IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH

OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 48 OF 2015

BETWEEN

DOINYO LESSOS CREAMERIES LTD.....APPELLANT

VERSUS

ELIZABETH ANGIRA CHAKA (Suing as Personal

Representative of the Estate of ALICE KHAKOBI OTIATO...RESPONDENT

(Being an appeal from the Judgment and Decree at Kitale

by (J. R. Karanja, J.) dated 23rd of May, 2013

in

Kitale Civil Appeal No. 33 of 2011)

****

JUDGMENT OF THE COURT

Background

[1] This is an appeal by **Doinyo Lessos Creameries Ltd** (the appellant) against the Judgment of the High Court (J. R. Karanja, J.) who found in favour of **Elizabeth Angira Chaka,** (the respondent) (Suing as Personal Representative of the Estate of **ALICE KHAKOBI OTIATO)**. The learned Judge ordered the appellant to pay the respondent the sum of Kshs.1,435,000/= as damages for loss of expectation of life, pain and suffering lost years and funeral expenses together with costs and interest.

[2] The brief background of the appeal as can be gleaned from the amended plaint filed on 10th December, 2004 is that on 22nd November, 2001 at about 7:30 a.m, **Alice Khakobi Otiato** (the deceased), was cycling along Kisawai - Kitale road; that as she approached the Wildlife Offices at Kitale, along the same road, motor vehicle registration number KXD 362 Nissan Lorry, registered in the appellant's name which was being negligently, recklessly and carelessly driven by the appellant's agent or employee, veered off the road and knocked down the deceased causing her fatal injuries.

[3] Ms. Elizabeth Angira Chaka (the respondent herein), the mother and personal representative of the deceased, filed **High Court Civil Suit No. R6 of 2002** before the High Court seeking damages under the Law Reform Act and the Fatal Accidents Act, special damages and costs of the suit plus interest arising from the death of the deceased. In its amended defence filed on 12th January, 2005, the appellant denied the claim and ownership of the motor vehicle and the alleged circumstances leading to the occurrence of the said accident. In the alternative, the appellant pleaded contributory negligence on the part of the deceased.

[4] Subsequently, vide a Notice of Motion filed on 6th February, 2007, the respondent successfully applied for transfer of the suit from the High Court to the Kitale Senior Principal Magistrate's Court for trial and final disposal on grounds of enhancement of the pecuniary jurisdiction of the Senior Principal Magistrate. Following the transfer, the suit, registered as ***Chief Magistrate's Court Civil Case No. 99 of***

2007, was heard and determined by the Senior Principal Magistrate (**Hon.Chepseba**).

[5] The respondent testified at the trial and produced documentary evidence in support of her claim and called three (3) witnesses in support of her claim including, **Eliud Wamalwa (Eliud)**, who testified that he witnessed the accident; that the motor vehicle was being driven at high speed at the time of the accident; that the motor vehicle veered off the road and hit the deceased who was riding a bicycle and threw her into a ditch. **Senior Sgt Peter Munene (Peter)**, a police officer who testified that the accident was reported to the police and that a police abstract was issued and **Johnstone Nyongesa (Johnstone),** a teacher at the school where the deceased had been a student who produced her report cards to prove that she had been a very promising student.

[6] The appellant did not call any witnesses in support of its defence. The learned trial magistrate found that the respondent failed to prove liability on the part of the appellant on the ground that vicarious liability was not specifically pleaded and that the driver of the motor vehicle was not enjoined in the suit as a defendant. The learned Magistrate dismissed the suit and stated as follows;-

> ***"Had the plaintiff (the respondent herein) proved liability, I would have apportioned damages as follows …:***
>
> **(1) Loss of expectation of life Kshs. 100,000/=**
>
> **(2) Pain and suffering Kshs. 20,000/=**
>
> **(3) Lost years Kshs. 1,280,000/=**
>
> **(4) Funeral Expenses Kshs. 35,000/=**
>
> **Total award Kshs. 1,435,000/=**
>
> **==========**
>
> ***…This would have been awarded plus costs and interest of the suit on General damages from the date of Judgment and on the special damages from the date of filing suit. However due to lack of proved liability against the defendant as above discussed, the suit is dismissed with costs to the defendant."***

