**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 1 OF 2020**

**JOEL KIPKOSGEI SIGEI.....APPELLANT**

**VERSUS**

**LYDIA KERUBO MOGAKA &**

**DOMINIC MOKUA MAKORI (Suing as the Legal Representatives of the estate**

**of CYRUS MOGAKA MAKORI (Deceased).....RESPONDENTS**

***{Being an appeal against the Judgement of Hon. C. W. Waswa (Mr.) – RM Nyamira dated and delivered on the 16th day of December 2019 in the original Nyamira Chief Magistrate's Court Civil Case No. 154 of 2018}***

**JUDGEMENT**

Pursuant to a limited grant ad litem issued to them on 11th February 2018 the respondents filed a claim in negligence against the appellant and were subsequently awarded general damages in the sum of Kshs. 1,437,680/=, specials of Kshs. 20,000/=, costs of the suit and interest. The claim arose from a motor accident that occurred on 7th February 2018 involving the deceased (a boda boda rider) and the appellant's motor vehicle Registration No. KBD 225N. The accident is said to have occurred along the Mokomoni – Nyaramba Mur ram Road within Nyamira County. The respondents attributed the accident to negligence on the part of the driver of the appellant's motor vehicle which the appellant vehemently disputed. The trial court nevertheless found the appellant largely to blame for the accident at 80% and assessed damages in favour of the respondents as outlined above subject to them bearing 20% liability. Being aggrieved the appellant preferred this appeal citing the following grounds: -

> **"1. The Learned trial Magistrate erred by arriving at a finding on liability was not supported by evidence adduced at the hearing.**
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> **2. The learned trial Magistrate erred both in law and fact in basing his finding on irrelevant matters.**
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> **3. The learned Magistrate erred in law and in fact in failing to appreciate or take into account the Appellant's submissions or at all.**
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> **4. The Respondent's case was not proved on balance of probability as is required by law.**
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> **5. The learned trial Magistrate's award of damages was improper, unrealistic and inappropriate under all circumstances of the case.**
>
> **6. The learned trial Magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned."**

The appeal was canvassed by way of written submissions. Principally Counsel for the appellant argues that the evidence adduced by the respondents was wanting in that none of them witnessed the accident; that the trial court ought to have put more reliance on the evidence of the driver of the appellant's motor vehicle and the eye witness account that the deceased overtook at a blind corner at a high speed and veered into the path of the appellant's vehicle hence causing the accident. Citing several decided cases Counsel submitted that at most given the evidence adduced by both sides the trial Magistrate ought to have found both parties equally to blame for the accident.

On the quantum of damages, Counsel for the appellant argued that because the respondents did not produce any marriage and birth certificates and the Chief's letter could not be relevant to the case the same having been written long before the death of the deceased (3rd April 2017 whereas the deceased died on 7th February 2018) then the court erred in adopting a multiplier of 2/3. Counsel pointed out that no

steps were taken by the respondents to correct the anomaly in the Chief's letter and that accordingly the trial Magistrate erred in putting reliance on the same. Counsel argued that a multiplicand of Kshs. 1/3 ought to have been adopted in the circumstances. Counsel urged this court to allow this appeal and set aside the decision of the trial Magistrate in totality and award the costs of the appeal to the appellant.

The appeal is vehemently opposed. Counsel for the respondents submitted that 20% contributory negligence was only attributed to the deceased because he was not wearing a helmet at the time of the accident. Counsel submitted that the evidence adduced by the respondents proved negligence on the part of the appellant and the trial Magistrate was correct in apportioning liability in the ratio 80%:20%; that in any case the appellant's driver (Dw1) also confirmed swerving to the right side of the road where he collided with the deceased's motorcycle. On the issue of quantum Counsel submitted that as the deceased was married with children the dependency ratio of 2/3 is not manifestly high and it ought not to be disturbed. Counsel contended that the trial Magistrate's judgement was detailed and gave reasons for the awards under each head and that the awards were also supported by precedents. Counsel submitted that there is no justification to interfere with either the finding on liability or the assessment of damages and the appeal should therefore be dismissed with costs to the respondents.

