REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 132 OF 2018

OWUOR CHRISTOPHER...1ST APPELLANT

STEPHEN MULINGE..2ND APPELLANT

-VERSUS-

CHARLES MUTUA KINGOLA & FELISTA NDUNGI MUTUA

(Suing as the legal representatives of the Estate of Muendo Mutua).......................RESPONDENT

(*Being an Appeal from the Judgement of the Honourable K. KIBELION Senior*

Resident Magistrate delivered on 2.6.2017 in Machakos CMCC No. 666 of 2012)

BETWEEN

CHARLES MUTUA KINGOLA & FELISTA NDUNGI MUTUA

(Suing as the legal representatives of the Estate of Muendo Mutua)...........................PLAINTIFF

VERSUS

OWUOR CHRISTOPHER...1ST DEFENDANT

STEPHEN MULINGE..2ND DEFENDANT

JUDGEMENT

1. The genesis of the suit from which this appeal originates was a road traffic accident which it was alleged occurred on or about the 3rd May, 2010 along Machakos Kitui Road at Kingatuani in which the deceased herein, **Muendo Mutua**, lost his life. According to the plaint, on that day the deceased was lawfully standing off the road when the Appellant, their authorised drivers, agents and/or servants negligently drove, controlled or managed motor vehicle registration no. KBA 558N that the same lost control, veered off the road and hit the deceased. Consequently, the deceased sustained fatal injured to which he succumbed. As a result of the death of the deceased, his estate suffered loss and damages both general and special. The particulars of negligence, statute and loss were pleaded. The Respondents also relied on the doctrine of *res ipsa loquitor* in claiming general damages, costs and interests.

2. It was pleaded that at the material time, the 1st Appellant was the registered owner of the said vehicle which was under the authority and physical possession of the 2nd Appellant hence the 2nd Appellant was the beneficial owner thereof. The vehicle, according to the plaint was being driven by the Appellants' authorised driver, agent and/or servant.

3. In their joint defence, the Appellants denied ownership of the sad vehicle as well as the occurrence of the accident and in the manner

pleaded. In the alternative, they pleaded that if the said accident, occurred, it was caused by the negligence of the deceased whose particulars they pleaded. They also denied the particulars of negligence, statute and loss pleaded in the plaint and sought that the suit be dismissed with costs.

4. To that defence, the Respondents filed a reply in which they reiterated the contents of the plaint.

5. In his evidence, PW1, **Charles Mututinga Kingola**, testified that the deceased was his first born son and that he was age 17 years at the time of his death on 3rd May, 2010 and he exhibited the death certificate as well as the grant of letters of administration in respect of his estate. It was his evidence that the deceased was employed as a herder earning Kshs 6000/- per month and was living at the home of his employer, **Kavoi Kingwana**. He averred that at the time the deceased was in good.

6. According to him, he received the report of the fact of the accident in which the deceased was hit by a minibus Reg No. KBA 558 N two days after the accident. He found the body at Machakos Level 5 Hospital Mortuary.

7. He testified that the deceased used to assist him with his salary as well, as assisting his mother and siblings. It was his testimony that the deceased used to send then Kshs 4,500/- per month. Being the first born child, PW1 had expectations that the deceased would assist him in bringing up his siblings. According to him, he spent he incurred expenses in seeking the grant of representation in the sum of Kshs 30,000/-, mortuary fees, hiring of two vehicles in the sum of Kshs 63,400/- and Kshs 200/- for police abstract report. He exhibited proof of the same. He also exhibited the burial permit and the police abstract itself. According to him the said abstract disclosed the owner of the said vehicle as the 2nd Appellant and upon conducting the search it was revealed that the owner of the 1st Appellant and he exhibited the search certificate. He also produced the demand letter.

8. In cross examination he reiterated that the deceased was earning Kshs 6000/- per month though he did not have any proof of the same. Similarly, he had no evidence that the deceased was sending him Kshs 4500/- per month. Though he never witnessed the accident, he blamed the driver of the vehicle for occasioning the said accident.

9. PW2, **Joshua Kavoi Kisilu**, confirmed that the deceased was his employee as a herder who was hit by a vehicle and died. According to him, he was paying the deceased Kshs 6000/- per month and he had worked for him for 2 years. His initial pay was Kshs 5500/- and on the second month the same was increased to Kshs 6000/-. It was his evidence that the deceased was in good health during the time and that the deceased was sending money to his parents as he had no drinking habit.