[7] Aggrieved by that decision, the respondent filed an Appeal to the High Court (J. R. Karanja, J.) The appellant was also dissatisfied with the findings of the trial court on the quantum of damages and filed its cross appeal on 7th July, 2011. On 23rd May, 2013, the learned Judge delivered his judgment, and found that the learned magistrate had erred in law by dismissing the suit and finding that the respondent had failed to establish liability on the part of the appellant; that the respondent's failure to enjoin the appellant's driver and to plead vicarious liability were not fatal to the respondent's claim. The learned judge found that the deceased was seventeen (17) years old at the time of her death and was a dependant of the parents and not *vice versa*; that the parents of the deceased hoped to depend on her financially in future upon completion of her studies but due to the accident, the prospects of the parents of the deceased receiving financial assistance from the deceased were extinguished. Based on the foregoing reasons, the learned judge held that the damages awarded would be in terms of lost years under the Law Reform Act. The learned judge found that the award proposed by the learned trial magistrate for lost years, loss of expectation of life and for pain and suffering was lawful and reasonable and upheld the award of damages as proposed by the learned trial magistrate had she found the appellant liable

The learned judge found as follows;-

> **"This Court would find against the respondent on liability at 100%... In sum, as far as quantum of damages is concerned, this Court has no reason to disagree with the proposals made by the learned trial magistrate even as she dismissed the appellant's entire suit. The entire award of damages by the learned trial magistrate is hereby upheld with the result that judgment be and is hereby for the appellant against the respondent in the total sum of Kshs.1,435,000/= together with costs and interest. The appeal by the appellant is thus allowed while the cross-appeal by the respondent is dismissed. The appellant shall be awarded the costs of the appeal."**

[8] Aggrieved by the award and the finding on liability, the appellant preferred this Appeal on four grounds namely; that the learned judge erred in law and fact:

> **1. In finding the award proposed by the learned trial magistrate fit and reasonable in the circumstances.**
>
> **2. In failing to carefully consider the loopholes in the Plaintiff's evidence.**
>
> **3. In apportioning vicarious liability to the Appellant yet the same was not pleaded and the driver of the motor vehicle involved in the alleged accident was not enjoined in the suit as Defendant.**
>
> **4. In approximating that the deceased would have spent 2/3 of her salary on her parents for about 20 years yet she would have been married and they would not have expected maintenance from her for more than about 15 years.**

The appellant sought the following orders:

(i) That this appeal be allowed, and the judgment and decree of the High Court awarding the respondent damages and dismissing the defendant's cross-appeal be set aside.

(ii) That the appellant be awarded costs of this appeal.

Submissions by Counsel

[9] At the hearing both parties were represented by counsel. **Ms R. Ruto** represented the appellant while **Ms Nekesa** represented the respondent. **Ms. Ruto**, counsel for the appellant submitted that the respondent did not plead vicarious liability on the part of the appellant; that parties are bound by their pleadings and that the learned judge erred in disregarding this principle of law; that it is not the duty of the court in an adversarial system to aid parties by awarding damages for claims not pleaded. Counsel for the appellant further submitted that the dependency ratio of Two Thirds (2/3) used by the magistrate was unreasonably high as it would be unreasonable to expect the deceased to have supported her parents with 2/3 of her salary; that the multiplier of 20 years was too high as it was unreasonable to expect a child to support her parents for that long; that there was duplication of damages in terms of lost years and loss of expectation of life. Counsel urged us to allow the appeal.

[10] Ms. Nekesa relied on their written submissions and submitted that it is not fatal if a driver is not enjoined to the suit. The respondent supported his submission in this regard, with the finding of this Court in the case of ***Ndungu v. Coast Bus Company Limited [2000] 2 EA 462 (Samuel Gikuri Ndungu's case)*** where this Court held that:-

> ***"The mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employees' liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya, J. that the non-joinder of the driver in an action as the one which gave rise to this appeal renders the suit incompetent."***

Counsel further submitted that the learned judge applied the correct principles in arriving at the award of damages and that the award was modest, reasonable and consistent taking into account the academic performance of the deceased; that the appellant has not demonstrated to this Court that the award is so high as to warrant interference; and that there was no duplication of awards. Counsel urged us to dismiss the appeal.

