REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO.27 OF 2017

BROADWAYS BAKERY LIMITED.....APPELLANT

-VERSUS-

PHYLLIS WAKONYU WAWERU (Suing as the Personal

Representative of Samuel Wachira Mwangi (Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. W.Kagendo, Chief Magistrate, which was delivered on 28th June 2017 in Nyeri CMCC No.545 of 2003)

JUDGMENT

1. The Respondent by a Plaint dated 1st August 2003, filed suit in her capacity as the administratix of the Estate of her deceased husband Samwel Wachira Mwangi. She claimed for her own benefit and that of the deceased's estate under the Law Reform Act and the Fatal Accidents Act. She sought special and general damages.

2. She pleaded that on the 4th August 2000, her husband was lawfully cycling off the Nyeri Karatina Road when the appellant's driver so negligently drove the appellant's motor vehicle registration no KZT 378 that it collided with the deceased causing him fatal injuries, and damaging his bicycle beyond repair. The Appellant filed a Defence dated 24th September 2003 admitting the occurrence of the accident but denied any negligence on their part. They attributed the occurrence of the accident to the negligence of the deceased.

3. In a judgment dated 28th June 2017 the subordinate court found the Appellant wholly liable for the accident and made the following wards together with costs and interests in favour of the Respondent: -

i. Loss Dependency	**Kshs. 1,560,000/-**
ii. Loss of Expectation of Life	**Kshs. 100,000/-**
iii. Pain and Suffering	**Kshs. 20,000/-**
Total	**Kshs. 1,680,000/-**

4. Dissatisfied by the said judgment, the Appellant brought this appeal via a Memorandum of Appeal dated 26th July 2017 on the following grounds. That

a) The learned trial Chief Magistrate erred in law and in fact by assessing liability at 100% while there was evidence to have the entire suit dismissed

b) The learned trial Chief Magistrate erred in law and in fact by making an award that was manifestly excessive and in particular the multiplier and the income.

c) The learned trial Chief Magistrate erred in law and in fact in by awarding double compensation under the Law Reform Act and the Fatal Accidents Act.

d) The learned Chief Magistrate erred in law and in fact by deciding the case against the weight of the evidence.

5. The Appellant seeks the Court to allow the appeal, grant costs and set aside the impugned judgment and substitute the same with an award that it deems fit and just to grant or dismiss the suit.

6. The Appeal was canvassed via written submissions.

The Appellant's submissions

On the 1st ground the appellant relied on **Mbuthia Macharia vs Annah Mutua Ndwiga and Anor [2017] eKLR** quoting s.107 of the Evidence Act on the burden of proof, *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"*, and **The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14** describe the burden of proof as follow-

> *"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose".*

It was argued that PW1 and PW2 gave inconsistent evidence with regard to the time of the accident. The no evidence of damaged bicycle was produced. That PW2 said he was 100m away yet it was dark and raining so he could not be a trustworthy witness. That his own description of the accident showed that the deceased was riding in the middle of the road.

Secondly that the plaintiff had not called a police officer to testify, produce a sketch or description of the scene, or investigations, or make and description of the motor vehicle, facts that were specifically denied by the appellant. He relied on **Joseph Njuguna vs Cyrus Njathi (1999) eKLR** on the relevance and weight of the testimony of the police in proving negligence. ***Wareham t/a A.F Wareham & 2 Others vs. Kenya Post Savings Bank (2004)2 KLR*** and ***Joseph Njuguna vs. Cyrus Njathi (1999) eKLR*** were also cited.

On the 2nd ground the appellant argued that there was no proof of the allegation that the deceased earned Ksh.400/- per day as a mason as testified by PW1. PW3 testified he was a carpenter. That even the certificate of death indicated that the deceased was a farmer. That there was no justification for the figure of Kshs. 6,500/- The Appellant relied on ***Beatrice W. Murage vs. Consumer Transport Ltd & Another (2012)eKLR*** where it was held:-

> *"Ordinarily if one does not prove what the deceased earned, the court would base the earning on the minimum wage"* and ***Authur Nyamwate Omutondi vs United Millers &2 others [2009] eKLR*** where the court stated *"if income is not proved then no award of dependency can issue. However, in our present case the court is prepared to take a minimum of Kshs.4000/- as what Sarah could earn in rural Migori to support herself and the nephew".*

On 3rd ground the Appellant argued that deceased's estate should not benefit twice from the same accident. It relied on **Transpares Kenya Limited & Another vs SMM [2015] eKLR** where the court cited from ***Kemfro vs. A.M Lubia & Another (1982-1988) KAR 727*** on the taking into account the damages awarded and the Fatal Accidents Act, while making an award under the Law Reform Act.

