IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 270 OF 2016

BETWEEN

AMALGAMATED LOGISTICS

INTERNATIONAL LTD.....1ST APPELLANT

DENNIS NDWIGA.....2NDAPPELLANT

AND

MMK .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J,) dated 09th September, 2016

in

HCCC No. 238 of 2012)

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JUDGMENT OF THE COURT

Our judicial system first came into contact with this tragic case of road carnage when the respondent, **MMK** (M) filed a compensatory suit against the appellants at the High Court. The learned Judge weighed the evidence tendered and reflective of the grievous injury suffered, ruled in favour of Monicah and awarded her a total sum of **Ksh.17,722,004**. The appellants are appealing against the said decision.

The facts leading to the suit are that on 5th December 2010 along Nairobi – Limuru road, an accident occurred between motor vehicle registration number KAZ 084F (Toyota) and a truck with a trailer registration number KBJ 015Y/ZC 8935. The Toyota belonged to M's father JK (J). At the time of the accident, M was a lawful passenger in the Toyota and her father was behind the wheel. The Toyota had two other occupants namely; E, M's little brother whom she held in her arms and MN. They were all traveling from Limuru towards Nairobi. On the other hand, the 2nd appellant was a passenger in the truck on official duty from Kampala to Mombasa with a coffee consignment. It was averred that the driver carelessly and negligently drove the truck causing it to violently hit the Toyota from behind.

The negligence of the 2nd appellant was particularized in the Plaint as; driving without care and control; driving at an excessive speed; failing to keep a safe distance from the Toyota in complete violation of the Highway Code; ramming into the Toyota from behind and failing to slow down, swerve or make any attempt to avoid the said accident.

An unfortunate result of the accident was that E who was an infant aged 3 years passed away while undergoing treatment at the Kenyatta National Hospital. This led to an **INQUEST CASE NO. 7 OF 2013** (inquest) being conducted before the Kikuyu Senior Principal Magistrate's Court. M on the other hand suffered serious life-changing injuries that were particularized as fractures on the T4, T5, T6, and T7 of the thoracic vertebrae leading to total paralysis from the waist downwards. M was admitted to hospital where it was confirmed that she had suffered 100% disability. Consequently, she was confined to a wheelchair and will be in need of physiotherapy for the rest of her life, other incidental needs included a special bed that would require changing every ten years and life long use diapers, as she had also lost control over her bowel movement. It was further pleaded that with the magnitude of her injuries, a nurse was required to care for her on a daily basis.

At the time of the accident, M was a form three student at [Particulars Withheld]Secondary School. Despite her disabilities, she was able to sit for her Kenya Certificate of Secondary School Education in 2011 and managed to get a mean grade of C plain. It was pleaded that since

M had been rendered permanently incapacitated due to the injuries suffered, it would be difficult for her to get a job and therefore, lost her earning capacity. In her amended Plaint, M prayed for judgment against the appellants jointly and severally for;

(a) General damages for pain and suffering.

(b) Special damages of Kshs. 176,004

(c) Future medical and related expenses as tabulated in paragraph 5 (c) namely:

i) Diapers at the cost of Kshs.3,000 per month.

ii) Versatile wheel chair at the cost of Ksh.80,000 and at every five (5) years.

iii) A nurse at a monthly pay of Kshs.15,000 per month.

iv) A special bed at a cost of Ksh.150,000 and at every 10 years.

v) Physiotherapy sessions at Ksh.3,300 every month for, life

(d) General damages for loss of earning capacity

(e) Costs of the suit and interest on (a), (b), (c) and (d) at court rates

The appellants filed a joint amended Defence and denied the allegations in the Plaint *in toto*. They averred that the accident was solely caused by J and M. Monicah's negigence was particularized as follows; failing to adhere to the laid down Traffic Rules and Regulations while traveling; failing to put on a safety belt while traveling; wilfully and knowingly exposing herself to harm while travelling; and failing to take due care and attention while traveling as a passenger.

The finger of blame was pointed at Jackson for failing to observe and/or adhere to the laid down Traffic Rules and Regulations while traveling; wilfully and knowingly exposing himself and other road users to reasonably foreseeable risks of harm and injury; being absent-minded while driving; driving a defective motor vehicle; failing to indicate to other road users, in particular the truck, in time or at all, his intention to slow down on a busy road; and bringing the Toyota to a sudden halt without indicating or giving any warning signals to other motor vehicles and in particular the truck hence causing the accident. The appellants sought the dismissal of the suit with costs.

