REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 65 OF 2017

BEATRICE KAVINDU MUSEMBI (suing as the legal representatives

of the Estate of PETER MUTETI MUSEMBI-DECEASED).....APPELLANT

-VERSUS-

PATRICK MBITHI KAVITA.....RESPONDENT

(An Appeal from the judgment of Hon E. Agade (Ms) Rm at Kangundo delivered on 7th April 2017)

BETWEEN

BEATRICE KAVINDU MUSEMBI (suing as the legal representatives

of the estate of PETER MUTETI MUSEMBI-DECEASED).....PLAINTIFF

-VERSUS-

PATRICK MBITHI KAVITA.....DEFENDANT

JUDGEMENT

1. The appellant in this appeal were the plaintiff in the lower court. She brought the suit in their capacity as the personal representatives of the estate of the deceased herein.

2. According to **Beatrice Kavindu Musembi**, the mother of the deceased who testified as PW1, she was called by one **Ndinda Musau** who informed her that an accident had occurred at Kaumone. Upon rushing to the scene she found that the victims including the deceased had been removed. She however found one body at the scene with a vehicle 15 metres from the road. She then proceeded to the Hospital Mortuary where she found the deceased's body. After that she went to the police station and recorded her statement.

3. According to PW1, the deceased was aged 30 years at the time of his death and prior to his death was a builder earning Kshs 500.00 per day. It was her evidence that the deceased used to assist her in the farm and to give her money since her husband was also deceased.

4. In her evidence she obtained letters of administration in respect of the estate of the deceased and as a result of the accident incurred funeral expenses whose receipts she produced. In cross-examination, PW1 confirmed that she did not witness the accident and that she arrived at the scene after the accident.

5. The plaintiffs also called the investigations officer, PC Peter Nyandemo, who visited the scene and found that one pedestrian had died on the spot while the other one died while undergoing treatment. From his investigations, he was of the opinion that the driver of the vehicle was to blame as he was driving at a high speed, lost control, veered off the road and caused the death of the two victims. Accordingly, the said driver was charged with causing death by dangerous driving though by the time of the trial, that matter was still pending under investigation.

6. The defence did not adduce any evidence.

7. In her judgement, the Learned Trial Magistrate found that the plaintiffs failed to prove their case since no eye witness testified as to how the accident occurred and there were no sketch maps produced by the police. There was therefore no evidence as to how the vehicle was

being driven and who was driving the same. In support of this decision the Court relied on **Daniel Kimani Njoroge vs. James K. Kihara and Another [2011] KLR**.

8. In this appeal the appellants relied on the following grounds of appeal:

> **1) The trial magistrate erred in law and fact in failing to enter judgment in favour of the appellants and in dismissing the above matter.**
>
> **2) The learned magistrate erred in law by failing to consider the Appellants' submissions in arriving at her judgment pronounced on 7th April 2017.**
>
> **3) The learned magistrate erred in law by failing to give concise statement of the case, concise statement of evidence adduced by parties, the points of determination, the decision thereon and reasons of her judgment pronounced on 7th April 2017.**

9. It was submitted that from the evidence adduced before the trial court, the vehicle was being driven at a high speed so that it caused the death of the deceased (low speed could not kill); that the defendant did not a proper look out and if he did he could have seen the deceased and avoid knocking him; that the Respondent did not have adequate control of the vehicle because if he did he could not have caused the death of the deceased; that he also did not stop, swerve or avoid hitting the deceased; and that he caused the accident and hence the death of the deceased.

10. It was submitted that as the defendant did not offer any explanation regarding the facts and allegations made against him, he should have been held 100% liable for causing the accident. In support of their position the appellants relied on **James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR** and **Margret Waithera maina vs Michael K. Kimaru (2017) eKLR** and submitted that there is enough material on record to make inference of negligence on the part of the Respondent.

11. According to the appellants, a case cannot be dismissed merely because there was no eye witness where there are overwhelming circumstantial evidence and more especially which have not been rebutted or challenged. In this respect, the appellants relied on the case of **F M M & Another vs. Joseph Njuguna Kuria & Another [2016] eKLR** and submitted that it is not enough for the Defendants to deny claim, shift blame or rely on their submission to sustain their defence. They have a positive duty to prove their allegations as contained in the statement of defence. As regards the failure to call witnesses, the appellant relied on **Mary Njeri Murigi vs. Peter Macharia & Another [2016] eKLR** and **Eunice Wanja Munyao vs. Mutilu Beatrice & 3 Others (2017) eKLR** in which **East Produce (K) Limited vs. Christopher Astiado Osiro Civil Appeal No. 43/2001** and **Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd 1991** where cited.

12. Reliance was also placed on **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR, Nickson Muthoka Mutavi vs Kenya Agricultural Research Institute (2016) eKLR**, **Nandwa vs. Kenya Kazi Ltd (1988) KLR, 488** and **Regina Wangechi vs. Eldoret Express Company Ltd (2008) eKLR**.

13. Based on the foregoing it was submitted that the Appellants in the present appeal discharged their burden of proof in the lower court as required.

14. According to the appellants the judgement also contained mistakes on the face of the record. It was submitted that the court seems to suggest that the Appellant ought to have attached an Act they relied on when section 59 and 60 of the ***Evidence Act*** Cap 80 is very clear on judicial notice. It was further contended that the court applied a standard of beyond reasonable doubt when it should have applied a balance of probability and that it recommended use of minimum wage applicable in agricultural industry where there was evidence that the deceased worked in the construction industry. In addition, the court did not pronounce the award it could have made under different headings had the Appellant proved their case.

15. The appellants therefore urged this court to enter judgment in favour of the Appellant for special damages in the sum of Kshs. 53,750/=, Kshs. 50,000/= for pain and suffering, Kshs. 150,000/= for loss of expectation of life and Kshs. 2,189,700/= for loss of dependency. Alternatively, the court was urged to make a lump sum award of Kshs. 2.5 million. Consequently, it was submitted that the Court ought to award the appellants Kshs. 2,753,750/= as special and general damages.

16. On behalf of the Respondent, it was submitted that the only issue for determination in this appeal is whether the Learned Magistrate erred in law and fact in dismissing the plaintiffs' suit in CMCC No 19 of 2016. It was however the Respondent's view that the Learned Magistrate was right is dismissing the appellants' suit in view of the evidence adduced therein.

17. According to the Respondent, while there is no doubt that an accident occurred on the 17th of July 2015, it was the sole duty of the appellants to prove their negligence claims against the defendant/respondent herein, which duty they failed to discharge on a balance of probability. This submission was based on the fact that the appellants herein did not call any eye witness to buttress their negligence claims and as such no single particular of negligence was proved against the respondent and that the appellants appear to have shifted the burden to the respondent which ought not to be the case.

18. The Respondent disagreed with the averment on behalf of the Appellants that where there is no eyewitness the testimony of the investigation officer is sufficient and contended that in **FMM & Another vs. Joseph Njuguna Kuria & Another [2016] eKLR** the police officer who testified in matter was not the investigating officer. Secondly the police officer though not the investigating officer produced the police file/records containing the investigation diary, charge sheets and sketch plans to the accident. Further, in case cited the defendants own admission to causing the accident added weight to case which again is not the case herein. It was therefore submitted that the said authority was quoted out of proportion and is not helpful nor relevant to circumstances obtaining in this matter. Similarly, it was submitted that the circumstances in the case of **James Gikonyo mwangi vrs DM [2016] eKLR** an eye witness gave evidence and it is on that basis that the appeal was upheld in favour of the plaintiff/respondent.

19. It was therefore submitted that the appellants have not shown that the Learned Magistrate relied on wrong principles to reach her decision. The Respondent therefore submitted that the Learned Magistrate was right in finding that liability had not been proved on a balance of probability and this Court was urged to dismiss the appeal with costs to the respondent.

Determination

20. 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."**

21. 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.

22. 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."**

23. 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."**

24. In this appal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

25. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. In P**alace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

27. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of res ipsa loquitor applies. In **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22**, the East African Court of Appeal held that:

"The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident… Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."

28. Dealing with the said doctrine, the Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** expressed itself as hereunder:

"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of *res ipsa loquitor*…If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."

29. However, in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council Civil Appeal No. 252 of 1998**, the same Court held that:

"It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was *prima facie* evidence of negligence and the onus lay on the defendant to rebut that *prima facie* case. It means the plaintiff *prima facie* establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety…*Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."

30. In this case it is true there was no eye witness to the accident. That however is not necessarily fatal as long as there is credible evidence on which negligence can be inferred. Such inference may be made where the plaintiff was a passenger in the vehicle that got involved in an accident in which event res ipsa loquitor may be successfully invoked. (See **Esther Mukulu Matheka vs. Merania Nduta Nairobi HCCC No. 3039 of 1995)**. In fact **Lenaola, J** (as he then was) in **Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007,** held that:

"Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations...The plaintiff, on the other hand pleaded the doctrine of *res ipsa loquitor* and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of *res ipsa loquitor* was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him."