The appellant also argued that the deceased was fully to blame for the accident.

On quantum the Appellant argued that no receipts were produced to support the claim for special damages or show that the bicycle was damaged. That special damages must be specifically pleaded and specifically proved. The appellant relied on ***African Line Transport Company & Another Vs. Silvester Keitant (2017)eKLR*** and ***Benedetta Wanjiku Kimani Vs. Chagaon Cheboi & Another (2013)Eklr*** *"…..plaintiffs must understand that if they bring action for damages it is not enough to write particulars and so to speak throw them at the court, saying 'this is what I have lost, I ask you to give these damages' they have to be proved"* .

On general damages under the Law Reform Act, the Appellant submitted that the deceased died at the scene of the accident, did not experience much pain and suffering, the appropriate damages should be Kshs. 10,000/-.

On loss of expectation, the Appellant proposed the sum of Kshs. 100,000/- and relied on ***Hyder Nthenya Musili & Another vs China Wu Yi Ltd (2017) eKLR***.

Under Fatal Accidents Act the Appellant argued that the deceased fell into the category of an unskilled laborer and the appropriate monthly income would be Kshs.5000/-. The deceased was aged 30 years at the time of death and the appropriate multiplier would be 15 years as was decided in ***Thomas Obwocha vs Charles Adams Otundo HCC No.54 of 2001***.

The Respondent's submissions

The Respondent first reminded the court of its role as a first appellate court. Citing ***Kapsiran Clan vs Kasagur Clan [2018] eKLR, Selle & Another Vs. Associated Motor Boat Co.Limited & Others (1986) EA 123*** and the ***East Africa Court of Appeal decision in Peters Vs.Sunday Post Limited (1958) EA 424***:-

> *"……as a first appellate court, this court is empowered to subject the whole of the evidence to a fresh scrutiny and make conclusion about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand….the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give allowance to the fact that the trial court had the advantage of seeing and hearing the witness testify before her…..and it is not open to the appellant court to review the findings of trial court simply because it would have reached different results if it were hearing the matter for the first time"*

The respondent argued the 1st and 4th grounds together. The trial court made findings of fact and exercised its discretion which this court could only interfere with a lot of caution. That the Appellant admitted the occurrence of the accident in its Defence and its driver stated that the accident occurred on 4th August 2000 at about 8.00pm between motor vehicle reg. no. KZD 378 which he was driving and the deceased cyclist.

That the issue of the color and make of the motor vehicle was irrelevant as the accident was admitted. There was an eye witness whose evidence was not contradicted hence even the evidence of a police officer who would have visited the scene was immaterial. In any event the appellant's driver had been driving for about 16hours, 8 hours above the legal limit as provided for under s. 66A of the Traffic Act. This, compounded by the state of the road, the weather, impaired the driver's judgment making him to cause the accident. ***See*** **John Kanyungu Njogu ~v~ Daniel Kimani Maingi (2000) eKLR** where it was held that when a Court is faced with two possibilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more than the other.

On 2nd ground, the respondent argued that damages granted were not excessive. The multiplier of 30 years and the multiplicand of Kshs.6,500/- were proper and arrived at judiciously. She cited ***Francis Wainaina Kirungu (Suing as the personal representatives of the estate of John Karanja Wainaina (Deceased)) vs Elijah Oketch Adella (2015) eKLR*** where the Court applied a multiplier of 35 years where the deceased died at the age of 28 years.

The multiplicand of Kshs.6,500/- was held to be the minimum wage in Kenya in ***Abdi Kadir Mohammed & Another vs. John Wakaba Mwangi (2009)eKLR*** regardless of the occupation one was engaged in .

On the 3rd ground, it was argued that the trial magistrate had exercised her discretion judiciously. Regarding damages under the Fatal Accidents Act reliance was placed on Section 2 (5) of the Law Reform Act provided: -

> ***"The right conferred by this part for the benefit of the estates of deceased persons shall be in addition and not in derogation of any rights conferred on dependants by the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom"***

This was fortified with the decision in ***David Kahuruka Gitau & Another vs. Nancy Ann Wathithi Gitau & Another (2016) eKLR*** where the judge looked at the decision in the **Kemfro case** , and cited ***Richard Omeyo Omino vs Christine A Onyango Kisumu Civil Appeal no. 61 of 2007***

> *"The Law Reform Act Section 2(5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4(2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction".*
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> 1. The issues for determination are:
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> i) Whether the Respondents proved their case on liability to warrant the orders granted.
>
> ii) Whether the damages awarded were manifestly excessive to warrant interference by this court.

