REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 83 OF 2019

KIOKO DAVID MUTINDA.....APPELLANT

VERSUS

TRANSLINK LOGISTICS (EA) LTD.....RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. Wanjiru Njuguna,

Resident Magistrate, on the 17th September 2019

in SRMCC No. 251 of 2018)

Coram: Hon. Justice R. Nyakundi

Kariuki Gathuthi Advocates for the appellant

Oloo & Chatur Advocate for the respondent

JUDGMENT

This is an appeal from a Judgment and decree of the Resident Magistrate at Kaloleni **(Hon. W. Njuguna)** delivered on 17.9.2019 on liability together with award general and special damages under the Law Reform Act and The Fatal Accidents Act. Being aggrieved with the decision on these two central issues, the appellant has appealed to this Court on (6) six grounds of appeal.

> **(1). The Learned Magistrate erred in Law and fact in placing a higher burden of proof upon the plaintiff on who was to blame for the accident than the degree allowed by the Law.**
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> **(2). The Learned Magistrate failed to pay due regard to the evidence given under oath by the investigating officer PW2.**
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> **(3). The Learned Magistrate erred both in fact and law in failing to consider that plaintiff's had adduced sufficient evidence to prove to the required standard that the deceased had children defendant on him.**
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> **(4). The Learned Magistrate erred both in fact and in Law in failing to consider conventional awards for general damages in similar cases.**
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> **(5). The Learned Magistrate erred in failing to consider the appellant submission on both liability quantum.**
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> **(6). The Learned Magistrate erred in both in fact and in Law in placing upon the plaintiff's a higher burden of proof than that required in civil suits in consideration of the sum awardable under Fatal Accidents Act and Law Reform Act.**

These grounds were supported by Learned counsel for the appellants submissions to the effect that:-

The Learned trial Magistrate went contrary to precedents set by the decided authorities by finding letter from the Chief's office on survivorship and dependency is not sufficient evidence to determine dependency. Learned counsel for the appellant further argued and submitted that the finding on liability was at variance with the testimony of the police officer, (PW2), who stated that the respondent's driver

was to blame for the accident. It was contended by the Learned counsel that in the instant case the Learned trial Magistrate gave no reason of apportioning contributory negligence at **25%:75%** in favour of the appellant.

In Learned counsel's contention the decision was inconsistent with the dictum in **Nadwa v Kenya Kazi Ltd {1988}.** In the premises argued Learned counsel the plea of prima facie case with respect to the evidence rendered the findings on liability at **100%** tenable.

Secondly, the appellant counsel felt dissatisfied with the assessment of quantum for being too low as to amount to an erroneous estimate of the total award. Inspite of the Learned trial Magistrate finding it was Learned counsel submission that the error was more pronounced on loss of dependency under Section 4 of the Fatal Accidents Act. In the present case Learned counsel argued that despite the appellant proving loss of dependency Learned trial Magistrate findings stood in contrast to both oral and documentary evidence before Court. Learned counsel cited the authorities of **Pamigo Ltd v Phelestus Hoka Libulele HCCA No. 570 of 2016, Joyce Medza Mangale & Musa Rocha Mangale v Eden Transporters & Logistics Ltd HCCA No. 70 of 2019** with these Learned counsel pointed out that the appeal ought to be allowed.

Counsel for the respondent submitted, first, the test on the criteria to constitute liability was firmly established by the evidence. Here, counsel argued and submitted that the servant or agent of the appellant drove at a material time and it was the negligent driving which caused the accident. As regards the Law applied by the Learned trial Magistrate counsel submitted that appellant has failed to show any misdirection to warrant the Court to interfere with the decision. Learned counsel contended that the contributory negligence on the part of both parties was well founded from the facts and evidence at the trial. With regard to the appeal, counsel invited the Court to dismiss the appeal in its entirety.

Analysis and determination

Broadly, this appeal is anchored on two central issues the question and findings on liability and quantum as inquired and decided by the Learned trial Magistrate. In the case of **Plan Farm Company Ltd v Paul Kimani Mungai HCA No. 70 of 2002**:

> **"It is the duty of the first appellate Court to review and re-evaluate the evidence tendered in the Lower Court and to ensure that the findings of facts by the trial Court are based properly on the evidence before it and that it has not acted on the wrong principles in reaching the conclusions what is in issue at that trial were the elements of negligence, a claim on duty, breach and consequent damage."**

It is trite that the plaintiff must satisfy the Court on the balance of probabilities that the harm of the plaintiff had been caused by the negligence on the part of the defendant. According to the appellant's case at the trial he blames the respondent driver for not exercising reasonable care in the management and control of the vehicle resulting in a collision. In **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another CA No. 345 of 2000**, the Court stated:

