REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 264 OF 2017

ROBERT GATHAGE.....APPELLANT

VERSUS

COSMAS MUTUNE NDULU (Suing as the Administrator of

the estate of **JOSEPH KYUNUVE MUTUNE** (Deceased)**.....RESPONDENT**

(Being an appeal from the Judgment of Hon. D.O Mbeja (Mr.) SPM dated and delivered on 28th April, 2017 in the Chief Magistrate's Court at Nairobi in CMCC No. 5642 of 2013)

JUDGEMENT

1. By way of a plaint dated 11/9/2013 the plaintiff (now respondent) sued the defendant for special and general damages, costs and interest. The claim was based on the alleged negligence on the part of the defendant while in control of motor vehicle Reg No. KAY 817B whereby he hit Joseph Kyunuve Mutune (deceased) fatally injuring him.

2. The claim was denied by the defendant and by further defence it is averred that the said accident occurred and/or was substantially contributed to by the negligent manner in which the deceased conducted himself as a pedestrian.

3. Upon hearing the testimonies of the plaintiff and the defendant, the trial magistrate in a judgement delivered on 28/4/2017 found on liability against the defendant at 100% and proceeded to award Shs. 300,000/= in general damages and Sh. 41,510/= in special damages against the defendant.

4. Aggrieved by the decision, the appellant lodged this appeal and raised the following grounds;

> **1. That the learned magistrate erred in law and in fact in failing to hold that the respondent's case was not proven on a balance of probability on liability.**
>
> **2. That the learned magistrate erred in law and in fact in failing to appreciate that the section of the road where the accident occurred was straight and the deceased's view was unobstructed.**
>
> **3. That the learned magistrate erred in law and in fact in totally disregarding the appellant's unchallenged evidence on the occurrence of the accident.**
>
> **4. That the learned magistrate erred in law and in fact by introducing extraneous issues leading to a miscarriage of justice.**
>
> **5. That the learned magistrate erred in law and in fact in failing to apportion liability.**
>
> **6. That the learned magistrate erred in law and in fact in awarding damages for loss of dependency based on a speculative income not supported by evidence.**
>
> **7. That the learned magistrate erred in law and in fact in awarding damages of Kshs. 3,000,000 based on a multiplier of 15 years while the same were unsubstantiated nor discounted.**

5. The appeal was canvassed by way of written submissions. An oral highlight of the submissions was made on 4/9/2019.

6. This being a first appeal, the principle in **Selle –vs- Associated Motor Boat Co. Ltd [1968] EA 123** is applicable. In that case it was stated;

> *"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 in 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."*

7. A recap of the evidence at the trial court is thus necessary. The plaintiff testified that Joseph Mutune (deceased) was his son. He had attained a C+ grade at Iringoni Secondary School. He had received an admission letter to Presbyterian University of East Africa.

8. It was the plaintiff's evidence that the deceased was hit by a vehicle on 4/9/2011. On receiving the report, the plaintiff travelled to Nairobi. A police abstract was issued. He spent Shs.45300 in burial expenses.

9. The defendant as the offending driver. The deceased was 23 years old at the time. The plaintiff blamed the defendant for over speeding at the material time and place.

10. The defendant in his testimony blamed the deceased for carelessly crossing the road. He stated that he was driving from Imara Daima to town at 70 to 80 kph. The road had 3 lanes. He hit the deceased when he was in the middle lane. On cross examination, he stated that he was not aware that the speed limit at the place was 50kph. He acknowledged, however, that while driving in town one is not supposed to exceed 50 kph. He saw the pedestrian when he was very close and this gave him no chance to avoid hitting him.

11. Looking at the evidence and submissions on record, the issues for determination are whether the findings of the trial magistrate both on liability and quantum are sound.

12. On liability, it is common ground that the plaintiff was not an eye witness to the accident. The police abstract relied on shows that the investigations were incomplete. The appellant's evidence is the only eye witness account of the incident. He states that he was driving towards Nyayo Stadium roundabout alone in the vehicle and traffic was light. He was using headlights.

13. Near Sameer business park, while at a speed of 70 to 80 kph, he saw a man crossing the road from the right to the left. The man emerged suddenly and the respondent's braking was not enough to avoid the accident.