31. In **Public Trustee vs. City Council of Nairobi [1965] EA 758**, it was held that:

"The maxim *res ipsa loquitor* applies only where the causes of the accident are unknown but the inference is very clear from the nature of the accident and the defendant is therefore liable if he does not produce the evidence to counteract the inference. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred."

32. In this case while regrettably the doctrine of res ipsa loquitor was not pleaded by the plaintiffs, the doctrine being a rule of evidence may be inferred from the circumstances of the case.

33. In **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 Bosire, JA** expressed himself as hereunder:

"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed."

34. This position is in fact mirrored by the decisions relied upon by the Appellant in this appeal. In **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR**, **Ibrahim, J** (as he then was) cited ***Charlesworth & Percy on Negligence***, 9th Edition at pg 387 inn which it is stated that:

"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

35. Similarly, in **Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J** quoted ***Halsbury's Laws of England***, 4th Edition at paragraph 662 at page 476 where it is stated that:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

36. In **Nandwa vs. Kenya Kazi Ltd (1988) KLR, 488** as cited by **Koome, J** in **Regina Wangechi vs. Eldoret Express Company Ltd (2008) eKLR** it was held that:

"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the Defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

37. The question that this Court must therefore deal with is whether there were proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the Respondent herein. That there was an accident involving the deceased and the Respondent's vehicle is not in doubt. It matters not that the Appellants did not call evidence to prove who was driving the vehicle at the material time.

38. According to PW1, when she arrived at the scene, she found the vehicle and a body lying 15 metres from the road. On the other hand, PW2 testified that the driver of the vehicle veered off the road.

39. In the absence of any evidence to the contrary the totality of the evidence was that the body of one of the deceased and the vehicle were off the road. In those circumstances, one may agree that there was a prima facie evidence that the driver of the vehicle by going off the road was negligent. In **Hallwell vs. Venables [1930] 99 LJKB 353**, it was held that:

> **"A driver of motor vehicle is held to have sufficient control over his vehicle and its surrounding circumstances to attract the operation of the principle in a suitable case. It is part of the experience of mankind that if a driver is exercising reasonable care, it is not usual for vehicles to overturn. In this case the vehicle overturned and therefore *res ipso loquitor* applies."**

40. In fact, in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, it was held that 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. There is no reason for a pedestrian's complete failure to see a motorist and vice versa. In my view, the evidence of the driver of the vehicle might have thrown more light with respect to the circumstances under which the accident which allegedly was off the road took place.

41. In this case it is my view tad the Respondent adduced evidence to contradict the averment that the accident occurred off the road, the decision of the trial court would have been unassailable. However, as there was evidence that both the body of the deceased and the vehicle that caused the accident were way off the road, and as the defence also failed to explain how comes the body of the deceased and the vehicle were off the road, it is my view that liability ought to be apportioned at the rate of 50:50. Accordingly the appeal succeeds to that extent.

42. I however have no reason to depart from the Learned Trial Magistrate's view on the quantum. As was appreciated by the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**:

> **"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."**

43. 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…"**

44. 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."**

45. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

> **"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."**

46. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which **Ringera J.** as he then was, held at page 248 that:

> **"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

47. In the premises I award the Appellant Kshs 90,480.00 being special damages. I also award the plaintiffs Kshs 20,000.00 being general damages for pain and suffering and Kshs 150,000.00 for loss of expectation of life. As for loss of dependency, it is now clear that parents do

expect financial assistance from their children and such expectation is not misplaced. This was the position in **William Juma vs. Kenya Breweries Ltd. Nairobi HCCC No. 3514 of 1985** where it was held 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."**

48. Since the dependant here was the mother while I adopt the multiplier and the multiplicand proposed by the Learned Trial Magistrate, it is my view that the dependency ration ought to be one half. Accordingly, the award under this head will be as follows:

5,436.00 x 29 x1/2 x 12 = 946,864.00.

49. The total would then be Kshs 1,206,344.00 less 50% hence the net award is Kshs 603,172.00.

50. While I decline to grant the costs of this appeal, the Appellant will have the costs of the trial court. General damages will accrue interest at the court rate of 12% per annum from the date of the judgement in the lower court while special damages will accrue interest at the same rate from the date of filing suit till payment in full.

51. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 25th day of February, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Muthini for Mr Orenge for the appellant

Mr Muia for Mr Onzombi for the Respondent

CA Josephine