At the hearing of the suit J, PW2, testified that upon realizing that he had a puncture, he slowed down, indicated, and started moving towards the side of the road, in order to change the tyre. In an instant, the Toyota was violently hit from behind and subsequently overturned, rolling twice. It veered off the road and fell on the left-hand side. He confirmed that M was seated on the back seat cuddling Emmanuel on the lap, while MN, his sister sat on the front passenger seat. He denied having hit the truck from behind. Significantly, Jackson stated that he was threatened and forced to sign a statement that stated he was to blame for the accident.

The 2nd appellant testified as the first defence witness (DW1). He stated that the Toyota hit the rear wheels of the truck, veered off the road and overturned. Contrarily, he stated that there was damage on the stairs leading to the cabin of the prime mover. He also claimed that he was the turn boy of the truck, and not its driver. He stated that the driver's name was Daudi Kimutai who had since left the employment of the 1st appellant. In further contradiction, he claimed, in cross-examination, that the Toyota hit the left-hand side cabin staircase of the truck.

After the hearing, Sergon, J. considered the matter before him and delivered a judgment on 9th September 2016. The learned Judge held that since the appellants did not deem it fit to join Jackson in the suit, he could not apportion liability against a stranger who was not a party to the suit. In the end, he found the appellants wholly liable for the accident. On quantum, the learned Judge applied a multiplier of 35 to calculate the amount payable under the head of loss of earning capacity, future medical expenses, and other related costs save for diapers for which he used a multiplier of 25. The judgment was entered against the appellants as follows;

i. General damages for pain and suffering Ksh. 6,000,000

ii. Damages for loss of earning capacity Ksh. 4,200,000

iii. Special damage Ksh. 176,004

iv. Future medical and other related costs

a. Diapers Ksh. 900,000

b. Wheelchair Ksh. 560,000

c. Nursing care Ksh. 4,200,000

d. Special bed Ksh. 300,000

e. Physiotherapy ***Ksh. 1,386,000***

Net total ***Ksh.17,722,004***

Aggrieved by the judgment, the appellants challenge it on six grounds which can be condensed as the learned Judge erred in law and fact by;

a) Assessing the damages at Kshs. 17,722,004 and finding the appellants jointly and wholly liable.

b) Holding the 2nd appellant liable for the accident while he was not the driver.

c) Awarding a manifestly excessive quantum of damages not commensurate with the nature of injuries suffered and/loss proved.

d) Misdirecting himself by relying on the wrong principles of law and failing to be guided by similar relevant authorities.

When the appeal came up for hearing, learned Counsel **Mrs Chirchir** appeared for the respondent. Even though there was no appearance for the appellants, we did note that their submissions had been filed we have duly and carefully considered them.

It was submitted on behalf of the appellants that the learned judge erred in holding that they were jointly and severally liable for the accident and the consequent apportionment of a 100% liability. It was written that the learned Judge arrived at this finding despite contrary evidence adduced in court. This included the evidence of the Police Constable who testified as PW3, and later as DW2, confirming categorically that the Toyota was solely to blame for the accident. This evidence was disregarded by the learned Judge yet the same was expert evidence. The said testimony was corroborated by the police abstract and the occurrence book details. The learned Judge had no basis to doubt the said testimony.

Further, it was contended that the learned Judge did not give sufficient reasons for disregarding such cogent evidence relying instead on the findings of the inquest. Moreover, the inquest proceedings clearly indicated one David Mignui (David) as the driver of the truck, hence the 2nd appellant was erroneously sued. In consequence the suit against the 1st appellant, which was based on vicarious liability for the actions of the 2nd appellant, could not stand since the latter was clearly not the tortfeasor.

As the appellants were not culpable, they were not obligated to take out 3rd party proceedings, as it would have amounted to an academic exercise. The case of **SKY SECURITY SERVICES V ISAAC KIIRU KING'ORI [2016] eKLR** was relied on to urge this Court was urged to find that the 2nd appellant was wrongly sued and thus absolve the 1st appellant from culpability.

