REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 56 OF 2017

(CONSOLIDATED WITH CIVIL APPEAL NO. 59 OF 2017 MACHAKOS)

CHARLES MAKANZIE WAMBUA......…......…...….…….APPELLANT

VERSUS

NTHOKI MUNYAO & PRUDENCE MUNYAO (Suing as personal

representatives of the estate of LILIAN KATUMBI NTHOKI- Deceased……....…RESPONDENTS

(Being an Appeal from the Judgment of the Honorable court delivered on the 5/4/2017 at the chief Magistrates Court in Kangundo by Hon D. ORIMBA Senior Principal Magistrate in CMCC No. 84 of 2015)

=IN=

NM & PM (Suing as personal

representatives of the estate of LKN- Deceased...........................………….........……PLAINTIFFS

VERSUS

CHARLES MAKANZIE WAMBUA...……DEFENDANT

JUDGEMENT

1. The Respondents herein, **NM** and **PMM** in their capacity as the administrators of the estate of **LKN** (Deceased) sued the Appellant herein before the trial court seeking damages, both general and special arising from a road traffic accident which occurred on or about 10 th August, 2013 when the deceased was crossing Kangundo-Nairobi Road at Tala Cereals. According to the Respondents the said accident occurred as a result of the negligence of the driver of motor vehicle registration no. KBH 621Q which was owned by the Appellant.

2. The Respondents set out the particulars of negligence of the said driver, particulars pursuant to statute and special damages which was Kshs 139,599/=

3. The Appellant was dissatisfied with court award on quantum while the Respondents/Cross-Appellants were dissatisfied on how the trial court had apportioned liability and as such parties preferred these Appeals.

4. Further, although the Appellant has raised five (5) grounds of Appeal in the Memorandum of Appeal, the same can be coalesced into one (1) main issue namely quantum. The Respondents have raised five (5) grounds in the Cross-Appeal they are challenging how liability was apportioned by the trial magistrate as well as the award under the head of lost years.

5. In support of their case the Respondents/Plaintiffs called three witnesses. According to PW1, **PMM**, on 10th August, 2015, she was to meet with the deceased at Tala near the Cereals Board. The deceased alighted from a *matatu* which was being driven from Tala Towards Nguluni. Upon alighting, the deceased started crossing the road when a *matatu* reg. no. KBH 621Q which was being driven from Nairobi towards Tala and which was over-speeding hit the deceased. According to PW1, she was staying on the third floor of a house which was next

to the road and witnessed the accident from the balcony of the house since she was expecting the deceased.

6. It was her evidence that the *matatu* overtook an ox driven cart carrying fruits, lost control and swerved and as the vehicle was coming back to its lane, it skidded and hit the deceased. According to PW1, when the deceased saw the vehicle she ran in an attempt to clear off the tarmac and was hit when she was off the tarmac. It was the said witness's evidence that it was safe for the deceased to cross the road since the cart was at a distance and that the *matatu* was also far behind the cart.

7. When PW1 came down she found that the deceased had died on the spot. The police were then called and they removed the body of the deceased to Kangundo District Mortuary. It was her evidence that as she came down she took some photographs which she produced as exhibits. It was her evidence that the vehicle was to blame for the accident as it was over-speeding and hit the deceased when the deceased was a step from crossing the road. She denied that the deceased crossed the road behind the tractor and reiterated that she only ran out of the road upon seeing the oncoming vehicle. It was her evidence that the vehicle only came to a standstill after regaining control.

8. In cross-examination, PW1 reiterated that her house was next to the road. Though she was not inside the vehicle and could not tell the actual speed she insisted that the vehicle was over-speeding. PW1 insisted that she was waiting for the deceased on the balcony and witnessed everything. She saw the deceased check both sides of the road and that the road was clear.

9. PW2, **NM**, the deceased mother testified that the deceased was born on 27th October, 1996 and exhibited her birth certificate. On 10th August, 2013 she was called by PW1 who informed her of the accident. She left home thereafter and saw the vehicle Reg. No. KBH 621Q which was involved in the accident. According to her, she was informed that the body of the deceased had been removed to the police station and then to Kangundo Mortuary. After she reported at the police station she was given a police abstract report which she exhibited. She was later issued with a burial permit which she exhibited. It was her evidence that they incurred funeral expenses totaling Kshs 10,869/= and exhibited receipts for the same. The coffin and transport cost them Kshs 82,000/= while mortuary fee was Kshs 4,750/= and she produced receipts therefor.