As a first appellate court my duty is to reconsider and analyze the evidence in the court below so as to arrive at my own independent conclusion (**See Selles v Associated Motor Boat Company Ltd (1968) EA 123).**

That a collision occurred between the appellant's motor vehicle and a motorcycle that was driven by the deceased on the date and place alleged is not in dispute. What is in dispute is the manner in which it occurred. At the trial the respondents attributed the collision to negligence on the part of the driver of the appellant's motor vehicle and called three witnesses. The evidence led by PC Dominic Munene (Pw1) was all hearsay as he did not witness or even investigate the accident. Lydia Kerubo Mogaka (Pw2) was not at the scene of the accident either. The only witness who gave direct evidence on causation was Zablon Omosa (Pw3). It was his evidence that the accident occurred because the appellant's driver overtook at a corner and veered into the path of the motorcycle. He also stated that the vehicle was ***"over speeding"*** although he was not able to tell the exact speed. On their part the witnesses for the appellant blamed the accident on the deceased who they alleged was at a high speed and veered to their path. It was their evidence that their vehicle was at a moderate speed.

I have considered the evidence carefully and I am satisfied that negligence on the part of the appellant's driver was proved on a balance of probabilities and that the decision to apportion contributory negligence to the deceased was well grounded. Both Dw1 (the driver of the appellant's motor vehicle) and Dw2 who was a passenger in the vehicle admitted that the accident occurred at a corner. It is also clear from the driver's evidence that the resultant damage was on the left side of the vehicle and it was indeed his evidence that the point of impact was the front left side of the vehicle. If this was the case it means he was driving on the right side/lane whereas he should have been driving on the left side/lane. This is consistent with Pw3's testimony that the appellant's driver overtook at a corner and veered into the path of the oncoming motor cycle. I do therefore agree with the trial Magistrate's finding of fact that the driver of the vehicle veered into the path of the deceased and was largely to blame for the collision. The deceased did not have a helmet so he too must shoulder some contributory negligence. I am satisfied that the trial Magistrate's apportionment of liability in the ratio 80%:20% was premised on a correct principle of the law and I see no justification to interfere with it.

On the quantum of damages Counsel for the appellant faulted the trial Magistrate only in respect of the adoption of 2/3 as the dependancy ratio. Had the trial Magistrate arrived at the conclusion that the persons named in the Chief's letter were not the spouse and children of the deceased then he would not have awarded damages under the Fatal Accidents Act as those are only awarded to a wife, husband, child, mother and/or father. The trial Magistrate however believed the contents of the Chief's letter. It is my finding that the said letter was indeed admissible for that purpose under **Sections 33 (e) (f), 35 (1) (2) and 38 of the Evidence Act** which provide: -

> **"33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—**
>
> **……..**
>
> **(e) relating to existence of relationship**
>
> **when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;**
>
> **(f) relating to family affairs when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised……..."**
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> **35 Admissibility of documentary evidence as to facts in issue**
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> **(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—**
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> **(a) if the maker of the statement either—**
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> **(i) had personal knowledge of the matters dealt with by the statement; or**

**(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**

**(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.**

**2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection**

**(1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence —**

**(a) notwithstanding that the maker of the statement is available but is not called as a witness;**

**(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.**

**38. Entries in public records**

**An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible."**

The issue regarding the date on which the Chief's letter was written vis a vis the date the deceased died was litigated during cross examination when the 1st respondent pointed out and it was resolved to be typographical error. It is common knowledge that not all marriages in our jurisdiction are evidenced by a marriage certificate and that the 1st respondent's evidence even without a letter to that effect sufficed provided there was no evidence in rebuttal or to the contrary. I am not therefore persuaded that the trial Magistrate's adoption of the 2/3 dependency ratio was based on a wrong finding of fact and as the assessment of damages was not faulted on any other issue I find no reason to interfere with the same. Accordingly, I find no merit in the appeal save that in accordance with **Section 4 (1) of the Fatal Accidents Act,** the nett of the damages for loss of dependancy shall be divided among the wife and children of the deceased as follows: -

**1. OMM - 25%**

**2. ENM - 20%**

**3. AKM- 20%**

**4. HKM - 20%**

**5. LYDIA KERUBO MOGAKA - 15%**

The share(s) of the minors shall be invested in the joint names of their mother and the Administrator of this Court (Executive Officer) until they attain the age of eighteen. The appeal is otherwise dismissed with costs to the respondents. It is so ordered.

**Signed, dated and delivered in Nyamira this 24th day of September 2020.**

**E. N. MAINA**

**JUDGE**