It was that the sum of Kshs. 17,722,004 as awarded by the court was grossly higher than what was awarded by other courts in comparable cases contrary to settled principles espoused in **WEST (HI) & SONS LIMITED V SHEPHERD (1964) AC326**. The appellants proposed their version of a reasonable award on quantum, based on comparable cases as follows;

a) General Damages at Kshs. 2,500,00

b) Future medical & other ancillary expenses

i) Diapers: Kshs. 2,000 * 12 * 25 = Kshs. 600,000

ii) Versatile wheelchair: Kshs. 80,000 * 5 = Kshs. 400,000

iii) Nursing care: Kshs. 8,000 * 12 * 25 = Kshs. 2,400,000

iv) Special bed: Kshs. 100,000 * 25/10 = Kshs. 250,000

c) General Damages for loss of earning capacity: Kshs. 10,000 * 12 * 25 = Kshs. 3,000,000

The appellants intimidated that they had no dispute with the award given as Special Damages but urged this Court to dismiss the suit against the appellants with costs.

In opposition, **Mrs. Chirchir** opined that the learned Judge did not err in his judgment as that there was sufficient evidence before the court to justify findings. She defended the learned Judge's non-reliance on the Police Constable's investigation since the rest of the evidence pointed towards a different direction. She posed the pertinent question of why the police would refer the matter to an inquest if at all their investigations were conclusive. In any case, the said inquest found the driver of the truck liable for the accident and recommended his prosecution.

Counsel further submitted that the reports made by Samuel Ongware, **PW1**, and Festus Sinago, **DW4** both indicated that the Toyota was hit from the rear, based on the impact points on both vehicles. This was consistent with and corroborated the evidence of M and Jackson. It was submitted that the learned Judge did not err in doubting the credibility of the 2nd appellant who gave contradicting evidence.

On liability, it was submitted that it is immaterial whether the 2nd appellant was the driver since the 1st appellant's truck was transporting coffee from Uganda to Kenya when the accident occurred. It was also stated by DW1 and DW3 that the truck was on official duty. At any

rate the vicarious liability of the 2nd appellant was never contested during the hearing of the matter.

It was submitted that the damages awarded were commensurate with the injuries suffered and the loss incurred by the respondent. Given fact that the respondent was disabled at a very young age, the bulk of the **Kshs. 17,922,044** will go towards making her daily life as comfortable as it can possibly be in the circumstances.

This being a first appeal, we are mandated to re-evaluate, re-assess, and re-analyze the entire record and determine whether the conclusions reached by the learned trial Judge are to stand or fall.

We recall the holding in **PETERS VS. SUNDAY POST LIMITED [1958] EA 424**;

> ***"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."***
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> See **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES V JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** and **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123].**

Having considered the appeal and the opposing submissions, we see the trio issues for determination; as whether the appellants were liable for the accident; whether the 100% liability as apportioned was just; and whether the resultant award was excessive.

The appellants contended that since the 2nd appellant was not the tortfeasor in the matter, the 1st appellant could not be held vicariously liable for actions not committed by him, rendering the entire suit which was hinged on the negligence of the unsued David unviable. We have to explore whether or not that oversight by the respondent rendered the suit unmeritorious.

Vicarious liability has been well elucidated in **Salmond on Torts**, 1st ed at Pg 83 as;

> ***"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master."***

This Court in **JOSEPH COSMAS KHAYIGILA V GIGI & CO. LTD & ANOTHER, Civil Appeal No. 119 of 1986** established a clear test for vicarious liability as follows:-

> ***"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 on the owner's behalf 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 or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."***

In the case at bar, it is not disputed that David was driving the vehicle on the 1st respondent's instructions. Together with the 2nd respondent, he was delivering a consignment of coffee from Kampala to Mombasa as employees of the 1st respondent. The driver's negligence in handling the truck occurred in the course of his duties as an employee and/or authorized agent of the 1st respondent. This invariably makes the 1st respondent vicariously liable for the acts and omissions occasioned, hence accident and the consequences thereof. See **TEACHERS SERVICE COMMISSION V WJ & 5 OTHERS [2020] eKLR**. The contention by the 1st respondent that since David was not sued, it could not be held liable for his actions does not hold water. Irrespective of the parties to a suit, so long as there exists of a master-servant relationship, the master is vicariously liable for the actions/omissions of the servant. See **KENYA BUS SERVICES LTD V DINA KAWIRA HUMPHREY [2003] eKLR**. In any case, the fact that David was not sued does not invalidate or obliterate his tortious actions which must attach to the 1st respondent. We, find that this ground has no merit.

On apportionment of liability, the appellants complain that the learned Judge erred in holding them to be 100% blameworthy. The appellants' perception is that this erroneous holding was arrived at due to the learned Judge's failure to take into account what they termed *"the expert testimony"* of DW2, the Police Constable, and other corroborative evidence.