10. In his evidence the scene of the accident was straight and he went there after the accident and found the body on the road as well as the minibus which was heading towards Kitui direction. In his evidence the same was on the left side as one faces Kitui while the body was on the right side edge of the tarmac. By the time he arrived at the scene police officers were already there taking measurements. It was his evidence that his home is on the right side as one faces Kitui direction but when he arrived the goats were on the left side of the roads one faces Kitui direction.

11. In cross examination he stated that though he never recorded his statement at the advocate’s office, he did record his statement with the police. He however admitted that he had nothing to show that the deceased was working for him but he had recorded his details somewhere. He also had no evidence to show how much he was paying the deceased but insisted that he was paying him Kshs 6000/-.

12. PW3, **PC Daniel Chacha**, attached to Machakos Police Station, Traffic Records Office was called to produce the police abstract report involving motor vehicle reg. no. KBA 558N and the deceased. According to him the driver of the vehicle, **Joseph Ndungu Kimathi**, was charged with causing death by dangerous driving but was acquitted under section 215 of the CPC.

13. In cross-examination he stated that he was not the inv3stigating officer but had the occurrence book and the register according to which the accident occurred on 3rd May, 2010 at 9.30 am. According to the records, the deceased was looking after goats when he was knocked down by the vehicle when crossing the road. He however did not visit the scene of the accident hence could not tell the point of impact. The report indicated that the deceased died on the spot.

14. At the close of the Respondents’ case, the Appellants called DW1, **IP Jack Ila**, attached to Machakos Deputy Base Commander’s Office in charge of record keeping. In his possession were the records of the accident that occurred on 3rd May, 2010 at around 9.30 am when the deceased was taking care of goats along Kitui-Machakos Road near Makutano. In his evidence, the deceased tried crossing the road with the animals and a number crossed while the others were on the other side where he remained to collect them. While in the process of crossing the road he was hit by motor vehicle reg. no. KBA 558N and died on the spot after which the body was taken to the mortuary and the vehicle to Machakos Police Station.

15. It was his testimony that the driver, **Joseph Ndungu Kimotho**, was charged with causing death by dangerous driving but according to the investigating officer, the deceased was to blame for failing to observe clearance of the road and the driver was acquitted under section 215 of the CPC. According to the witness, from the investigations, the pedestrian was to blame. He exhibited the police abstract report in evidence.

16. In cross-examination, the witness stated that he was not the investigating officer and did not visit the scene and was not when the accident occurred. From the police file, he stated there was no eye witness. Asked about the sketch map, he stated that the same was produced in the traffic case. In his opinion the impact must have been great though he admitted that he could not tell the distance the victim was thrown after being hit or even the position after the accident. From the investigations, the deceased was 25 years. In his evidence the road in question is a busy one and according to the report, no goats were hit. Though the driver applied brakes, due to proximity of the deceased, the accident still occurred. He however denied that great impact implied great speed.

17. DW2, **Wahinya Kuawa**, the Executive Officer, Machakos Law Courts was called to produce the file in respect of Traffic Case No. 1538

of 2011. According to him the case in question was **R vs. Joseph Ndungu Kimotho**. After hearing the case, the accused was acquitted of the charges of causing death by dangerous driving.

18. After hearing the evidence, the trial court found that the only witness who attempted to give an insight of how the accident occurred was DW1. However, that witness was neither the investigating officer nor did he visit the scene. Though he still blamed the deceased for the accident without explaining the basis upon which the driver was charged. The Court found the traffic proceedings were not binding on the court since the standard of proof in such cases is different from that in civil cases. He found that there was no explanation as to the efforts that the driver took to avert the accident and proceeded to hold the Appellants 90% liable while finding the deceased 10% liable. While disallowing the claim for special damages for lack of specific plea, he awarded Kshs 20,000/- for pain and suffering, Kshs 120,000/- for loss of expectation of life. As for loss of dependency, he applied a multiplicand of Kshs 6,000/-, with 1/3rd dependency ratio, multiplier of 25 years and arrived at a total of Kshs 600,000/-. The total sum was discounted by 10% to arrive at the figure of Kshs 648,000/-.