> **"The plaintiff asserted that the accident was caused by negligence of the defendant and gave particulars of negligence. The defendant also asserted the accident was caused by a negligence of the motor cyclist and gave particulars of negligence. In the event each party was under a duty to prove its own assertion." As the High Court in *Eastern produce (K) v Christopher Atindo Osiro HCA No. 43 of 2001 and Kiema Mutuku v Kenya Cargo Hauling Services {1991} KLR 461 2 KAR 258:***
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> **"In the case of negligent damage it is trite Law that the onus of proof is on he who alleges and in millers where negligence is alleged the position is that there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

In the present case what the Learned trial Magistrate said was to the effect that the respondent was more to blame for the accident than the appellant. For the Court in **Mariam Athman Senengo v Sun 'n' Sand Beach Hotel & 3 others HCCC No. 72 of 2002:**

> **"The argument proceeds that it is a very salutary principle, I think that when one man by his negligence puts another in a position of difficulty, the Court ought to be slow to find that other than man negligent merely because he may, have failed to do something which looking back on it afterwards might possibly have reduced the amount of damage. The question is whether at the time he ought to have done it and was negligent not to do it."**

In the instant case evidence by **PW2 – PC Juma** showed that the collision occurred at Guya area along Mombasa –Voi Road involving the respondent's motor vehicle and the deceased motor cyclist. He attested to matters as to impact indicating the respondent's motor vehicle was off the road onto the lane of the motor cyclist.

Once I accept **(PW2),** evidence its my duty to examine whether the Learned trial Magistrate could reasonably come to the view of finding contributory negligence apportioned at **25%:75%.** Liability on the part of the appellant, or whether on the face of it an apportionment was a proper exercise of discretion.

The position which appears persuasive as I make the determination herein is as illustrated in the case of **Hummerstone v Leary {1921} 2KB 664** in which the Court observed:

> **"Where in a tortious action by a complainant against the defendants, a complainant is able to prove negligence generally but unable to prove negligence specifically on the part of one or other, the complainant is entitled to a determination notwithstanding the Court's difficulty in deciding the question of liability and the degree of contribution (if any) between the defendants."**

It's apparent to me that the Learned trial Magistrate reached conclusion on contributory negligence based on the facts and circumstances as placed before him. It may be that the Learned Magistrate was faced with a delicate balance to conclude that a finding on negligence as against the respondent could only be an apportionment.

In so far as the relevant facts of the case stand there are no salient features to enable this Court interfere with factual findings of the Learned trial Magistrate. I note the difficulties the Learned trial Magistrate had in considering whether the respondent was negligent and whether he had acted in breach of duty or he had taken every step to avoid the collision. It required consideration of the speed at which the deceased or the respondent's driver was travelling and prevailing conditions that then obtained on the said road. In the end it also demanded consideration of what steps could have been taken by both drivers to avoid what was a sudden and unexpected hazard.

In the result, I accept that in evaluating the evidence the trial Court had the advantage of seeing and hearing the witnesses to gauge their credibility and demeanor on the issues at stake. **(See Pandya v R {1957} EA 336, Ruwala v R {1957} EA 570).** In **Vaughan v Taff Valerly Co. {1860} 157 ER 1351 Willes J.** said that:

> **"The definition of negligence is the absence of care, but whatever may be its general description, negligence is now judicially recognized as an independent tool, the essential ingredients of which are:**
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> **(a). The existence of a duty to take care owing to the plaintiff by the defendant.**
>
> **(b). A breach of that duty and**
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> **(c). Damage suffered by the plaintiff which is legally deemed to be the consequences of that breach of duty."**

It's the contextual analysis of the evidence by the Learned trial Magistrate which gave rise to the apportionment on liability ratios. She sought to distinguish and draw inference on the degree of negligence. **The Court in Wagon Mound {1966} 2 ALL ER 709 Lord Reed stated**:

> **"it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, for example, that it would involve considerable expense to eliminate the risk."**

In so far as the Learned trial Magistrate established both parties to some degree owed a duty of care to each other to take evasive measures to avoid the collision.

That being so the orders of the appellant that are being appealed against are hereby devoid of merit. The next ground of appeal taken up by the appellant was on account of assessment of damages, in particular loss of dependency under the Fatal Accidents Act. As indicated in the memorandum of appeal and submissions by Learned counsel for the appellant the level of dissatisfaction is on the rejection of the chief's letter sufficiently identifying survivorship and dependants of the deceased. In the second limb of grievance is on the question and application of multiplier formulae of 1/3 instead of 2/3 which the Learned counsel considered appropriate. For purposes of this appeal, it is however necessary to restate the jurisprudential position in Kenya on this issue. So what is the best method of seeking to achieve a generally accepted standard of fairness.