From the judgment, it is clear that the learned Judge was persuaded by the findings of the inquest and relied on the same to determine the events that occurred leading to the accident. He held that the truck indeed hit the Toyota from behind and that the alleged tyre burst that was blamed for the accident did not happen.

We have perused the record of appeal and are inclined to agree with the finding of the learned Judge. We acknowledge that the Police Constable testified in his capacity as an 'expert' on traffic matters. However, his finding that the Toyota was to blame for the accident as it had a tyre burst which caused it to ram into the truck, was untenable. It was nullified by the investigation report produced by Samuel Ongware, PW1 which indicated that the Toyota was hit from the rear, based on the impact on both vehicles. Moreover, the testimony of Festus Sinago, **DW4** that the truck did not have any damage on its rear, put paid to the suggestion that the truck was hit from behind. Further, the testimony of the 2nd respondent, who stated that the Toyota hit the truck from behind then stated in cross-examination that the Toyota hit the left side cabin of the truck.

This was noted by the learned judge who concluded that he was not a credible witness, we concur with the finding of the judge. The said contradiction goes to affirm, the true version of events that the truck is the one that caused the accident. The learned Judge was properly persuaded by the finding of the inquest that recommended the prosecution of the driver who was found him wholly to blame for the accident.

The evidence of the Police Constable, despite his expertise on the matter, was not binding on the trial court and in establishing facts from all the evidence on record. See **EQUATOR DISTRIBUTORS V JOEL MURIU & 3 OTHERS [2018] eKLR**.

On liability, the learned Judge held as follows;

> ***"The evidence tendered by the defence seem to suggest that they intended to enjoin the owner of motor vehicle registration no. KAZ 084F as a party to this suit. The defendants did not deem it fit to do so. Therefore in the absence of such an enjoinder this court cannot make any finding apportioning liability against a party who is not a party to this suit."***

He proceeded to find the appellants 100% liable for the accident. The appellants desired that some liability be apportioned to David as well, yet he was not a party to the suit. The appellants offered the rather lame excuse for not joining him; that since the driver had not been sued, he could not be held vicariously liable for his actions.

Since the appellants deliberately elected not to enjoin David, when they had the right to do so, they cannot be heard to complain about the finding on liability yet the same was partly arrived at because of their inaction. In any case, it is trite that a suit cannot be defeated only by reason of a non-joinder. We reiterate the holding of this Court in **ATTORNEY GENERAL V KENYA BUREAU OF STANDARDS & ANOTHER [2018] eKLR**;

> ***"We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned."***

On quantum, this Court is conscious that an appellate court should not substitute the views of the trial court with its own simply because it is hieratically higher, and or powerful. See **BOARD OF GOVERNORS OF KANGUBIRI GIRLS HIGH SCHOOL & ANOTHER V JANE WANJIKU MURIITHI & ANOTHER [2014] eKLR**.

We have carefully considered the award given by the learned Judge and find it faultless save for the use of the multiplier of 35. The instant matter is very unfortunate and Monicah was a young girl with big dreams. Deferred or altogether shattered. Nonetheless, justice must be applied to all parties equally, as we shall do shortly.

Since M was 17 years old at the time of the accident, all we can do is speculate about how her life is going to be adversely affected by the accident. It is not entirely uncommon for people who have survived adversity to go on to succeed in areas that they would not have considered, were it not for their tragedy. We hope that is the true position for M and prayer is that M have a quality, bright and successful life God willing. Considering all those uncertain and unforeseen variables of the future, and doing the best we can, we set aside the multiplier of 35 applied by the learned Judge and reduce it to 30, without a lot of pain and sympathy.

Ultimately, this appeal partly succeeds only to the extent of the reduction of the multiplier. We, therefore, amend the award as follows;

a) General damages for pain and suffering Ksh. 6,000,000

b) Damages for loss of earning capacity Sh. 10,000 x 12 x 30 Ksh. 3,600,000

c) Special damages Ksh. 176,004

d) Future medical and other related costs

i) Diapers Sh. 3,000 x 12 x 30 Ksh 1,080,000

ii) Wheel chair Sh. 80,000 x 6 Ksh. 480,000

iii) Nursing care Sh.10,000 x 12 x 30 Ksh. 3,600,000

iv) Special bed Sh. 100,000 x 3 Ksh. 300,000

v) Physiotherapy Sh. 3,333 x 12 x 30 Ksh. 1,188,000

Net total Ksh.**16,424,004**

The appellants shall pay to respondent the costs of the suit and half of the costs of this appeal.

Dated and delivered at Nairobi this 24th day of July, 2020.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR