IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 42 OF 2016

BETWEEN

CHABHADIYA VISRAM.......................................APPELLANT

AND

AGNES NAFULA WAKOLI...............................RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kitale (J. R. Karanja, J.) dated 26th May, 2015

in

CIVIL APPEAL NO. 21 OF 2010)

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JUDGMENT OF THE COURT

[1] This appeal originates from a suit that was filed in the Chief Magistrate's Court at Kitale, by the respondent herein Agnes Nafula Wakoli, who was suing in her capacity as the administrator of the estate of the late Maurice Werunga Wakoli (deceased). She had sought general and special damages from Chabhadiya Visram, the appellant herein on account of general and special damages under the Fatal Accidents Act and the Law Reform Act, arising from the death of the deceased as a result of a road traffic accident caused by the negligence and or breach of statutory duty on the part of the appellant and or his driver in the management and control of motor vehicle KAR 043Y.

[2] The appellant filed a defence in which he specifically denied owning the motor vehicle or that it was involved in an accident, and in the alternative pleaded that if there was an accident then the same was caused by the negligence of the deceased. During the hearing of the suit, the respondent called three (3) witnesses, whose evidence was that there was a fatal accident in which the deceased was knocked down by motor vehicle KAR 043Y, and that at the time of the accident, the motor vehicle was being driven at high speed. Initially, the appellant objected to the production of a police abstract report of the accident, but later, the police abstract report was by consent produced in evidence without calling the maker. At the close of the respondent's case, the appellant did not call any evidence. However, both parties filed written submissions urging the court to find in their favour.

[3] In her judgment, the trial magistrate found contradictions in the police abstract report and on that basis, found the respondent's case not proved and dismissed the suit.

[4] Being aggrieved, the respondent appealed to the High Court contending, *inter alia*, that the trial magistrate erred in failing to take into account the totality of the evidence before her; and in failing to take into account that the defence did not adduce any evidence to dispute the evidence of the respondent.

[5] Upon hearing the appeal, the learned judge of the High Court (J. R. Karanja J), found that on the evidence that was adduced before the trial magistrate, the occurrence of the accident and the ownership of the material vehicle were not substantially disputed, and that the police abstract report which was admitted in evidence showed that the appellant was the owner of the vehicle. The learned judge therefore allowed the appeal, set aside the judgment of the Chief Magistrate and gave judgment for the respondent with damages assessed at a global figure of Kshs. 500,000/= for loss of dependency, Kshs. 100,000/= loss of expectation of life, Kshs. 20,000/= for pain and suffering, and Kshs.3,900/= as special damages.

[6] The appellant is now before us in this second appeal, in which he contends, *inter alia*, that the learned judge of the first appellate court erred in finding that the respondent had proved her case; in finding the appellant 100% liable for the occurrence of the accident; in finding that the appellant was the legal owner of the subject vehicle; in accepting and taking the contents of the police abstract report as conclusive evidence of ownership; and in applying the wrong principles in the assessment of damages. Hearing of the appeal proceeded by way of written damages that were duly highlighted by the parties' counsel.

[7] In the submissions, the appellant identified the issues for determination in this appeal as proof of ownership of the subject vehicle; whether negligence was established against the appellant and whether damages were properly awarded. On the issue of the ownership of subject vehicle, it was submitted that proof of ownership of a motor vehicle unless admitted by pleadings or evidence must be by way of production of a certificate of search from the Registrar of Motor Vehicles and that a police abstract was not sufficient for this purpose. In this regard, reliance was placed on **Thuranira Karauri vs Agnes Ncheche [1997] eKLR.**

[8] On the issue of negligence, it was submitted that the learned judge relied on erroneous findings that the appellant was the owner of the subject vehicle; that the appellant was vicariously liable for the acts of his driver; and that the driver was reckless in the manner of driving. It was submitted that the respondent had not pleaded vicarious liability and it was therefore wrong for the learned judge to make a determination in this regard as parties are bound by their pleadings. It was reiterated that the trial magistrate was right in finding the respondent's case not proved as there were many glaring contradictions and inconstancies in the respondent's evidence.

[9] In regard to damages, it was submitted that although the respondent prayed for damages under the Law Reform Act, and Fatal Accidents Act, the respondent did not prove that she was entitled to the damages sought. This was because she did not prove the income of the deceased or adduce any evidence in this regard such as to justify the award of damages to compensate the estate and the dependants of the deceased for their loss.

[10] On her part, the respondent maintained that proof of ownership of the subject motor vehicle at the trial was required to be done on a balance of probability which was attained by the production of the police abstract in court. That this report having been admitted by consent of both parties and no evidence having been offered to counter or challenge it, the learned judge of the first appellate court was right in relying on the same. In this regard, this Court's decision in **Joel Muga Opija vs East African Seafoods Limited [2013] eKLR,** was relied upon.

[11] In regard to the issue of liability, the respondent relied on **Pritoo vs West Nile District Administration [1968] EA 428;** and **Karissa vs Solanki [1969] EA 318,** for the proposition that where it is proved that a car caused damage by negligence, in the absence of evidence to the contrary, a presumption arises that it was driven by the person for whose negligence the owner is liable. The respondent maintained that the evidence adduced established that the subject vehicle was involved in an accident, and that it was at the time being driven negligently, and this having not been denied, the appellant was 100% liable.

[12] Finally, on assessment of damages, the respondent cited, **Bonham Gata vs Hyded Park Limited [1948] 64 TL 177** in which the judge declined to apply the multiplier approach as no evidence was adduced regarding the deceased's monthly earnings. The respondent argued that a global award approach under the Fatal Accidents Act for loss of dependency was proper and the amounts awarded were reasonable.

[13] We have carefully considered this appeal, the submissions made before us and the authorities cited. We take note that this is a second appeal, and therefore, our jurisdiction is limited to considering matters of law with the caveat expressed by Onyango-Otieno JA in **Kenya Breweries Limited vs Godfrey Odoyo [2010] eKLR,** that:

> ***"this Court, on second appeal confines itself to matters of law only unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

[14] The parties herein appear to be in agreement that the issues in this appeal are whether the learned judge of the first appellate court erred in accepting a police abstract report as proof of ownership of the subject vehicle. Whether the learned judge was right in finding the appellant vicariously liable, and finally, whether he was right in his assessment of damages. We note that these are matters that involve conclusions of law arrived at by the first appellate court as a result of re-evaluating the evidence that was adduced in the trial court. In this regard, this Court has the jurisdiction to determine whether the first appellate court took into account matters they should have considered and whether the conclusions arrived at were proper.

[15] In regard to the ownership of the motor vehicle, the learned judge having analyzed and evaluated the evidence that was before the trial magistrate, found that the occurrence of the accident and the ownership of the motor vehicle were factors that were not substantially disputed. He concluded that proof of ownership of the subject motor vehicle was achieved through the production of the police abstract report.

[16] We have considered the position taken by the appellant, that ownership of the subject vehicle could only be proved through the production of a certificate of search from the Registrar of Motor Vehicles. In this regard, we can do no more than reproduce what this Court stated in **Joel Muga Opija vs East African Seafood Limited [2013] eKLR,** where a similar submission was made.

> ***"We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."***

[17] The police abstract report having been produced in evidence by consent of both parties, and the appellant not having adduced any evidence to challenge the abstract report, the abstract was sufficient to establish that the appellant was the owner of the subject vehicle.

[18] As regards the issue of vicarious liability, although the respondent's claim as pleaded, was not perfect, at paragraph 8 of the plaint, the respondent pleaded that her claim was against *"the defendant jointly and severally."* In the police abstract that was produced in evidence by both parties, the appellant was indicated as the owner of the subject vehicle, while David Shimani Chanzu, was indicated as the driver. The evidence of the respondent's eye witness, was to the effect, that the appellant's motor vehicle was being driven very fast, and that it knocked the deceased who was on the side of the road. This evidence was not challenged or contradicted by the appellant. In the circumstances, there was sufficient evidence upon which negligence was established and vicarious liability could be inferred. We are satisfied that the matters taken into account by the learned judge were matters that were relevant to the issues before him and his conclusion cannot be faulted. The assessment

of liability, was a matter of discretion based on the evidence and we do not find any justification to interfere.

[19] On the assessment of damages, the evidence was that the deceased was a trader with an income which he used to maintain his family including paying school fees for his children. Although there was no specific evidence adduced regarding the actual amount of income, it was open to the learned judge given the evidence that was available, to assess the amount of damages doing the best that he could. We are not persuaded that the approach of a global award as adopted by the learned judge was wrong. We find the awards made reasonable and have no reason to interfere.

[20] The upshot of the above, is that we find no merit in this appeal and do therefore dismiss it with costs.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 17th day of January, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.