10. PW2 also took out letters of administration and paid the advocate Kshs 40,000/= towards the same and was issued with a receipt which she exhibited. The witness also produced the death certificate, the Chief's letter, motor vehicle search records for which she paid Kshs 500/=.

11. According to PW2, at the time of her death the deceased was 16 years old and was at [particulars withheld]Girls where she was performing well. In KCPE the deceased had gotten 335 points. She produced the deceased's admission letter, report form, Results Slip, School Leaving Certificate and a letter from the area MP accepting to sponsor her education. It was PW2's testimony that the deceased wanted to be a secondary school teacher and was useful at home. Apart from helping in the farm work, she was also assisting with the household chores as well as her siblings with homework. On the day of her death the deceased was going to see PW1. As a result of her death PW2 and the deceased's grandmother were seriously affected. PW2 therefore prayed for damages.

12. In cross-examination PW2 admitted that she was not present during the accident and that the deceased was depending on her though she was interested in becoming a teacher.

13. PW3, **Reuben Anyasi**, a retired deputy director of HRM with TSC testified that he was familiar with the salary of teachers. According to him the starting salary for a graduate was Kshs 31,020/= per month while the maximum was Kshs 41,590/= per month with house allowance of Kshs 16,500/= for Nairobi and rent of Kshs 7,500/=. According to him a teacher was entitled to commuter allowance of Kshs 5,000/= per month, leave allowance of Kshs 6,000/= per year and produce a circular to that effect.

14. The defendant did not adduce any evidence.

15. In his judgement, the learned trial magistrate held that since the deceased is said to have attempted to cross the road, she therefore must have contributed to an extent, though the driver of the vehicle had the last chance to avoid the accident. According to the learned trial magistrate the Plaintiff failed to testify on the negligence since he was not an eye witness. He however found that circumstantial evidence abounds that there was an accident involving the suit vehicle and the deceased. The learned trial magistrate held that in the absence of the testimony by the plaintiff, there was no evidence tendered by the plaintiff in the discharge of the burden on him pursuant to section 108 of the Evidence Act as read with the case of **Lucy Muthoni Munene vs. Kenneth Muchangi and KBS**. He proceeded to attribute liability between the Defendant and the Plaintiff in the ratio of 70:30 respectively. He then proceeded to award Kshs 139,599/= as special damages, Kshs 10,000.00 pain and suffering, Kshs 100,000.00 loss of expectation of life, and Kshs 1,320,000.00 loss of dependency.

16. In this appeal it is submitted on behalf of the appellant that since the deceased was a pedestrian attempting to cross the road at an un-designated spot, she therefore contributed to the accident and as such the trial court never erred in apportioning liability in the ratio of 70:30 in favour of the Cross-Appellant. This submission was based on the court of Appeal decision in Isabella **Wanjiru Karanja v Washington Malele [1983] eKLR**.

17. According to the appellant, there was no evidence as to why the deceased was unable to see the vehicles approaching her and therefore she was the author of her own misfortune. The Appellant therefore submitted that as far as the question of liability is concerned, the trial court rightly considered the evidence tendered and urge the Court to uphold the same ratio of 70:30 in favor of the plaintiff when re-evaluating the evidence.

18. On quantum, it was submitted that the deceased did not have any children and depended on the mother for upkeep, she wholly depended on her parents for her upkeep as she was not employed. The future prospects of the deceased were not known nor was there any basis to speculate that she would have been a teacher as per the testimony of her mother. Even if she was, the plaintiff did not offer any evidence to show the level of expected earnings or for her future prospects. It was contended that the award made under the ***Fatal Accidents Act***, namely the Dependency Ratio of 2/3(two-thirds) and a multiplier of 30 years is extremely high and unreasonable for minor who was aged 17 years at the time of death and that the reasons given by the magistrate were based on mere speculations. The Appellant insisted that it was wrong for

the Learned Trial Magistrate to use the dependency ratio of two-thirds. In his view, he should have used the ratio of one third (1/3) or adopt a global figure because it was clear from the evidence that the deceased was not married and did not have any children and was still depending on her parents and not the other way round. Indeed, the trial court took note of the fact that the deceased was unemployed and would still be dependent upon her parents.