14. The trial magistrate had this to say on liability at page 3 of the judgement;

> *"The defendant must have had a clear view of the deceased if he enjoyed good vision and his vehicle was not defective moments before the accident occurred as he was moving in a straight line. The occurrence of the accident herein is not disputed. The defendant herein ought to have taken reasonable measures to avoid the accident by slowing down or otherwise acting in a manner that could have aided him to avoid the accident. It is also apparent that if DW 1 was driving his motor vehicle at a speed of 70 to 80 kilometres per hour then he was in a position to control the motor vehicle such as to avoid causing the accident."*

15. The trial magistrate proceeded to remonstrate on the loss of lives on our roads due to carelessness and recklessness of motorists. For inexplicable reasons, the trial magistrate fails to give any consideration at all to the possibility of the deceased being the author of the accident and/or contributing to it.

16. In civil cases determination is on the basis of a balance of probabilities. This is well articulated in William Kabogo Gitau –Vs- George Thuo and 2 Others [2010]1KLR 526 where the Judge stated;

> *"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that 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."*

17. It is trite law that when an accident occurs involving one or more vehicles or pedestrians, one or both must be held liable. In **Farah –Vs- Lento Agencies** and **Multiple Hauliers –Vs- Ralids Muthome Kimani [2015] eKLR**, the Court of Appeal held that when there is no concrete evidence to determine who is to blame, both parties should be held liable.

18. In **Herbert Juma & Anor –Vs- Rose Mudibo [2019]eKLR**, it was held that in determining what a reasonable standard of care should be, the four factors, inter alia, that should be considered are;

> **1. The likelihood of a pedestrian crossing the road into the motorist's path.**
>
> **2. The nature of the pedestrian, whether a child or an adult.**
>
> **3. The degree of injury to be expected if the pedestrian was struck.**

4. The adverse consequences to the public and to the defendant in taking whatever precautions that were under consideration.

19. On negligence of a driver, a text form **Charlesworth** on Negligence Fourth edition in paragraph 214, pages 93 to 94 gives a useful guide. It states;

> *"It is the duty of a driver or rider of a vehicle to travel at a speed which is reasonable under the circumstances.*
>
> *In determining what is reasonable, the nature, condition and use of the road in question, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on it are important matters to be taken into consideration."*

20. Upon re-evaluation of the evidence herein it is evident that both parties contributed to the accident. On the facts of the case, it is evident that the appellant shared a higher degree of blame he having admitted that he was driving at 70 to 80 kph, a speed that was higher than the speed limit allowed. If he was watchful and careful, he would have seen the deceased in good time and would have been able to take steps to avoid knocking him.

21. It is also manifestly clear that the trial magistrate proceeded on determining liability oblivious of the requirement by the traffic rules and regulations that require a pedestrian to exercise caution while crossing a road. In the case of **Peter Okello Omedi –vs- Clement Ochieng' [2006] eKLR** the court stated that the plaintiff who was a pedestrian owed a duty of care to other road users to move with due care and in a manner that would not endanger the safety of other road users.

22. This in no way negates or reduces the duty of care owed by a driver. In the case of **Mary Murigi –Vs- Peter Macharia & Another [2016]eKLR** it was held;

> *"a person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."*

23. In our instant case, am not persuaded that the plaintiff laid evidence that the defendant was liable at 100%. Neither am I persuaded, in light of the evidence before court, that the defendant was completely blameless in the occurrence of the accident.

24. The defendant admits he was driving at 70 to 80 kph within town (Nairobi). He, in that regard, flouted **S 42(3)** of the **Traffic Act Cap 403 Laws of Kenya** which provides;

> "**S. 42(3)** *No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, any vehicle at a speed exceeding fifty kilometres per hour or any road within the boundaries of any trading centre, township, municipality or city:*
>
> *Provided that the highway authority shall erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometre per hour speed limit restriction begins and ends."*

25. The deceased, a pedestrian also owed a duty of care to himself and other road users. There is no evidence that he was totally blameless.

26. On the material before me and basing my finding on a balance of probabilities, I would fault the finding of the trial magistrate on liability against the defendant at 100% and substitute thereof a finding on liability against the defendant at 70%. I reach this conclusion on the basis that the driver exceeded the speed limit allowed at the place of accident and he thus shoulders higher liability.

27. As regards quantum, it is submitted for the appellant that the trial magistrate erred in adopting the notion by the respondent that the deceased would have joined university, joined the job market at 25 years and would have worked for at least 35 years earning Sh. 50,000/=. This, I am urged, was just speculation with no basis and could not have been considered when awarding damages under the Fatal Accidents Act.