This being a first appeal this Court is guided by the ration in ***Selle vs. Associated Motor Boat Company Ltd (1968) EA 23 at page 126*** where it was held: -

> ***"Briefly put they (the principles) are that the Court must reconsider the evidence, evaluate 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 that respect.***
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> ***In particular this Court is not bound necessarily to follow the Trial Judge's finding of fact if it appears that he clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence; of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally" see also Peterson Ndung'u and 5 Others vs Kenya Power & Lighting Company Ltd (2018)eKLR, Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013)eKLR***

i) Whether the Respondent proved its case on liability to warrant the orders granted.

The respondent called PW2 who was the eye witness. He told the court that he was walking along the road while from Karatina going to his house. It was around 6:00pm. Then this m/v KZT 378 canter for Broadways Bakery was headed towards Nairobi. The driver swerved to avoid some pot holes. That is when the motor vehicle veered off the road and knocked down the deceased who was cycling along the road, off the road but headed same direction. The motor vehicle did not stop until about 20 to 50m ahead. The weather was good.

According to the Driver DW1 he was driving from Isiolo where he had delivered bread. He reached Karatina around 8:00pm. He had left Thika at 4:00am, reached Isiolo at 2:00pm and left at 4:00pm. He was with his turn boy who was a sleep. He saw three cyclists in front. He tried to avoid the three but the deceased skidded onto the yellow line in trying to get away slipped and hit himself onto the rear part of the

motor vehicle. He denied speeding or being fatigued, and even became hostile when asked about the number of hours he had driven that day.

These are the two sets of circumstances. The accident is admitted. The issues of time become irrelevant. The scene of accident is admitted. The driver said he did not stop at the scene because there was a crowd that wanted to lynch him. The deceased was taken to hospital by a Good Samaritan. The scene which would have been useful to an investigator had already been interfered with. The issue is how did the accident happen? The eye witness says there was one cyclist the deceased cycling going the same direction as the motor vehicle. That the driver was avoiding potholes and due to speed swerved off and hit the cyclist. The driver's version is that he hooted at the three cyclists, two left the road but the third one, hit the end of the road and slid back onto the road. He avoided to hit him but he *'was pushed by the bicycle and hit the rear part of the lorry where the tyres are'*. When he stopped and went to check the deceased, he was dead. He said he was not charged though he reported to the police and recorded a statement. This a driver who had been on the road for 16 hours. His own turn boy was sleeping at the time of the accident a clear indication of the fatigue the two must have had. His demeanor was noted by the trial court that he did not want to accept the natural fact that driving for 16 hours could impair one's judgment. The Court of Appeal in ***John Wainaina Kagwe vs. Hussein Dairy Ltd [201] eKLR*** held that indeed exhaustion can impair a driver's judgment. This court did not have the advantage of noting his demeanor which contributed to the trial magistrate's finding.

The driver put a lot of emphasis on what the police observed on his motor vehicle. He too could have called them to come and corroborate his averments. Between the two circumstances, the one by the eye witness appears more probable and I would go by it. It is fortified by the fact of the DW1's fatigue which was described by the learned magistrate thus:

> ***"The driver appeared evasive and did not take kindly to any suggestion of wrongdoing on the part (sic). He however admitted that he had been on the road for over 17 hours. Even though he claimed not to have been tired, the court saw him and he did not claim to exhibit features of a super man who would not get tired after such strenuous hours of driving.***
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> ***It was dark and raining and his judgment must have been impaired since he admitted that he saw the 3 cyclists ahead, they he avant (sic) to have been more cautious."***

ii) Whether the damages awarded were manifestly excessive to warrant interference by this court

On quantum the authorities cited by the respondent are instructive. In the case of ***David Kahuruka Gitau & Another vs. Nancy Ann Wathithi Gitau & Another (above), Dumez (Nig) Ltd V.Ogboli (1972) 3 S.C page 196. "per BADA, J.C.A (p.28.***

> *"it is settled law that "An Appellate Court will not interfere with an award of general damages by a trial court unless:-*
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> *(a) where the trial court acted under a mistake of law; or*
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> *(b) where the trial court acted in disregard of principles; or*
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> *(c)where the trial court took into account irrelevant matters or failed to take into account relevant matters: or*
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> *(d) where the trial court acted under a misapprehension of facts; or*
>
> *(e)where injustice would result if the Appellate court does not interfere; or*
>
> *(f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

The trial court held: -

> ***"The Plaintiff's advocate did not state how he arrived at the multiplicand of Kshs. 10,000/-. The Court will use Kshs. 6,500/- as a multiplicand guided by the case of John Wakaba Mwangi vs.David Karaya Nakuru Civil Appeal No. 133 of 2003 (2009) eKLR (sic) where Kshs.6500/- was used as the minimum wage."***

There must have been a typographical error and the case referred by the lower court in the above quoted pronouncement must be ***Abdi Kadir Mohammed & Another vs John Wakaba Mwangi [2009] eKLR*** where it was held: -

> ***"Clearly the said figures are unreasonable given that the minimum wage in Kenya today is about Shs 6,500/-. I do not think the deceased, had he lived would have earned a salary below this amount whatever occupation he may have engaged in."***

It is not in dispute that the respondent did know any proof of the deceased's income. Whether he was a farmer, a carpenter or a mason or all of them together, I think in the circumstances the trial magistrate exercised her discretion judiciously in arriving at Ksh.6500/-. With regard to the **30 years multiplier, the trial magistrate applied the statutory retirement age. I think it would have been reasonable to take into account the vicissitudes of life as was held in *Festus Akolo & another ~v~ Dickson Taabu Ogutu [2016] eKLR***

> *"Was a Multiplier of 30 years adopted by the Learned Magistrate reasonable? In the Death Certificate the age of the Deceased is stated to be 30 years. The Court adopted a retirement age of 60 years. That retirement age is not questioned by the parties and is acknowledged to be a reasonable retirement age in the Kenyan context and in fact the retirement age for a majority of Public*

Servants. But by using a multiplier of 30, the Learned Trial Magistrate did not take into account the vicissitudes and imponderables of life. I would think that a multiplier of 25 is more reasonable."

In *Franco* ***Mwirigi vs Patrick Musyoki Munywoki & Duncan Mbole Munyoki (suing on behalf of the estate of Maurice Wambua – Deceased [2018] eKLR*** it was held:-

> ***"In light of the averment in the plaint that the deceased was a "strong, brilliant, healthy, talented young man" aged 30 years with "an extended life expectancy" and the persuasive submissions, the trial court had reason to ratchet up the multiplier for lost years as proposed by the respondents. It cannot indeed be doubted that all things being equal, the deceased had a long life ahead of him. However, life is not predictable. The unpredictability of life should be taken into account in picking a multiplier. Taking the vagaries of life into account, I find that a multiplier of 30 years was on the higher side. It is not stated in the judgment of the trial court why 30 years and not 18 years was picked as the multiplier…Even though the evidence established that the deceased was in good health at the time of the accident, it cannot be ruled out that he could have died of other causes shortly thereafter had he not died in the accident. In my view, the trial magistrate failed to take into account this factor in picking the multiplier of 30 years. This was an error and this court as an appellate court is allowed to interfere with the award. I will in the circumstances of this case substitute the multiplier of 30 years with one of 20 years. "***

I am persuaded that a multiplier of 25 years would be reasonable. 6500x12x25x2/3=1,300,000/-

Regarding the award for pain and suffering, courts have general made awards of between KSh.10,000 and Ksh.100,000/- depending on the amount of suffering the deceased went through before death after the accident. The award of Kshs. 20,000/- awarded is reasonable taking into consideration that deceased died at the scene. **See Edner** ***Gesare Ogega vs Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased) [2015] eKLR***

Regarding the issue of double benefit to the estate of the deceased from the same accident, courts have moved away from the mathematical interpretation made of the Kemfro case. I adopt the words of the judge in **John** ***Wamae vs John Kituku Nziva & Another [2017] eKLR*** **it was held:-**

> *"In my view, the requirement in the Law Reform Act is to "take into account" and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency."*

And in ***Peres Wambui Kinuthia & Another vs~S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 OF 2010 (UR)*** where he held that: -

> *"In the case of* ***Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30*** *the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"*

In conclusion I find that the appeal succeeds partially I set aside the trial court's judgment and make the following awards:

Loss of Dependency	**6500x25x12x2/3= Kshs. 1,300,000/-**
Loss of expectation of life	**Kshs. 100,000/-**
Pain and suffering	**Kshs. 20,000/-**
Total	**Kshs.1,420,000/-**

The respondent will have costs of this appeal and interest from the date of the judgment.

Dated, delivered and signed at Nyeri this 28th February 2019.

Mumbua T Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Ms.Ndegwa holding brief Ms.Muasya for Appellant

Muli is on record for Respondent.

Mumbua T Matheka

Judge

28/2/19