19. As regards the dependency period, it was submitted that since the deceased was aged 17 years, the trial magistrate therefore entered into the realm of speculation and erred in finding that the deceased died at the age. The trial court in finding that the deceased would have worked till the age of 47 years was illusionary and speculative and therefore warrant an interference by this court. According to the Appellant, in determining the Multiplicand what is important is the expected period of dependency and not how long the deceased would have worked. In view of the above it was submitted that a global figure was appropriate and this was not a fit case for using the multiplier method of arriving at the damages payable. The said submission was guided by the case of **Mwanzia Ngalali Mutua Vs Kenya Bus Services (Msa) Ltd & Another** cited in **Albert Odawa vs. Gichimu Gichenji [2007] eKLR** and **Simon Kibet Langat & Anor. vs. Miriam Wairimu Ngugi (Suing as the Administrator of the estate of Daniel Mwiruti Ngugi [2016] eKLR**.

20. The Appellant therefore urged the court to consider the instant Appeal in light of the foregoing submissions and the decisions in **Palm Oil Transporters & Anor. vs. W W N [2015] eKLR, Chen Wembo & 2 others versus I.K.K & Another [2017] eKLR** and **Multiple Hauliers (EA) Limited & another vs. William Abiero Ogeda (Suing as the Representative of Christine Arglera Abiero (Deceased)) & 2 others [2016] eKLR** and the court was invited to interfere with the award of Kshs. 1,320,000.00 under the head of loss of dependency as being extremely high and erroneous considering the comparable awards for similar claims and substitute with a global figure of between Kshs 300,000- Kshs 600,000/= as per the above cited authorities since the trial court proceeded on wrong principles.

21. He prayed that in view of all the foregoing, this Appeal ought to be allowed as prayed and the Cross-Appeal be dismissed and the quantum awarded by trial court be set aside in terms of the foregoing submissions and a global sum be adopted.

22. On behalf of the Respondent, it was submitted that the learned trial magistrate erred in finding that since the matter was pending investigations and no one had been charged was sufficient to justify a finding that the deceased was liable for the accident. It was further submitted that contrary to the finding that PW1 was not an eye-witness, the said witness witnessed the accident from her balcony hence her evidence was erroneously disregarded. Accordingly, it was urged that liability ought to have been 100%. To the Respondent attempting to cross the road is not negligent since the evidence was that it was safe for the deceased to cross the road. It was submitted that there was no evidence that the deceased was crossing the road at undesignated place as found by the trial court. Since the Appellant did not call any evidence, it was submitted that based on **Agnes Bosibori Ogega vs. Tea Research Foundation & Joseph Mawia Mutisya [2006] KLR**, liability ought to have been determined at 100%.

23. As regards the quantum, it was submitted that the deceased was 16 years at the time of her death and intended to become a teacher. She was also helping her mother with the farm and household chores as well as her siblings with homework. Based on the definition of "dependant"" in section 4(1) of the ***Fatal Accidents Act***, the deceased's parents were her dependants. Based on the evidence of PW3, the court was urged not to interfere with the dependency ration of 2/3rds. As for the multiplier the court was urged to follow the holding in **David Ngunje Mwangi vs. The Chairman of the Board of Governors of Njiri High School [2001] eKLR** where the deceased, a student aged 17 years was awarded Kshs 1,680,000/= for lost years. They also relied on **DMM vs. Stephen Johana Njue & Another [2016] eKLR** where an award of Kshs 700,000.00 for a child aged 16 years was substituted with Kshs 1,200,000/=. Accordingly, it was submitted that an award of Kshs 1,569,599.00 was not inordinately high as to warrant a reduction but ought to be enhanced to Kshs 2,103,840.00.

Determination

24. I have considered the submissions of the parties 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."**

25. 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.

26. 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."

27. 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."**

28. In this appeal the Respondent is challenging the trial court's finding on apportionment of liability. As to whether the apportionment of liability was proper, 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.**

29. 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.

30. In this case the learned trial magistrate commented on the fact that at the hearing of the suit, the traffic proceedings were still pending investigations and no one had been charged. It would seem that the learned trial magistrate linked the issue of liability to culpability in the traffic proceedings. As regards the relevancy of the police investigations to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

31. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the evidence 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 fact that the civil case comes up for hearing while the traffic matter is still pending investigations is not necessarily fatal to the former. In **Peter Kanithi Kimunya vs. 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."**

32. Even where the traffic proceedings are complete and decision made thereon, save for the fact that a [person may be found liable therein, it does not necessarily follow that the person found culpable is the person solely liable for the occurrence of the accident. Nor does an acquittal automatically exonerate the person charged in those proceedings. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"**

33. In **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998**, it was held by the Court of Appeal that:

> **"Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the 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 the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous…It is not for the Judge to read proceedings in the 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, 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…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 and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."