28. The established fact from the evidence was that the deceased was 23 years old at the time of the accident and had been admitted to university to study Sociology.

29. I find useful guidance in the Court of Appeal decision in **Rosemary Mwasya –vs- Steve Tito Mwasya & Another [2018]eKLR** where the court stated;

> *"Issues No. 4 and 5 are also interrelated and will be dealt with as such. With regard to the choice of a multiplier, and a multiplicand, the trial court was guided by the holding in **Haniel Mugo Muriuki versus Marris Min Njeramba HCCC No. 24 of 2005** referred to by the respondent wherein the deceased was a university student aged 24 years old and in which the court therein assessed damages for lost years using a multiplier of 25 years; **Betty Ngatia versus Samwel Kinuthia Thuita HCCC No. 339 of 1998** relied upon by the appellant wherein, the deceased was aged 19 years and pursuing a secretarial course. Also referred to was the case of **Hassan versus Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457** for the holding that loss of earnings to be considered in the assessment of damages should be loss of earnings for the profession the deceased was pursuing or would have pursued had death not occurred. In the light of the above, the learned Judge made findings as follows:-*
>
> ***It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been***

earned by the deceased, less the living expenses, assuming that one lived and worked up to the age of retirement. It has been suggested that a salary of Kshs. 123,750 per month be used with multiplicand of 30 years less living expenses of 1/3. The plaintiff did not tender any documentary evidence to establish this point.

However, the plaintiff has presented documents showing that the deceased undertook studies leaning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an appropriate monthly salary of Kshs. 118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the deceased and the defendant agree that the dependency ratio should be 1/3. On the head of lost years I make the award as follows:

118,564 x 30 x 1/3 x 12 = 14,227,680."

30. This decision, with suitable adaptations, is relevant and applicable in our instant suit.

31. In the matter before me the deceased was 23 years old and had an admission letter to join university. No evidence of the likely earnings was presented as in the Mwasya case above. The trial magistrate assessed damages under the Fatal Accidents Act based on expected earnings of Sh. 50,000/= per month and giving a multiplier of 15 years. There is no possibility that the deceased would have completed university education in 2 years to commence working at 25 years.

32. I would consider employment at 28 years as the appropriate age at which deceased would have commenced working. The trial magistrate in my view correctly put into account the vagaries and uncertainties of life in arriving at a multiplier of 15.

33. Speaking on the choice of a multiplier, the Court of Appeal in **Board of Governors of Kangubiri Girls High School –Vs- Jane Wanjiki & Another [2014] eKLR** stated;

"*The choice of multiplier is a matter of the court's discretion which must be exercised judiciously with a reason."*

34. I would consider the multiplier of 15 a little on the lower side given the current retirement age in Kenya at 60. But since I have not been invited by the respondent to interfere with this aspect, I will let it lie.

35. I find the trial court's finding on the expected earnings at Sh. 50,000/= reasonable and sound taking judicial notice of the average earnings of a 1st degree holder in the country. I would indeed consider this figure very conservative.

36. From the foregoing, the trial magistrate in principle did not deviate from the relevant factors for consideration in the assessment of damages. One omission though stands out. As seen in the Rosemary Mwasya Case above, the court ought to have factored in the element of taxation and other compulsory deductions at a 1/3 of the multiplicand.

37. I would thus within the principle in **Butt –Vs- Khan [1981] eKLR 349** disturb the award of damages for the reasons stated.

38. With the result that I fault the trial court's finding on liability at 100% against the defendant, set aside the judgement on liability and substitute thereof a judgement against the defendant at 70% liability.

39. Further and for reasons stated hereinabove I would disturb the damages awarded and recalculate the same as follows;

Kshs. 50,000(less 1/3 of 50,000) x 12 x 15 x 1/3

= 1,999,998.60

Less 30% contribution = 1,399,998.60

Special damages remain undisturbed at Kshs. 41,510/=.

40. The final award to read as follows;

1. Special damages 41,510.

2. General damages for lost years 1,399,998.60

3. Special damages to bear interest from the date of filing suit.

4. General damages to bear interest from date of the judgement of the court below.

5. The appellant who is partially successful shall have half the costs both on appeal and the trial court.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE