant's testimony was that he bought the car for private use at home and charged his brother, the late Wilfred Litei, with the use of the said vehicle. This points to the fact that, when the said brother used the car to go to Naivasha, he was using it for his private purpose as a member of the family. There was no evidence adduced by the appellant to show that his

deceased brother collected fare from the occupants of the suit vehicle as to signify that he was using the said vehicle for his own benefit and not for the use charged with by the appellant.

35. The respondent's wife was in no position to influence the negligent actions of the deceased driver. In **James Gikonyo Mwangi v DM (Minor Suing through his Mother and next Friend, (IMO) Civil Appeal 1 of 2012 [2016] eKLR,** the court stated that: -

> ***"The appellant and his driver did not furnish the court with any testimony to counter the allegations that he was negligent in the manner in which he drove managed or controlled the suit motor vehicle thereby allowing it to veer off its lane and ram into an oncoming motor vehicle.***
>
> ***In his defence filed in the lower court, the appellant alluded to the fact the respondent was guilty of contributory negligence. The respondent was a passenger in the suit motor vehicle and as such I find that there is no way that he could have caused or contributed to the said accident.***
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> ***Charlesworth and Percy on Negligence*** *states at page 1943-04 as follows on contributory negligence:*
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> ***"The expression contributory negligence … applies wholly to the conduct of the plaintiff. It means that there has been some act or omission on the plaintiff's part which has materially contributed to the damage."***

The appellant did not give any evidence to show how the respondent contributed to the suit motor vehicle veering off its lane and ramming into an oncoming vehicle. The version of PW1 on how the accident happened has not been contradicted by any other evidence. The respondent was a passenger in the appellant's motor vehicle and therefore the appellant's driver was primarily 100% responsible for his safety and the safety of the rest of the passengers in order to ensure that they arrived at their destinations safely."

36. All of this is to say that, this Court finds that the trial court did not err in apportioning liability at 100% against the appellant. It considered all the relevant factors and properly applied the doctrine of vicarious liability having come to the similar conclusion as I have that the appellant was vicariously liable for the actions of his deceased's driver.

37. I see no reason therefore to disturb the lower court's finding on liability. The position I've taken is one well settled by the law. In **Ephantus Mwangi & Geoffrey Nguyo Ngatia v Dancun Mwangi Wambugu [1982-88], KAR 278,** it was held, *inter-alia*, that an appellate court ought not to interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.

38. Turning to the issue of quantum, this Court notes that the appellant's quarrel with the trial court's judgment was on the multiplier adopted by the trial court in calculating the award for loss of dependency.

39. The jurisprudence on quantum reveals that an appellate court is always reluctant to interfere with a trial court's finding on any question of fact. It is

particularly reluctant to interfere with a finding on damages unless it is satisfied either that the trial court applied the wrong principle of the law by taking into account some irrelevant factor or leaving out of account some relevant one or short of this that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See**Joseph Ndirangu v Honourable The Attorney General Civil Appeal No. 83 of 1991 [1991] LLR 4925 (CAK).**

40. In **Kemfro Africa t/a Meru Express & Anor v A.M. Lubia & Another [1988] 1 KAR 727,** the Court of Appeal held that before interfering with an assessment of damages, the appeal court must be satisfied either that the trial court, in assessing damages, took into account an irrelevant factor, or left out of account of a relevant one, or that the amount is so inordinately low or so in inordinately high that it must be wholly erroneous estimate of the damage.

41. On appeal therefore, the appellant ought to effectively demonstrate with the provisions of law and fact that the trial court misdirected or partly or wholly took into account an irrelevant matter or ignored a relevant one in exercising discretion to award damages.

42. In the present case, the appellant submitted that the multiplier of 20 years was excessive as the trial court failed to take into account the vagaries and vicissitudes of life whereas a multiplier of between 14 – 15 years.

43. Conversely, the respondent urged the court to uphold the multiplier of 20 years adopted by the trial court which was appropriate.

44. I have looked at the cases cited. In **Pleasant View Limited v Rose Mutheu Kithoi & Another [2017] eKLR**, the court adopted a multiplier of 20 years for a 36 years old deceased person to calculate loss of dependency.

45. In light of vicissitudes of life, which are in the realm of unknown; bearing 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. And make an allowance of 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: the trial court did not err in adopting a multiplier of 20 years for the deceased who died at the age of 35 years. I reject the ground of appeal on multiplier.

46. Accordingly, I find the appeal to be without merit and dismiss the same with costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **28th** day of **November, 2025**.

A. MABEYA, FCI Arb

JUDGE