34. Platt, JA in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** 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."**

35. 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."**

36. 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."**

37. **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."**

38. Therefore, if it was the learned trial magistrate's court's view that in the absence of completion of the investigations in the traffic case, he was thereby handicapped in arriving at a decision as to who was liable, that view would be respectfully erroneous. As was held by **Madan, J** (as he then was) in **Welch vs. Standard Bank Limited [1970] EA 115** expressed himself as hereunder:

> **"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape**

simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame…Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion…There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."

39. Similarly, in **Lakhamshi vs. Attorney-General [1971 EA 118** it was held that:

"A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."

40. In this case there was evidence from PW1 that she witnessed the accident happening. At the time of the accident she was in her balcony overlooking the road when she saw the deceased whom she was waiting for alight from the vehicle and start crossing the road. However, the vehicle which was over speeding and which was behind a hand cart lost controlled veered of the road and as it returned back to its lane collided with the deceased. According to her, there were other people who were similarly alarmed by the manner in which the vehicle was moving and took off. With due respect to the learned trial magistrate this piece of evidence was never considered. The learned trial magistrate's decision was informed by the fact that the Plaintiff did not adduce any evidence in support of the allegations of negligence. In fact, it would seem that the decision was simply based on the fact of collision since the learned trial magistrate found that the Respondent did not discharge the burden which was on them.

41. This respectfully was a misdirection. A plaintiff can prove his case either based on his own evidence or on the evidence of his witnesses. It does not follow that in accident cases, if a plaintiff did not witness the accident the case must fail notwithstanding the fact that he called the eyewitnesses who testified as to the occurrence of the accident as happened in this case. I agree with the legal pronunciation by the Court of Appeal in **Isabella Wanjiru Karanja vs. Washington Malele [1983] eKLR** that:-

"There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion 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. I would not disagree with the learned judge's finding that the appellant's speed was excessive in the circumstances, but the failure to keep a proper look out would seem to be the predominant factor. I respectfully agree that the learned judge was right to apportion the blame 75 per cent to the appellant driver and 25 per cent to the respondent pedestrian."

42. Where however, there is clear evidence as to who is liable, the court cannot fall back on that decision in order to apportion liability. In this case the incontrovertible evidence was that the vehicle in question lost control before colliding with the deceased after veering off the road. To my mind that is not the same as the case where a vehicle is being driven properly on the road and collides with a pedestrian who due to failure to pay attention proceeds to cross the road. The learned trial magistrate stated in his finding that the deceased was crossing at an undesignated part. However, there was no such evidence.

43. In this case I find that the decision of the learned trial magistrate as regards the finding that the accident occurred at an undesignated part of the road was based on no evidence. Similarly, his finding that the Plaintiffs failed to prove their case by not testifying on liability was based on the application of a wrong principle. His finding on liability must therefore be interfered with. Based on the only evidence on record, I find that the Plaintiff/Respondent proved their case and the Appellant was 100% liable.

44. As regards quantum, it is clear that the deceased was an adolescent. 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."

45. 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…"

46. 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."**

47. 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.**

48. **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."**

49. 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."***

50. In this case the trial court awarded the Respondents a sum of Kshs 1,320,000.00 loss of dependency. I am not satisfied that the said amount was manifestly excessive in the circumstances to warrant interference. In the presence I decline to disturb the same.

51. Consequently, I allow the cross appeal as regards liability, set aside the apportionment of liability and enter judgement for the Respondents against the Appellant at 100% liability. It follows that judgement is hereby entered for the Respondents against the Appellants as follows:

(a) Special Damages of Kshs 139,599/=

(b) General Damages for Pain and Suffering Kshs 10,000/=

(c) General Damages for Loss of Expectation of Life Kshs 100,000/=

(d) Loss of Dependency/Lost years Kshs 1,320,000/=.

52. The Special Damages will accrue interest at court rates from the date of filing suit till payment in full while the general damages will accrue interest from the date of judgement in the lower court at court rates till payment in full.

53. The Respondents will get the costs of the lower court but as the Respondents failed to comply with this court's directions to furnish soft copies there will be no order as to the costs of this appeal and cross appeal.

54. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 28th day of April, 2020

G V ODUNGA

<u>JUDGE</u>

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Josephine