Determination

[11] We have considered the record, the submissions, the authorities cited and the law. This is a second appeal from the decision of the High Court in its appellate jurisdiction. As such, it lies on issues of law only under Section 72 of the Civil Procedure Act which provides as follows:

> ***"72 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-***
>
> ***(a) The decision being contrary to law or to some usage or having the force of law;***
>
> ***(b) The decision having failed to determine some material issue of law or usage having the force of law;***
>
> ***(c) A substantial error or defect in the procedure provided by this Act of by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***
>
> ***(2) An appeal may lie under this section from an appellate decree passed ex parte."***

[12] As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

In **Stanley Maore & Geofrey Mwenda at Nyeri Civil Appeal No.147 of 2002** this Court relied on the authority of **Kenfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88) 1 KAR 727** and stated as follows:

> ***"The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."*** *(Emphasis added).*

In the instant case, three witnesses testified and produced documentary evidence in support of the respondent's claim. The respondent testified and produced the police abstract report on the accident and receipts in respect of expenses incurred in the burial of the deceased. **Eliud** testified that he witnessed the accident; that the accident was caused by the negligent and reckless manner in which the motor vehicle was driven and that the motor vehicle was at high speed at the time of the accident. On liability, the learned Judge found that there was sufficient evidence that the accident was wholly attributable to the negligent and reckless manner in which the vehicle was driven when it veered off its path and knocked down the deceased cyclist who was riding on her correct path. The appellant did not adduce any evidence to

prove that the deceased in any way contributed to the accident

[13] On the issue whether the owner of a motor vehicle may be found liable for vicarious liability where the driver of the motor vehicle is not enjoined in the suit as a defendant, this Court has found that an owner of a motor vehicle may be found liable for vicarious liability even where the driver of the motor vehicle is not enjoined in the suit. We are guided by the case of **Mwonia vs Kakuzi Limited (1982 – 88) 1 KR 525** where this Court stated as follows:-

> ***"From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in the damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings, and of the claim. Vicarious liability of the employer is not pegged on the employee's liability but to his negligence."***

(See also Samuel Gikuri Ndungu's case (supra))

[14] In ***Lake F*lowers Vs. Cila Francklyn Onyango Ngonga & another [2008] eKLR** this Court held that:

> ***"We agree with the Appellants complaint both in the Memorandum of Appeal and the submissions before us that vicarious liability was not pleaded in the plaint and that the driver of the Mitsubishi Canter was not joined as a party to the proceedings in the superior court. However, it is our view that failure to sue the Appellant's driver and the omission by the 1st Respondent to directly refer to the Appellant's liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the necessary primary facts were pleaded and evidence led to show the owner of the Mitsubishi canter and from whom vicarious liability can be inferred as a matter of law. And as was put in Dritoo-vs-West Nile District Administration {1968} E.A. 428: Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner responsible."***

[15] In the instant appeal, it is clear from the record that the respondent pleaded the particulars of negligence and proffered sufficient evidence that the accident was caused by the negligence of the driver of the motor vehicle. The learned Judge found, correctly in our view, that the failure to enjoin the appellant's driver and/or agent and failure on the part of the appellant to plead vicarious liability was not fatal to the respondent's claim.

[16] On the quantum of damages, the learned Judge found that the appellant was entitled to special damages and general damages in terms of loss of life expectation, loss of dependency, and pain and suffering. A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

Lord Goddard, CJ in the case of **Senham Carler Vs. Hyde Park Limited [1948] 64 JLR 177** stated:

> ***"…. Plaintiffs must understand that if they bring a document for damages, it is not enough to write particulars and so to speak, throw them at the Court saying this is what I have lost, I ask you to give these damages they have to be proved".***

[17] In the instant case the respondent produced receipts relating to the burial of the deceased and the learned Judge found, correctly in our view that the respondent was entitled to the proven special damages.

[18] On the claim for loss of dependency, it was the appellant's submission that the learned Judge erred in approximating that the deceased would spend two thirds (2/3) of her salary on her parents for about 20 years whereas they would not expect to receive maintenance from her for more than 15 years as she was likely to be married within that time.

*In assessing loss of dependency, the following factors are important; the age of the deceased, the fact that she was doing well in school as evidenced by her good report card (produced by her teacher, **Johnstone**), and had prospects to finish school and assist her parents; and the extent of dependency, life expectation and other vicissitudes of life. We are guided by the case of* **Kenya Breweries Limited Vs. Saro [1991] eKLR Mombasa Civil Appeal No. 144 of 1990 *(eKLR)*** where this Court rendered itself thus:

> ***"We would respectively agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law".***

[19] On the issue of lost years, we are further guided by the case of Sheikh **Mushtaq Hassan V. Nathan Mwangi Kamau Transporters & 4 others [1986] KLR 457** where one of the considerations this Court put forth in assessing the award recoverable for a Kenyan child is that in Kenya, children regardless of their age are expected to assist and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. We therefore find that the respondent was entitled to damages for lost years.

[20] In the circumstances of this case, we find that the learned Judge reached the correct decision both on liability and quantum of damages.

Accordingly, this Appeal has no merit and we dismiss it with costs to the respondent.

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