19. In this appeal, the Appellants have raised the following grounds of appeal:

> ***1. The learned trial magistrate's judgment was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.***
>
> ***2. The learned trial magistrate erred in law and facts in finding the appellants 90% liable in view of the evidence produced before the trial court in particular the following:***
>
>> ***a) That the Respondent failed to produce sufficient evidence in court to prove that the Appellant was responsible or acted in a negligible manner that led to the subject accident.***
>>
>> ***b) That the trial magistrate did not rely on the evidence by PW3 Daniel Chacha who stated that he did not precisely understand how the decision to prefer and bring traffic charges against the Appellant for reckless driving was arrived at.***
>>
>> ***c) That the witnesses PW1 and PW2 were not at the scene of the accident nor anywhere nearer when it occurred and the evidence they brought to court was merely hearsay.***
>>
>> ***d) That the Appellant gave evidence that charges against him for causing death by dangerous driving were quashed as the prosecution did not have sufficient evidence.***
>>
>> ***e) That the deceased ran back to the road and as a result he occasioned the subject accident thus being at fault.***
>
> ***3. The learned trial magistrate erred in law and in facts in holding the Appellant liable by the fact that the deceased died yet no evidence was brought to court attributing negligence that he was reckless and DW1 actually testified that the deceased was running on the road chasing after goats he was herding thereby making him liable for the accident.***
>
> ***4. That the learned trial magistrate erred in land and in facts in holding the Appellant 90% liable for causing the accident with all the facts presented.***
>
> ***5. The learned trial magistrate erred in law and in fact in stating that the Appellant was liable just because an accident occurred and that in previous incidents the driver should have exercised care on the road. Each case has its different circumstances and in this instance the deceased contributed greatly towards the accident.***
>
> ***6. The learned trial magistrate erred in awarding an excessive sum for the injuries in the face of the evidence adduced.***
>
> ***7. The learned trial magistrate failed to exercise vested discretion judiciously in awarding damaged and failed to apply the settled principles.***
>
> ***8. The learned trial magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.***
>
> ***9. The learned trial magistrate erred in assessing an award hereunder which was inordinately high and wholly erroneous estimate of the loss and damages suffered by the Respondent in view of actual injuries sustained.***
>
>> ***a) Pain and Suffering- Kshs. 20,000/=***
>>
>> ***b) Loss of expectation of life- Kshs. 100,000/=***
>>
>> ***c) Loss of dependency- Kshs. 600,000/=***
>>
>> ***d) Special damages0- Nil***
>>
>> ***e) Net Award- Kshs. 720,000/=***
>>
>> ***f) Less 10% contribution***

10. There was no good or proper basis for the said assessment of damages.

20. It was submitted on behalf of the Appellants that from the evidence on record, it was evident that the deceased was to blame for his own misfortune since the deceased was running on the road after the goats he was herding. It was therefore submitted that the court erred in finding the driver 90% liable for the accident as the defence witnesses exonerated DW1 and DW2 from any blame as alleged by the Respondents. In support of the submissions the Appellants relied on **Treadsetters Tyres Ltd vs. John Wekesa Wepukhulu [2010] eKLR**. Since the driver was charged and acquitted, the Appellants relied on sections 107, 108 and 109 of the ***Evidence Act*** and cited **East Produce Limited vs. Christopher Astiado Osiro Civil Appeal No. 43 of 2001** on the burden of proof and submitted that causation of the accident by the Appellants was not established by the Respondents at all.

21. On quantum, it was submitted that the award for pain and suffering as well as loss of expectation of life were fair and incontestable. It was however submitted that based on the decision in **Transpares Kenya Ltd & Anor. vs. S MM [2015] eKLR** the award under ***Law Reform Act*** ought to have been deducted from that awarded under the ***Fatal Accidents Act***.

22. It was further submitted that the multiplicand of Kshs 600 was not supported by any documents hence the learned trial magistrate plucked the figure from the air. Further it was submitted that there was no evidence in support of anticipated dependency as the deceased was 17 years at the time of his death and was depending on his parents hence the multiplier approach was inapplicable. This submission was based on the decision in **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nbi HCC No. 1638 of 1988**. To the Appellants the court should have adopted the global sum method instead and contended that the court ought to have awarded between Kshs 300,000.00-400,000.00

23. On behalf of the Respondents, it was submitted that an acquittal in the criminal case ought not to be taken as an absence of proof in the civil trial and reliance was placed on **the case of Andrew Kamau Waweru vs. Guchu Muruguri (supra)** and **the case of Joseph C. Mumo vs. Attorney General & Another [2008] eKLR**. It was therefore submitted that the trial magistrate took into account the evidence and information availed to him that although the driver of KBA 558N was acquitted of the traffic offences, it did not mean that he should be absolved from any liability hence the fact of acquittal did not absolve the driver of negligence in the manner he drove the vehicle at the material time.

24. According to the Respondents, evidence was adduced at the trial court that the deceased was crossing the road when the accident happened. Both PW3 and DW1, who were police officers were not the investigating officers in the cases and therefore did not visit the scene of the accident and neither could they conclusively attribute liability to the deceased. Accordingly, the driver of KBA 558N was at fault for failure to drive with due care and attention to other road users expected of a person competent to drive. Since the driver of KBA 558N was driving on a public road where members of the public cross the road, he had a higher duty of care to other road users. It is trite law that a person driving a motor vehicle is under as duty to care for other road users since a vehicle is a lethal weapon and due care is expected of him.

25. It was submitted that had the driver of KBA 558N notbeen at high speed, he would have stopped or slowed down or swerved to avoid hitting the deceased person. It was however not demonstrated for the appellants what action if any the said driver took to avert the said accident. He was not on a proper lookout for any eventuality. Reliance was placed on **Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another NRB HCC 1638 of 1998, Savannah Hardware v EOO (Suing as representative of SO (deceased) [2019] eKLR** and **Ephantus Mwangi and Another vs. Duncan Mwangi Wambugu [1982] 1 KAR 278.**

26. According to the Respondents, by awarding Kshs 720,000/- subject to liability was reasonable in the circumstances and they urged the court to uphold the same. Accordingly, it was sought that the appeal herein be dismissed with costs to the Respondents.

Determination

27. I have considered the issues raised in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

28. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

29. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

30. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

31. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. In this appeal, it is clear that the determination of this appeal revolves around the question whether the respondents proved their case on the balance of probabilities. That the burden of proof was on the respondents to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

33. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

34. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

> **'That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.'"**

35. In this case there was no eye witness who was called to testify. According to PW1, the father of the deceased he came to know of the news 2 days after the accident. PW2 however went to the scene after the accident and found that the police officers were already at the scene. The vehicle that cause the accident was on the left side of the road as one faces Kitui while the deceased's body was on the right side as one faces the same direction. According to the police report, the accident occurred while the decased was driving the goats across the road and when he attempted to cross the road himself. While some of the goats crossed the road, the deceased was no so lucky. It was however stated that none of the said goats were involved in the accident.

36. If that version is correct, then in the absence of evidence that the scene where the accident occurred was at a bend or that visibility was limited, the driver of the said vehicle, had he kept a proper lookout on the road would have noticed that the goats were being driven across the road and ought to have either stopped or reduced his speed. In fact, according to PW2, the scene of the accident was straight. There was no evidence as to what step if any he took since he never testified. On the evidence placed before the court, there is no reason for the driver's complete failure to notice the presence of the goats and the deceased and the fact that the said animals were being driven across the road. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. It was similarly held in **Suleimani Muwanga vs. Walji Bhimji Jiwani and Another [1964] EA 171,** by **Udo Udoma, CJ** that that:

> **"It is clear from the evidence, I find, that by the driver of the Volkswagen bus turning as he did, he was, in the circumstances of this case, driving his vehicle in a most dangerous manner across the road. It is clear on the evidence that the driver of the omnibus was also not keeping a proper lookout while attempting to overtake the Volkswagen; for if he did, he would have seen clearly in time to slow down his vehicle when the driver of the Volkswagen bus put out his hand indicating that he was turning to the right side of the road. If, on the other hand, the driver of the omnibus did keep a lookout, he must have been travelling at such a speed, which is considered unreasonable in the circumstances of this case, which probably accounts for his inability to bring his bus to a stop in time to avoid the collision."**

37. Although DW1 in his evidence testified that the deceased was the one to blame, DW1 was not the investigating officer and only relied on the records. The investigating officer was not called to clarify the circumstances under which he made a decision to charge the driver with the traffic office of causing death by dangerous driving. I agree with the decision of **Khamoni J.** in **High Court Civil Case No. 656 of 2002 Francis Njoroge Njonjo vs. Irene Muroki Kariuki and 7 Others** where he expressed himself as follows:

> **"in her submissions concerning the 6th Defendant, M/s Oburu has relied on the evidence of PW5, a Police Constable Joseph Mutungi who produced copy of the Police Abstract and Occurrence Book from Parkland Police Station concerning that accident. They were P Exhibit 15 and P Exhibits 16 and 17. PW5 was not the Investigating Officer and was not attached to Parklands Police Station during the time of the accident. His evidence was therefore based on those three documents he was given to produce in the court and the Plaintiff's Counsel has pointed out that the documents included information that the Investigating Officer found the 6th Defendant responsible for causing the accident that was why the 6th Defendant faced charges of causing death by dangerous driving**."

