Benedata Ndungwa Muthoka and Jecinta Muthio Musyoka (suing on their own behalf and as administrators of the Estate of the Late Lawrence Muema Muthoka - Deceased) v Muthangya (Civil Appeal 40 of 2019) [2021] KEHC 312 (KLR) (22 November 2021) (Judgment)

Neutral citation: [2021] KEHC 312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 40 OF 2019

MW MUIGAI, J

NOVEMBER 22, 2021

BETWEEN

BENEDATA NDUNGWA MUTHOKA AND JECINTA MUTHIO MUSYOKA (SUING ON THEIR OWN BEHALF AND AS ADMINISTRATORS OF THE ESTATE OF THE LATE LAWRENCE MUEMA MUTHOKA (DECEASED) ..... APPELLANT

AND

COLLINS MUSYONI MUTHANGYA ..... RESPONDENT

(An appeal from the judgment of the Learned Magistrate, Honourable G.O Shikwe (SRM) delivered at Kithimani on 20th March, 2019 in Kithimani PMCC No. 389 of 2015)

JUDGMENT

BACKGROUND

1. By a Plaint dated 15th December, 2015 and filed 18th December, 2015, the Appellants suing on their own behalf and as the administrators of the estate of the late Lawrence Muema Muthoka (Deceased) sought general damages under the *Fatal Accident Act* and the *Law Reform Act*, special damages of Kshs. 25,445/- plus costs and interest.

2. The Appellants pleaded that on 22nd September, 2014, the deceased was lawfully walking along Matuu-Thika Road at Dreamland area when the Respondent or his driver so carelessly and negligently drove motor vehicle registration number KBU 543G which he caused to lose control and violently knocked down the deceased. Consequently, the deceased succumbed to fatal injuries. The Appellants pleaded the doctrine of res ipsa loquitur.

3. In the Plaint at paragraph 4, the Respondent pleaded particulars of negligence against the Respondent and/or his driver which the court will consider in the determination.

4. As regards the particulars pursuant to the Statutes cited above, the Appellants pleaded that the deceased was aged 29 years old, a farmer earning approximately Kshs.30, 000/- per month. According to Appellants, the deceased enjoyed good health and lived a happy life. It is pleaded that the deceased substantially contributed to the maintenance of his brother and sisters as listed in paragraph 5 of the Plaint hence the dependents lost the deceased support causing them to suffer loss and damage. Accordingly the deceased life expectancy was cut short by his death.

5. In opposition, the Respondent filed his appearance and statement of defence on 24th February, 2016. The Respondent denied that he was the registered owner of motor vehicle registration number KBU 543G. He denied that the deceased was lawfully walking along the said road as well as the particulars of negligence, injuries, pursuant to the statute and special damages as pleaded. According to the Respondent, the accident was solely caused by the negligence of the deceased. In the alternative and without prejudice, the Respondent pleaded that the accident was inevitable.

6. In response to the Respondent's defence, the Appellants filed a reply to defence dated 29th February, 2016 and reiterated the claim.

HEARING

7. PW1, No. 72988 Sergeant Michael Mbugua of Matuu Traffic Base now attached at Matuu testified that a road traffic accident occurred on 27th September, 2014. He stated that he had the police file in court but did not have time to produce the OB. It was his testimony that the case is about a pedestrian who died after being knocked down at 10 am at Dreamland area by Collins Musyomi Muthangya motor vehicle KBU 534G and the Investigating officer was Sergeant Charles Lekursai. He stated that he charged Kshs.5000/- for court attendance. P exhibit 1(a) & (b).

8. In cross –examination by Mr. Ndungu, on the question posed, PW1 stated that he did not carry the OB and the police file. He stated that the court cannot confirm the position of impact. According to PW1 the case is pending under investigation (P.U.I) and no one had been charged. He stated that he did not know if the deceased was mentally challenged or not. It was his testimony that was not the reason why he did not bring the police file and OB to court. According to PW1, he did not know who reported the accident or was the eye witness.

9. In re-examination, he stated that the abstract was from their station. In his evidence he stated that he could not tell if he (deceased) was crossing the road.

10. PW2, Benadata Ndunga Muthoka stated that Lawrence Muema Muthoka (deceased) was his brother. According to PW2, the deceased did not have children but all of them were depending on him as siblings. He stated that the deceased was a farmer.

11. PW2, produced the following documents; copy of ID as P exhibit 2, copy of letters of administration and receipt of Kshs.1,250 as P exhibit 3(a) and 3(b), copy of ID of the second administrator as P exhibit 4,copy of postmortem as P exhibit 5, copy of death certificate as P exhibit 6, copy of burial permit as P exhibit 7, copy of receipts for Kshs.23,700/- as P exhibit 8, copy of motor vehicle search and receipt as P exhibit 9(a) and (b) and as copy of the Chief's letter as P exhibit 10.

12. In cross-examination by Mr. Morara, in answer to the questions posed, PW2 stated that he was not at the scene of the accident. She stated that well-wishers raised Kshs.30, 000/- to cater for funeral expenses. She stated that the deceased was not married. According to PW2, their mother passed on after 3 months. She stated that the deceased was 29 years old when he died. In her evidence, PW2 stated that she did not have any documentary exhibits on the deceased earnings. She stated the she had heard the name Joseph Mutemi.

13. PW3, Joseph Mutemi adopted the contents of his witness statement dated 15th December, 2015 and filed on 18th December, 2015. He stated that he was butcher living in Mwingi. In his evidence, PW3 stated that he was involved in the accident in that he was standing 5 meters away approximately near the bus stage in Dreamland. According to PW3, the deceased was walking just off the road facing Matuu direction. He stated that the motor vehicle was speeding.

14. In cross-examination by Kagonda, in answer to the question posed, PW3 stated that the accident occurred at 10 am in the morning. He stated that he knew the deceased who was a bit mentally retarded. According to PW3, you could talk to the deceased but the deceased would forget what you have said. In his evidence, PW3 stated that he had a butchery there. According to PW3, the deceased had a habit of walking on the road. PW3 stated that the motor vehicle was moving at 80 Kph. He stated that he witnessed the accident with his own eyes.

15. In re-examination, PW3 stated that the deceased was off the road. He witnessed the accident occur. He stated that the driver was at fault and the motor vehicle was speeding.

DEFENCE

16. In defence case, DW1, No. 79682 PC Salat Diba of Matuu police station stated that the accident occurred at 22nd September, 2014 at 1000 hours along Matuu-Thika road involving motor vehicle KBU 543G Mistubishi Mini Bus and a pedestrian at Dreamland area. According to DW1, the motor vehicle was heading towards Thika direction at the location of the accident. He stated that the pedestrian dashed onto the road. In his evidence, DW1 stated that he (deceased) was mentally ill and was knocked down. He stated that he (deceased) died instantly. According to DW1, the scene was visited and the body was moved to mortuary. He stated that was what was entered on OB 6/22/9/14. In his evidence, the deceased was to blame for the accident for dashing onto the road. He stated that as per the police abstract the driver was not charged.

17. In cross-examination by Ndungu, in answer to the question posed, DW1 stated that the Investigating Officer C.I.D Lekursei is in training at Kiganjo. He stated that they were alerted by members of the public. According to DW1, the OB is in court which he has not produced as an extract. In his evidence, DW1 stated that the officers were not there at the time of the incident. He stated that he was not sure if an inquest was opened. He stated that he had not produced a sketch plan. According to DW1, an eye witness account would hold more weight herein and he was not sure there was an eye witness. In his evidence, DW1 stated that he could not tell that the pedestrian was a mental case. He confirmed that the abstract indicated that the pedestrian was blamed. He stated that the accident occurred at 10 pm and he did not produced a sketch plan. According to DW1, it is indicated in the OB that the driver tried to avoid the accident.

18. In re-examination, DW1 stated that the investigations were done. He stated that it is indicated that the pedestrian was mentally ill. To DW1, the abstract does not indicate name of any witness.

TRIAL COURT'S JUDGMENT

19. In his judgement, the Trial Magistrate was convinced by DW1 evidence that the deceased was mentally unstable hence a reason why he dashed onto the road causing the driver to try avoid the accident. According to the Trial Magistrate, an approximate speed of 80Kilometers was not a high speed hence it could not be shown that the driver was speeding of reckless in his driving. The Trial Magistrate found no liability as the Plaintiff failed to prove negligence on a balance of probabilities and that the accident could be attributed to the driver hence he dismissed the suit with costs.

20. On quantum awarded, the Trial Magistrate agreed with the Respondent's submissions that an award of a global sum was appropriate since the deceased had no known source of income and was mentally retarded. The Trial Magistrate held that he would have awarded Kshs.300, 000/- as damages if liability was proved.

APPEAL

21. Aggrieved by the Trial Magistrate's decision, the Appellants lodged this appeal citing the following grounds:-

    (1) THAT the learned trial magistrate erred in law and in fact by dismissing the Appellants suit against the Respondent.

    (2) THAT the learned trial magistrate misdirected himself in law and in fact by finding that the Appellants had not proved their case against the Respondent, despite the overwhelming evidence led by the Appellants.

    (3) THAT the learned trial magistrate erred in law and in fact in by failing to address his mind on the evidence adduced and hence made and erroneous finding.

    (4) THAT the learned trial magistrate erred in law and in fact by placing too much reliance on the Respondent's evidence which was contradictory.

    (5) THAT the learned trial magistrate erred in law and in fact by failing to consider the totality of the evidence adduced at trial.

    (6) THAT the learned trial magistrate erred in law and in fact by failing to consider the parties' written submissions.

    (7) THAT the learned trial magistrate erred in law and in fact by failing to assess the damages that would have been awarded to the Plaintiff's as required by law.

    (8) THAT the learned trial magistrate misdirected himself in law and in fact by failing to find at the very least the Respondent was liable for the accident.

22. The Appellants have urged the court to allow their appeal by setting aside Trial Magistrate's judgment and assess the damages payable to the Appellants. The Appellants have also sought costs of the appeal.

APPELLANTS SUBMISSIONS

23. On behalf of the Appellants, it is submitted that the issues for consideration are

    a. Ownership of the suit motor vehicle

    b. Occurrence of the accident

    c. Who was to blame

24. On the first issue, it is submitted that a copy of search and police abstract established that the Respondent was the registered and beneficial owner of the suit motor vehicle. No evidence was led to controvert PW1 evidence.

25. On issue two, it is submitted that at paragraph 4 of the Plaint it is pleaded that the accident occurred on 22nd September 2014. Further that PW3 testified that the deceased was walking off the road along

Matuu-Thika Road while DW1 stated that the deceased was mentally retarded, walked onto the road and the driver of the suit motor vehicle tried to avoid the accident.

26. As to who was to blame for the accident, it is submitted that PW1 and PW3 version of the evidence was plausible. According to the Appellants, DW1 evidence was contradictory for the reason;

    1. DW1 was not the investigating officer. He did not have a sketch plan that indicated the point of impact, pictorial evidence and a postmortem that indicates the deceased was mentally handicapped. He read an OB whose contents came from an unknown member of the public hence DW1 evidence is largely hearsay.

    2. DW1 stated that the driver of the suit motor vehicle tried to avoid the accident but in cross-examination he stated that the driver may have declined to prevent the accident and exercise the care and skill reasonably expected of a driver as DW1 was not at the scene of the accident. DW1 admitted that his evidence as to the occurrence of the accident was of less probative value as compared to that of an eye witness

    3. In cross-examination DW1 stated that he did not have a witness to confirm insanity.

    4. PW3 stated that the suit motor vehicle veered off the road hence in the absence of an explanation as to why the motor vehicle veered off, it is logical to assume it was due to the driver's carelessness and negligence. Reliance is placed in Michael Njagi Karimi vs Gideon Ndungu Nguribu & Another [2013]eKLR.

    5. From the circumstances of the accident the Respondent or his driver failed to avoid the accident.

    6. The driver of the suit motor vehicle having in possession a lethal machine had a greater duty of care than the deceased person. Reliance is placed on Isabella Wanjiru Karanja vs. Washington Matele (1982-88) 1 KAR 186.

    7. DW1 did not prove any of the particulars of negligence pleaded under paragraph 6 of the statement of defence.

    8. DW1 seemed to place reliance on the fact that the driver was not charged and/or convicted of the offence of causing death by dangerous driving. In opposition the Appellant place reliance on the case of Philip Kepto Chemwolo & Mumias Sugar Co.Ltd vs Augustine Kubende[1982-88]1KAR 1036 (1039-1040) and in Ann Mukami Muchiri vs.David Kariuki Mundia[2008]eKLR on the proposition that the mere fact that the Defendant has been acquitted in the traffic case does not necessarily mean that he cannot be held liable in subsequent civil proceedings.

27. The Appellants urged the court to find the Respondent 100% liable.

28. On quantum awarded, it is submitted that the suit was brought under the Fatal Accident Act and *Law Reform Act*. According to the Appellants, PW3 testified that the deceased was earned Kshs.30, 000/- per month in farming even though he had no proof of the earnings. Reliance is placed in *Jacob Ayiga Maruja & Francis Karani vs. Simeon Obayo* [2005] eKLR.

29. On the award under loss of expectation, pain and suffering, the Appellants proposed awards of Kshs.100, 000/- and Kshs.50, 000/- respectively. Reliance is placed in *Alice O.Alukwe vs. Akamba Public Road Services Ltd & 3 Others* [2013] eKLR.

30. On the award under loss of dependency, reliance is placed *Jacob Ayiga Maruja & Francis Karani vs. Simeon Obayo* [2005] eKLR in support of the deceased income of Kshs.30,000/-.On multiplier, the Appellants submitted that the deceased aged 29 years who was in good health would have lived upto the age of 70 years. Further that the deceased was not working in public sector would have worked past the retirement age of 60 years. Reliance is placed in *Cornelia Elaine Wamba vs.Shreeji Enterprises Ltd and Others* [2012] eKLR and in *Board of Gevernors of Kangubiri Girls High School & Another vs. Jane Wanjiku Muriithi & Anoher* [2014]eKLR. As regards dependency ratio, the Appellants proposed 2/3 for the reason that the dependants of the deceased were his siblings.

31. The Appellants proposed the computation under this head is made up as follows; Kshs.30,000/- x 12 x 25 x 2/3= Kshs.6,000,000/-

32. The total quantum of damages as follows:-

    a. Pain and suffering Kshs.50,000/-

    b. Loss of expectation of life Kshs.100,000/-

    c. Special damages Kshs.25,445/-

    d. Loss dependency Kshs.6,000,0000/-

    TotalKshs.6, 175,445

33. The Appellants urged the court to allow the appeal with costs and interest of the trial court and this appeal.

RESPONDENT SUBMISSIONS

34. On behalf of the Respondent, it is submitted that PW1 was not an eye witness. PW3 was not sure where the deceased was walking since he said that the deceased was walking off the road but also had a habit of walking on the road. According to the Respondent DW1 had more weight since he read OB stating that the deceased dashed onto the road and was knocked. It is submitted that DW1 evidence that the deceased was mentally challenged was corroborated by PW3 evidence. According to the Respondent it is not in dispute that the accident occurred between the deceased and the suit motor vehicle but the Appellants did not prove that the Respondent was to blame for the accident. Reliance is placed on the cases of *East Produce (K) Limited vs. Christopher Astiado Osiro* Civil Appeal No.43 of 2001 and *Statpack Industries vs. James Mbithi Munyao* Civil Appeal No.152 of 2003.

35. On quantum awarded, it is submitted that the Appellants claim is brought under the Fatal Accident Act and *Law Reform Act* hence pursuant to Section 4(1) of the Fatal Accident Act the deceased's sisters and brother would not benefit under the Act but only under the *Law Reform Act* for general damages. Reliance is placed in *Mohamed Hirbo Shande & another v George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena)* [2021] eKLR and in *John Mungai Kariuki & Another vs. Kaibei Kangai Ndethiu & 2 Others* Kiambu Civil Appeal No. 29 of 2018.

36. As regards the awards under the *Law Reform Act*, on pain and suffering, it is submitted that the deceased died on the same day hence Kshs.10,000/- was adequate compensation while the award for loss of expectation, it is submitted that the deceased was 23 years old hence an award of Kshs. 80,000/-

was adequate. Reliance is placed in *Dominic Kiongerah (Suing as the Legal Administrator of the Estate of the late Magdaline Njeri Kiongerah) vs. Zacharia Wachira Gatiga & Another* [2018] eKLR.

37. On costs, the Respondent urged the court to dismiss the appeal and award him costs of the appeal pursuant to Section 27 of the *Civil Procedure Act*.

DETERMINATION

38. I have considered the pleadings and evidence on record as well as the written submissions filed on behalf of respective parties.

39. In this appeal, the Appellants are challenging dismissal of their suit filed at Kithimani Senior Resident Magistrate's Courts in RMCC No.3289 of 2015. The Appellants also contend that the Trial Magistrate failed to assess the damages that would have been awarded to the deceased as required by the law.

40. This being a negligence claim against Appellant, the standard of proof required is on balance of probabilities hence the two issues for determination are namely;

    a) whether the Appellant proved his case on a balance of probabilities and

    b) whether the doctrine of res ipsa loquitor is applicable in the circumstances.

41. 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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 lose because the requisite standard will not have been attained."

42. According to 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."

43. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:-

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

44. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

Section 112

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

45. The Appellants placed reliance on the doctrine of res ipsa loquitor which means according to the *Black's Law Dictionary* (8th Ed.) page 1336, "the thing speaks for itself".

46. In *Nandwa vs. Kenya Kazi Limited* [1988] eKLR, Court of Appeal (Gachuhi JA) cited, with approval, a portion *Barkway vs. South Wales Transport Company Limited* [1956] 1 ALLER 392, 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:

> " The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

47. The court will then proceed to find out whether the Appellants discharged the burden of proof on balance of probabilities.

LIABILITY

Is it driver or the deceased herein who was to blame for the accident?

48. The Court in discharging its mandate, this being a 1st appeal, it is trite law, that the court evaluates and reconsiders the evidence on record and draws its own conclusion while bearing in mind that the Court has neither seen or heard the witnesses and should make allowances in this respect. See *Peters vs. Sunday Post Ltd* [1958] E.A.424; *Butt vs. Khan* [1981] KLR 349 & *Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini vs. A. M. Lubia & Olive Lubia* (1982-1988) 1 KAR 727.

49. This being the first appeal court, its duty is well expressed in *Selle vs. Associated Motor Boat Co* [1986] EA 123 where court held as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court 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 through 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."

50. The court in *Khambi & Another vs. Mahithi and Another* [1968] EA 70, 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"

51. The occurrence of the accident is not disputed. The Respondent does not dispute ownership of the suit motor vehicle. How the accident occurred is what the Respondent disputes? The Respondent relies on PW1 and PW3's evidence. It is submitted that PW1 (Sergeant Michael Mbugua) did not witness how the deceased was knocked by the said motor vehicle, hence his evidence is of less probative value to the court despite stating that he had the Police file in court and referred to it. With regard to PW3 who was an eye witness, the Respondent submitted that PW3 was not sure where the deceased was walking of the road or on the road. The Respondent's view is that the deceased was mentally unstable, a fact that the Respondent say was corroborated by the PW3 evidence.

52. It therefore imperative for the court to re-evaluate the evidence adduced by the three witnesses with a view of determining their value to the court. The Respondent seem not to be concerned with PW2 testimony.

53. In cross-examination, at page 55 of the Record of Appeal PW1 stated:-

> " The court cannot confirm the position of the impact. The case is pending investigations. No one has been charged...I do not know if the deceased was a lunatic. That is not the reason I did not bring police file and OB to court. I do not know who reported the accident or who was the eye witness"
>
> In re-examination at page 57 of the record of appeal:-
>
> "I cannot tell if he was crossing the road."

54. In cross-examination, at page 58 of the Record of Appeal, PW2 stated:-

> " I was not there when the accident occurred"

55. In his evidence in chief, at page 64 of the Record of Appeal, PW3 stated:-

> " I was involved in the accident in that I was standing 5 meters away approximately near the bus stage in Dreamland.
>
> The deceased was just walking off the road facing the Matuu direction. The vehicle was speeding."
>
> In cross-examination, PW3 stated:-
>
> "Accident was at 10am in the morning. The deceased was someone I knew he was a bit mentally retarded. You could talk to him and he forgets what you have said.
>
> "I have a butchery there. The deceased had a habit of walking on the road. I think the vehicle was moving at 80Kph.

I witnessed the accident with my own eyes."

In re-examination, at page 65 of the Record of Appeal PW3 stated:-

"The deceased was off the road.

I witnessed the accident occur. The driver was at fault. The vehicle was speeding."

56. In his evidence in chief, at page 67 of the Record of Appeal, DW1 stated:-

> " The vehicle was heading towards Thika direction at a location of the accident the pedestrian dashed to road. He was mentally ill and was knocked down.
>
> The pedestrian is to blame for the accident as he dashed to the road. I have the police abstract, the driver was not charged."
>
> In cross-examination, DW1 stated:-
>
> "...We were alerted by members of the public. The officers were not there at the time of incident. I have not produced a sketch plan....I am not aware that there was an eye witness herein.
>
> We cannot tell for a fact that the pedestrian was a mental case. The abstract does not indicate the pedestrian was blamed....It is indicated in OB the drive r tried to avoid the accident."
>
> In re-examination, DW1 stated:-
>
> "Investigation were done. It is indicated the pedestrian was mentally ill.
>
> The abstract does not indicate name of any eye witness."