One of the most striking expressions of the approach to be followed is in the Judgment of the Courts in **Havens v Patel EA {1961} 129, Khemar v Murlinhar {1958} EA 268, Kemfor v Lubia {1987} KLR 30** thus:

> **"In a claim under the Fatal Accidents Act, First, the Court must find out the annual loss of dependency: secondly, the annual loss should be multiplied by a reasonable figure representing so many years purchase: thirdly, the capital sum so found must be discounted to allow for legitimate concerns as the prospects of the widow's remarriage and the fact that the award is being received in a lumpsum at once. In finding the annual loss of dependency the relevant income is the net earnings of the deceased and in choosing a multiplier, regard should be made to the ages and expectation of dependency by the dependants, the age expectation of earning life by the deceased and the vicissitudes of life of both the deceased and the dependants. Finally where the beneficiaries of the estate of the deceased are the same persons as the dependants under the Fatal Accidents Act, the amount awarded to the estate must be taken into account in making the award under the Fatal Accidents act in order to avoid over compensating the dependents."**

An examination of the provisions of this Act therefore underpins the above principles. The second point to be noted is that the existence of one of those factors listed in the cited authorities is a matter of particular cogent evidence. In **Bor v Onduu {1988-92} 2 KAR 288:**

> **"Loss of dependency is a matter of fact in every individual case and there is no rule of Law that two thirds or indeed any other fraction of the deceased's income is deemed to be what is spent on the family. The so called two-thirds rule is more than finding of fact which has masqueraded for long as holding on a pong of Law." (See also Beatrice Wangui Thairu v Ezekiel Bargetory & Another HCCC No. 1638, James Kirimi v PCEA Kikuyu Hospital & Another {2017} eKLR).**

In the instant case **Kioko David Kyengo & Mueni Mutinda** obtained grant of Letters of Administration issued on 4.7.2018 to pursue a claim for damages on behalf of the **Estate of Kyalo Mutinda Muma** for the benefit of the dependants under the Law Reform Act and Fatal Accidents Act.

The essence of the appellant's claim was that the deceased had met his death through a wrongful act by the respondent following the death,

the estate of the deceased was entitled to compensatory damages. The witness in support of the claim testified that the deceased aged 41 years was a businessman selling vegetables with a monthly income of over Kshs.20,000/=. He was also survived by his mother and five children as evidenced by the chief's letter produced as exhibit 6. As at the time of his death, the letter confirms that five children were all minors. On the other hand there was no challenge to that evidence on the death of the deceased and his relationship with the mother and his five children or that indeed they were not dependents to claim benefit from the estate.

The Learned trial Magistrate in assessing damages gave due consideration to the earnings of the deceased by rejecting that he was a vegetable vendor and elected to rely on the relevant notice on regulations of wages (general) amendment order of 2015 legal notice No. 117 of 2015 and with that accorded him an income of Kshs.5,844.20/=. He went further to apply a multiplier of twenty (20) years pegged on the age of the deceased who died at forty-one (41) years old. In an attempt to calculate loss of dependency using multiplier – multiplicand approach it is clear from the record that the Learned trial Magistrate adopted one third as the appropriate ratio.

In canvassing the appeal on the part of the appellant all these factors which were factored by the Learned trial Magistrate are in contestation. Learned counsel submitted that the analysis by the trial Court ignored fundamental features on proof of dependency as contained in the chiefs later for both the mother and his minor children. As such he arrived at an erroneous estimate of the award under the Fatal Accidents Act when all this is said I agree with the appellant's contention on this issue. In the case of the **Administrator Estate Gladstone Keith Richardson (deceased) v Fitzroy Thomas, darissa & Richard Clemetston Suit No. 1988/181 UR.** The Court said:

> **"A dependent referred to as near relation, is one who can satisfy a Court that at the time of the death of the deceased he was in receipt of a benefit from the deceased and that the death has deprived him of such benefit."**

The Law of Succession under Section 29 is quite instructive on the definition of dependency and how the estate is to devolve upon the surviving dependants, such as in this case. I have before me the chief's letter dated 8.3.2018 on the five surviving children of the deceased aged between 12 -17 years old. Section 35 and 38 of the Law of Succession read together with Section 3 (2) of the Act defines child and children thus:

> **"reference in this Act to child or children shall include a child conceived but not yet born as long as that child is subsequently born alive and, in relation to a female person, a child born to her out of wedlock and in relation to a male person, a child whom he has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. To the extent of the provisions of the Fatal Accidents Act, Section 4 (1) provides as follows:**
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> **"Every action brought by nature of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the persons whose death was so called, and shall be brought by and in the name of the executor or administrator of the person deceased."**

That principle may be adopted to the application of the provisions under the Fatal Accidents Act. In such an application it gives credence to the statutory relationship between the Fatal Accidents Act and the Law of Succession on intestate estate. So on parental responsibility if for no other reasons the deceased during his lifetime was obliged to make adequate provision to his mother and the five children.