38. I also associate myself with the decision of **Musinga, J** (as he then was) in **Nakuru High Court Civil Case No. 186 of 2002 - Margaret Wanjiru vs. S. Karanja & Another** that: -

> **"On the same day the first witness for the Plaintiff, Police Inspector Kibii Keror attached to Traffic Section Naivasha testified. He produced Police Traffic File A.R. No. 15 of 1983 which related to the accident involving the aforesaid motor vehicles. No one cross –examined him on anything and neither did he state anything else other than identifying himself and producing the file. I think the Plaintiff should have made better use of that witness given that the issue of liability was seriously contested. The witness should have been requested to state what the police findings were at the scene of the accident and should also have been requested to give his opinion as to who was to blame for the accident. His evidence would of course not have been conclusive not binding upon the court but would have assisted the court in determining the issue of liability. A party who calls a police officer to produce a police file should do everything possible but within the knowledge and/or information of the officer, to examine him with a view to shedding some light into the issue in dispute rather than just dump a police file before the court and require the judge to study all the statements in the file, sketch plan drawings, photographs and whatever else may be contained in the file,"**

39. However, proof of negligence being on a balance of probabilities does not solely depend on the investigations and findings of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In **Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR** it was held:

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station**."

40. As regards the relevancy of a conviction or acquittal of a traffic offence to a civil claim in respect of negligence, it was held by the Court of Appeal in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** in which **Platt, JA** opined that:

> **"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."**

41. According to **Apaloo, JA** (as he then was) in the same case:

> **"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."**

42. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

> **"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."**

43. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

> **"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it…Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."**

44. I therefore do not read too much into the fact that the driver was charged and acquitted of the traffic offence.

45. The trial court was therefore clearly entitled to apportion the liability. As to whether in so doing the trial court erred, in **Khambi and Another vs. Mahithi and Another [1968] EA 70**, it was held that:

> **"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.**

46. That seems to have been the position in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle. In this case, I have reviewed the evidence that was presented before the trial court and I have no reason to interfere with his finding on liability. From the evidence on record, it is clear that the driver of the subject motor vehicle had ample time and opportunity to avoid the accident but did not do so.

47. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

48. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own**

figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

49. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

50. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.

51. With respect to fatal accidents, in **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988** (unreported), **Ringera J.** as he then was, held at page 248 that:

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear 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. The sum thus arrived at must then be discounted to allow the 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."

52. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."

53. It is true that the deceased was 50 years old. He was awarded Kshs 100,000.00 for loss of expectation of life. In my view, considering comparable awards, I am not satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

54. It was submitted that the learned trial magistrate ought to have adopted the global award method rather than dependency method. In this case the deceased was aged 6 years. The principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others Civil Appeal No. 123 of 1983 [1986] KLR 457; [1982-1988] 1 KAR 946; [1986-1989] EA 137** as:

(1). Parents cannot insure the life of their children;

(2). The death of a victim of negligence does not increase or reduce the award for lost years;

(3). The sum to be awarded is never a conventional one but compensation for pecuniary loss;

(4). It must be assessed justly with moderation;

(5). Complaints of insurance companies at the awards should be ignored;

(6). Disregard remote inscrutable speculative claims;

(7). Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;

(8). A young child's present or future earning would be nil;

(9). An adolescent's would real, assessable and small;

(10). The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;

(11). Calculate the annual gross loss;

(12). Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case;

(13). Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and

(14). Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.