57. The court notes that the Respondent or his driver did not testify in court. It was only DW1 (PC Salat Ndiba) who testified in the defence case. The Respondent did file a statement of defence on 24th February, 2016 wherein at paragraph 6(a) to (f) particulars of negligence were pleaded against the deceased.

58. That being the position, what happens when a Defendant does not attend court to substantiate his/her averments?

59. In *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni J. citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

60. The Respondent place reliance on DW1 evidence. DW1 stated there were no officers at the time of the accident hence a confirmation that no police officer is an eye witness to give an exact account of the accident. In fact, DW1 confirmed that they were alerted about the accident by members of the public.

61. The court notes that DW1 stated that the deceased dashed onto the road while on the other hand he stated that he did not have the sketch-plan. A sketch plan is important as it is drawn at the accident scene with exact measurements before the accident scene is disturbed or interfered with. From the

sketch plan it would show the point of impact which would confirm if the deceased was on the road as alleged by the Respondent or the Respondent's vehicle veered off the road. In fact, PW1 stated in cross-examination that the position of the impact could not be confirmed.

62. Secondly, the only eye witness is PW3 who recorded his statement and relied on it. He testified that the deceased was walking off the road facing Matuu direction. The [Defendant's] motor vehicle was speeding. This is direct evidence that was subjected to cross-examination by the Defense. The Trial Court had the opportunity to consider the veracity of the evidence and credibility of the witness through his demeanor in Court and ought to have recorded why the Court found the evidence by PW.3 untrue, unreliable or insufficient to prove the Plaintiff's claim.

63. Thirdly, the evidence by DW1& PW3 indicated that the deceased was mentally challenged but medical evidence was not adduced to inform the status/extent of the mental instability. PW3 stated that the deceased was someone he knew he was a bit mentally retarded. The Court record shows that DW1 in his evidence in chief stated that the deceased was mentally ill but in cross-examination by Mr. Ndungu, DW1 stated that they could not tell for a fact that the pedestrian was a mental case. In re-examination, DW1 stated that the investigation established that the deceased was mentally ill but no investigation report was produced in court as an exhibit. DW1 was not the Investigation Officer, they were CID Lekursei & C.I Dorcas Nyaga according to Police Abstract. The Court notes that an expert in mental assessment was not brought to Court to substantiate the mental illness. It is not indicated how that the conclusion was arrived at to conclude that the deceased was mentally ill. The court's view is that the evidence by DW1, is not tangible to conclude that the deceased was mentally ill. Even assuming the deceased was mentally challenged without proving particulars of registration in the defense he cannot be found to blame.

64. However the court notes that PW3 who stated in cross-examination that the deceased was abit mentally retarded could be a credible witness. PW3 stated that he operated a butchery in the area and knew the deceased. According to PW3, the deceased had a habit of walking on the road and could forget what has been said to him. The court's view is that PW3 evidence may be believable although not conclusive evidence that the deceased was mentally ill. Even assuming that the deceased was mentally challenged that fact by and of itself does not mean he automatically is to blame for the accident, the particulars of negligence alleged by the Defendant in the Defense ought to be proved, that the deceased failed to walk without due care and attention and to keep on the pedestrian walk.

65. PW3 stated that on the material day of the accident, he was standing 5 meters away approximately near the bus stage in Dream land. According to PW3, the accident happened at 10 am. In fact DW1 stated that the accident occurred at 10.00 pm contrary to the time indicated in the police abstract. The court notes that, that is the time indicated in the police abstract. PW3 stated that the deceased was walking off the road facing Matuu direction although he did not state which direction the suit motor vehicle was coming from. DW1 confirmed that the suit motor vehicle was heading towards Thika direction which is the opposite direction of Matuu. It means therefore that the driver of the suit motor vehicle may have or may have not seen the deceased noting that neither the Respondent nor the deceased testified in court.