It was not open to the Learned trial Magistrate to deliberately demand of the administrator of the estate to produce Birth Certificates of the children as a ground of their status under the Fatal Accidents not even under the Law of Succession for them to qualify as genuine dependents of the deceased. Apart from merely making sweeping statements that the administrator ought to have exhibited Birth Certificates to proof birth and age of the children there are plethora of cases on this issue in the realm of Criminal Law, which can apply **Mutatis Mutandis** on proof of age.

In the case of **Francis Omuroun v Uganda CA No. 2 of 2008** the Court held interalia:

> **"That apart from medical evidence, age of a child may also be proved by a birth certificate, the victim parents or guardian and by observation and common sense."**

This was another area of anxiety to note that according to the Learned trial Magistrate it's only by way of Birth Certificates and clinical cards age of the children of the deceased would be proved. Considering the explanation in that Judgment, it would be apparent that the Learned trial Magistrate was using a different yardstick that as a who occasioned prejudiced and injustice to the appellants.

In the present case, the claimants were dependants of the deceased. Consequently, it must be stated that the Learned trial Magistrate was in error on this issue of the chief's letter and non-production of Birth Certificates to support the claim under the Act. The Court can and would have been entitled on this matter to actually draw reasonable inferences in that regard, but it drifted away? The other possible challenge is in respect of application of the minimum wage in substitution of the evidence that the deceased was a vegetable vendor earning a monthly income of Kshs.20,000/=. As regards pecuniary loss in question the claim was based on actual loss of Kshs.20,000/= expected income available to the deceased earnings from his business as a vegetable vendor. In order to displace the evidence on income with a minimum wage the Court ought to have been satisfied that a factor of this significance was not proved on a balance of probabilities. It would seem to me that the Learned trial Magistrate was expecting the administrator to the Estate to provide financial statements of accounts, receipts for daily sales or bank accounts of the deceased. The composite approach mentioned above by the Learned trial Magistrate is in contrast to the prevailing jurisprudence direction set out in the case **Jacob Ayiga & Another v Simeon Obayo {2005} eKLR and in Nelson Rintari v CMC Group {2015} eKLR** the Courts held interalia:

> **"That respondents cannot therefore urge the Court to deny the appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the respondent's submission are accepted. This would do a lot of injustice to**

many Kenyans who have invested in informal sector and do not worry about keeping books of accounts."

In **Jacob Ayiga case (supra)** the Court of Appeal observed interalia:

> **"that when dealing with the issue of the nature of evidence to support a case under for dependency in the Fatal Accidents Act " we do not substitute to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things…"**

The most advisable course for the Learned trial Magistrate to take was to be fortified in his findings with the guiding principles in the above cited cases. The appellants having succeeded in bringing their claim within the principles elucidated herein any legitimate interest on pecuniary loss before the deceased death was Kshs.20,000/= and not the minimum wage of Kshs.5,844.20/=.

As was discussed in **Taff rate Railway Co. v Jenkins {1913} AC 1**:

> **"It is not a condition precedent to the maintenance of an adult under the Fatal Accidents Act. That the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before death of the deceased, provided that the plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of his life."**

The most important point in my opinion in this appeal is for this Court to depart from the findings of the Learned trial Magistrate to the extent on assessment of damages under the Fatal Accidents Act. Before reaching a firm conclusion and having carried out the statutory exercise I should always be well advised as a general guide the yardstick set forth in **Butt v Khan {1981} KLR 349, Kitavi v Coastal Bottlers Ltd {1985} KLR 470.** Applying the specified factors also provide a helpful elucidation:

> **"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was in either inordinately high or low."**

Indeed, the overall considerations the Learned trial Magistrate gave to the exercise of discretion and interpretation conferred by Section 4 of the Fatal Accidents Act was erroneously founded on certain aspects of her Judgment. The decision exceeded the ambit of the well established principles within which a fair and reasonable award was not possible rendering it plainly wrong. This Court therefore agrees with the submissions by the appellant counsel in that regard. Bound by the above principles and bearing in mind the Courts appellate jurisdiction exercisable in this case, I would allow the appeal on loss of dependency to the extent of the substituted award of **Kshs.20,000 x 12 x 20 x 1/3 = Kshs.1,600,000/=** subject to **25%** liability deduction.

The children named in the chief's letter dated 8.3.2018 are dependants of the deceased before or at the time of death and so their claim under Fatal Accidents Act is maintainable. The claim under the Law Reform Act (miscellaneous provisions and Fatal Accidents are legitimately part of the claim by the administrator to the Estate of the deceased. In conclusion therefore, I allow the appeal with costs of this appeal to the appellant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Wesonga advocate for the appellant

2. Ms. Adoyo advocate holding brief for Otieno advocate for the respondent

30 (thirty) days interim stay and leave for each party to apply.