55. That is my understanding of the holding of the Court of Appeal in **Kenya Breweries Ltd vs. Saro [1991] KLR 408** 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 in awardable in the case of a four year old one who has not been to school and whose abilities are not yet ascertained. That, we think, is a question of common sense rather than the law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and invariably take care of their aged parents."**

56. **Githinji, J** (as he then was) in **William Juma vs. Kenya Breweries Ltd. Nairobi HCCC NO. 3514 of 1985** however appreciated that:

> **"In this country, the courts have taken into account the nature of our society and have correctly held that parents expect financial help from their children when they grow up. It is recognised that in our society children render useful services in the house or in the shamba, which relieves parents from financial expenditure on, say an employed worker. Those free services can be converted into money. The courts therefore have been awarding a lumpsum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer."**

57. In ***DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR*** the court expressed itself as hereunder:

> ***"In the circumstances, the sum of Kshs. 700,000/= was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000/= to Kshs. 1,500,000/=. In my discretion, I find the sum of Kshs. 1,200,000/= to be adequate compensation for loss of dependency. Accordingly, I set aside the award of Kshs. 700,000/= awarded by the trial court for loss of dependency and in its place I award the sum of Kshs. 1,200,000/= for loss of dependency."***

58. I agree with **Ringera, J** in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** that:

> **"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is**

a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

59. From the foregoing it is clear that the parents of the deceased were clearly entitled to an award considering that thy legitimately expected the deceased to assist them in old age. As regards the issue of global award, such award is appropriate where the deceased was not yet earning or where, based on his age, his source of earning cannot be ascertained. In this case there was evidence that though the deceased was still technically a minor aged 17 years old, he was already engaged in income generating activity and was earning a monthly income. As to how much he was earning, it is true that there was no documentary evidence to that effect. However, PW2 testified that the deceased was his employee and was earning Kshs 6,000/- per month. In **Jacob Ayiga Maruja & Another vs. Simeon Obayo (2005) eKLR** the court held:-

> **"…….we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways…we reject any contention that only documentary evidence can prove these things."**

60. Similarly, the Court of Appeal in **Wambua vs. Patel & Another [1986] KLR 336** appreciated that in that case the evidence of the deceased earnings was:

> **"…a very poor account. Although he appeared to be a man of enterprise and somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So all his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 years cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. The figures he gave as his business earnings and expenditure must be considered with great care. Nevertheless, the court is satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him and the defendants ought not to be heard to say that the plaintiff should be denied his earnings because he did not develop more sophisticated business methods. Whereas damages for loss of earnings must be established by satisfactory evidence and the evidence should appreciate that, the court should approach the consideration of the plaintiff's evidence with caution and must not allow him to "pluck a figure from the air", a victim does not lose his remedy in damages merely because its quantification is difficult."**

61. In this case the evidence was that the deceased was earning Kshs 15,000.00. However, in determining the multiplicand, it was held in by **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** that:

> **"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."**

62. In this case the trial court believed the evidence of PW2 as regards the deceased's earning and I have no reason to disbelieve him either. The Court of Appeal in **Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995** that the issue of dependency is always a question of fact to be proved by he who asserts.

63. Therefore, in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, **Ringera J.** as he then was, was:

> **"…constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track."**

64. In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, it was the opinion of the Court of Appeal that:

> **"There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss…**"**Dependancy" or "dependency" is the relation of a person to that by which he is supported…The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and**

family. There can be no rule or principle of law in such a situation…But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person…In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."

65. In this case, the deceased was the Respondents' child. I agree that one third dependency ratio was reasonable in those circumstances. Regarding the multiplicand, the evidence was that the deceased was giving the parents Kshs 4500/- per month. Accordingly, the adoption of Kshs 6000/- under this head was erroneous. As for the multiplier, all things being equal, he deceased was expected to marry and have his own family. Accordingly, the 25 years that was adopted was, in my view, rather excessive. I would reduce the same to 20 years.

66. As regards the double award, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) the capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. Similarly, the Court of Appeal in **Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004** held that:

"As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards…Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-."

67. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation.

68. Accordingly, the award that ought to have been made to the Respondents was as hereunder:

(a) Pain and Suffering Kshs 20,000.00

(b) Loss of expectation of life Kshs 120,000.00

(c) Loss of dependency Kshs 4,500.00 x 12 x 20x1/3 = Kshs 360,000.00

69. This brings the total to Kshs 500,000.00. Upon applying the 10% contribution it comes to Kshs 450,000.00. In the premises the appeal succeeds to that extent. Accordingly, the award of the lower court is hereby set aside and substituted with Kshs 450,000.000.00. The Respondents will have the costs of the trial court plus interest. As for the costs of this appeal, the Respondents is awarded half the costs to be borne by the Appellant.

70. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyoka for the Respondent

CA Geoffrey