66. According to PW3, the suit motor vehicle was speeding. He stated that it was moving at 80Kph. PW3 blamed the driver and insisted that he witnessed the accident with his own eyes. In his evidence in chief, DW1 blamed the deceased for dashing onto the road but in cross-examination by Mr.Ndungu he stated that in the police abstract, the deceased was not blamed. DW1 stated that in the OB it is indicated that the driver tried to avoid the accident but PW3 stated in his witness statement dated 15th December, 2015 adopted in court that the driver's efforts were frustrated since the suit motor vehicle was on a high speed.

67. The court's finds PW3 evidence to be a direct evidence. Indeed DW1 admitted that an eye witness evidence holds more weight. The court's view is that the Respondent or his driver caused the accident. A sketch plan was not produced by DW1. DW1 was not the investigating officer neither did he witness the accident as they were alerted by members of the public. The accident occurred during the day. PW3's evidence of over speeding was not challenged. PW3 evidence remain uncontroverted as to the circumstances of the accident. The court finds the doctrine of Res ipsa loquitor is applicable against the Respondent.

68. In the case of *Masembe vs. Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ....Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently..."

69. In the case of *Isabella Wanjiru Karanja vs Washington Malele* Nbi Civil appeal No 50 of 1981 Hon. Chesoni J observed;

> " What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep greater lookout for other road users."

70. The fact that the Respondent was not charged for the offence of causing death by dangerous driving does not mean that he has no case to answer in civil proceedings. See *Chemwolo and another vs. Kubende* [1986] 492: 1986 – 1989] EA 74, *Robinson vs. Oluoch* (1971) EA 376.

71. In the absence of the Defendant's evidence to cast doubt or controvert the Plaintiff's claim, the Court finds that the Trial Magistrate erred in law and fact for not finding liability against the Respondent. The court will apportion the Respondent 100% liability.

QUANTUM

72. On quantum awarded, the Appellants contend that the Trial Magistrate did not assess damages hence in error of law.

73. 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."

74. The court notes at Page 236 of the Record of Appeal, the Trial Magistrate was alive to the duty of assessing damages despite a finding that the Appellants had not proved liability.

75. Indeed in Lei Masaku vs Kaplama Builders Ltd (supra) where Mabeya J stated that the trial court must assess damages despite dismissing the suit. Similarly, in *Frida Agwanda & Ezekiel Onduru Okech vs. Titus Kagichu Mbugua* [2015] eKLR Onyancha J held that:-

> " Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment."

76. If liability was proved, the Trial Magistrate stated that he would awarded a global sum of Kshs.300,000/- as damages for the reason that the deceased was aged 29 years and had no dependents. He observed also that the deceased had no known source of income and based on evidence from PW3 and DW1 the deceased was mentally challenged. The Court notes that the Trial Magistrate assessed damages.

DAMAGES UNDER FATAL ACCIDENT ACT

77. Both the Appellants and Respondent have submitted based on a multiplier method and not the global sum awarded by the Trial Magistrate. However, the Respondent is opposed to the Appellants prayer for an award for loss dependency in toto. According to the Respondent, the deceased listed siblings cannot benefit under the Fatal Accident Act. At paragraph 5 of the Plaint, the siblings are listed as follow; MARTIN KIOKO MUTHOKA-Brother (39 years), NDUKU DOMINIC-Sister (39 years), JECINTA MUTHIO MUSYOKA-Sister (35 years), BENEDATA NDUGWA MUTHOKA-Sister (35 years), FRANCISCA NZEMBI-Sister (35 years) and ANNASTACIA WAYUA-Sister (26 years).

78. In his evidence in chief, at page 58 of the Record of Appeal, PW2 stated;

> " The deceased did not have children but all of us were depending on him as a siblings
>
> In cross-examination by Morara, PW2 stated:-
>
> "He was unmarried/single. Our mother passed on after 3 months. All of us have our families even at the time of his death.."

79. A copy of the Chief' letter (P exhibit 10) shows that DOMINIC MUTHOKA NDUNDA and CATHERINE MUENI, who are deceased are father and mother respectively to the deceased herein.

80. The court in Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR stated as follows:

> " Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country..."

81. Section 4(1) of the *Fatal Accidents Act* provides as follows:-

> " Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused..."

82. Section 2 (1) of the same Act provides:-

> " child" means a son, daughter, grandson, granddaughter, stepson or stepdaughter;
>
> "parent" means a father, mother, grandfather, grandmother, stepfather or stepmother.

83. The position was well expressed by Mohamed Hirbo Shande & another vs. George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena) [2021] eKLR Muriithi J. that:-

> "
>
> " 28. There is no mention of brothers and sisters of a Deceased, and the Court, therefore, finds that no damages were awardable for loss of dependency. In so finding, I respectfully agree with the finding of Majanja J. in the case of John Mungai Kariuki & Another vs. Kaibei Kangai Ndethiu & 2 Others Kiambu Civil Appeal No. 29 of 2018 at paragraphs 12 to 15 thereof where it was held that: -
>
> "The brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased. Even in the cases relied on by the appellant, the principle that in African culture children are expected to support their parents is supported by the words of the statute as the deceased parents are named a dependants.....
>
> ....For the reasons I have set out above, the trial magistrate did not err in failing to award damages for loss of dependency and for lost years as urged by the appellants....'. See Ishmael Nyasimi & another vs. David Onchangu Orioki suing as personal representative of Antony Nyabando Onchango (Deceased) [2018], Kenya Power Limited vs. James Matata & 2 others (suing as the legal representatives of the Estate of Nyange Masaga (Deceased) [2016], Awadh Ahmed Awadh vs. Shakil Ahmed Khan [2001] eKLR

84. However in *Ursular Mulandi vs. Kyalo Mutunga & Others* [2017] eKLR the court insinuates that a siblings can be awarded if there is proof that the deceased was substantially depending him or her alone. In *Ireri Moses v Peter Mutugi Muthike (suing as the legal administrator of Estate of the Late Mary Njeri Muthike* (Deceased) [2019] eKLR 23 Gitari J. held:-

> " 23. However, in this case, the deceased's parents died when she was at age 9 years. She was brought up by the respondent until she passed away in university. The respondent took the role of a parent to the deceased and therefore the trial court was correct in awarding him loss of dependency."

85. In this case, PW2 did not mention about their parents depending on the deceased. In fact PW2 stated that they depended on the deceased as siblings. According to the list, Paragraph 5 of the Plaint of the siblings were older than the deceased. PW2 stated that all of the siblings had their families. If indeed the deceased was mentally ill, how then would the siblings also rely a person who is mentally ill? It should be deceased who ought to be a dependent on his siblings.

86. The court will therefore not award the Appellants damages for loss dependency. The ground fails.

DAMAGES UNDER THE *LAW REFORM ACT*

87. As regards damages for Pain and suffering, the Appellants proposed Kshs.50, 000/- while the Respondent proposed Kshs.10, 000/-. The Court notes DW1 in his evidence in chief, at page 67 of

the Record of Appeal stated that deceased died instantly and the body moved to mortuary as per what was entered on the OB 6/22/9/14. In the case of Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR and the decision the decision relied on by the Appellants, the courts awarded Kshs.50, 000/-. The decisions were decided earlier than the Trial Court judgment herein. The Appellants are awarded Kshs.50,000/- as damages for pain and suffering.

88. On the award of damages for loss of expectation, a conventional figure of Kshs.100, 000/- is the acceptable figure under this head as held in Mercy Muriuki & Another –Vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR. The Appellants are awarded Kshs.100, 000/- as damages for loss of expectation.

SPECIAL DAMAGES

89. The special damages of Kshs.25, 445/- pleaded are not disputed. The court is satisfied that the receipts were produced before the Trial Court as exhibits.

90. From the foregoing, I find merit in this appeal.

DISPOSITION

91. The Trial Court Judgment delivered on 20th March, 2019 dismissing Kithimani PMCC No. 389 of 2015 is set aside and substituted therefore with an apportionment of 100% liability against the Respondent.

92. Accordingly, the award that ought to have been made to the Appellant was as hereunder:

(a) Pain and Suffering Kshs. 50,000/-

(b) Loss of expectation of life Kshs. 100,000/-

(c)Loss of dependency Kshs. NIL

(d)Special damages Kshs. 25,445/-

Total Kshs. 175,445/-

93. The appeal has succeeded partially. The court will award half of the costs of the appeal to the Appellants. The Appellants will have full costs of the Trial Court.

94. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damage will attract interest from the date of filing the suit.

Judgment accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 22nd DAY OF NOVEMBER 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Thairu holding brief - for the Appellants

No appearance - for the Respondent

Geoffrey - Court Assistant