**REPUBLIC OF KENYA**

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

**HCA NO.142 OF 2017**

**MAINA STEPHEN MATHU.....1ST APPELLANT**

**DAVID KASAINI SIRONGA.....2ND APPELLANT**

**ONDUKO BONIFACE.....3RD APPELLANT**

**-VERSUS-**

**DAVID KANJA MACHARIA AND ESTHER WANGUI MWAI**

**(Suing as the administrators of the estate of**

**JAMES GACHOKA MACHARIA (DECEASED).....RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. This appeal arise from a suit filed by the plaintiff in the lower court on behalf of the estate of **James Gachoka Macharia** who died after being knocked by the defendants' motor vehicle on 13th November 2014 along Njoro - Mau Narok road.

2. The trial magistrate found the defendants 100% liable and assessed damages at kshs.5,103,600.the defendants being aggrieved by the decision filed this appeal challenging both liability and quantum on the following grounds:-

i. The learned magistrate erred in fact and in law in apportioning 100% liability against the appellants without sufficient and/or conclusive evidence.

ii. The learned magistrate erred in law and fact in not apportioning any liability to the deceased contrary to the evidence on record.

iii. The learned magistrate erred in fact and in law in awarding the respondent Kshs.5,103,600 in damages which award was manifestly excessive in the circumstances.

iv. The learned magistrate erred in law and in fact in using a multiplicand of Kshs.45,000 as earning for the deceased while the same was not proved and had no basis whatsoever.

v. The learned magistrate considered extraneous circumstances to arrive at the erred finding in law and fact.

vi. The learned magistrate erred in fact and in law in disregarding the Appellant's submissions on both liability and quantum.

vii. The learned magistrate's finding was not supported by evidence on record and no sufficient reasons for the findings were given

**APPELLANT'S SUBMISSIONS**

3. Appellant submitted that the trial magistrate failed to apportion liability despite the fact that the deceased was knocked while crossing the road as per evidence of eyewitness. Appellant submitted that this was a clear case where apportionment of liability was appropriate.

4. Appellant submitted that although the driver owed the deceased a duty, the duty was not absolute. That the trial magistrate considered and compared submissions but arrived at an unfair conclusion, which is not justified in law; that the respondent failed to prove his case on a

balance of probabilities to warrant full liability.

5. Respondent cited court of appeal decision in **W.K (minor suing through next friend and mother L.K Vs Ghalib Khan Neer Construction & Another [2011] eKLR** where the court found that in the absence of clear evidence the court should have apportioned liability equally and not find the appellant wholly to blame for the accident. Similar finding was in the case of **VOW(minor suing through uncle and next friend EOW) Vs Private Safaris Limited Nairobi Civil Appeal No. 329 of 2010** dismissed appeal holding that the trial magistrate and high court held findings of fact that the appellant was unable to prove how the accident occurred at all. The court held that they were satisfied that the two courts were entitled as they held to hold against the appellant.

6. Appellant submitted that while the facts of the two cases above are distinguishable, the underlying principle of the plaintiff proving his case on a balance of probabilities remain constant.

7. Appellant submitted that under **Section 107 of the Evidence Act** whoever alleges must proof and it is not enough for a party to allege the other was negligent without any proof; that evidence of PW2 was not enough to find the appellant wholly liable. Appellant urged court to set aside the trial court's finding on liability and dismiss the suit for want of proof or in the liability apportion liability equally between appellant and respondent.

8. In respect of quantum the appellant submitted that comparable injuries should be compensated by comparable awards and that the trial magistrate failed to exercise discretion fairly by taking into consideration irrelevant factors and awarded inordinately high and excessive sum of kshs.5,103,600.00.

9. On loss of dependency, appellant submitted that the deceased's income was not proved to the required standard as income was not proved and the absence of prove of income minimum wage would apply or in other cases global award. Appellant submitted minimum wage of kshs.5,218 per month as at 2014 should apply. Appellant further submitted that if this court is inclined to find that the minimum wage is low, an amount of kshs.10,000 would be reasonable; that by applying monthly income of kshs.45,000 was erroneous and manifestly high. Appellant submitted that despite accounts record not being admitted the court arriving at the decision went ahead and used the figures.

10. Appellant further submitted that award for loss of consortium is not provided under **Fatal Accidents or Law Reform Act** and urged court to set it aside. Appellant quoted the case of **Innocent Ketie Makaya Vs Peter Kipkore Cheserek & Another[2015]eKLR** where the court held as follows:-

> **"In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in question in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own."**

11. Appellant urged court to set aside the prayer for loss of consortium entirely.

12. On double award the appellant submitted that kshs.100,000 awarded under Law Reform should be deducted under Fatal Accidents Act. Appellant cited that case of **Kemfro Vs A.M Lubia & Another [1982-1988]KAR 727** that:

> **"The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act."**

13. Appellant submitted that the trial magistrate did not take into account the awards under both Law Reform and Fatal Accidents Acts and deduct kshs.100,000.

**RESPONDENTS SUBMISSIONS**

14. The respondent cited the case of **George & Another V Daniel Wachira Mwangi & Another [2017]eKLR** where the court held that it is natural and reasonable for an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so there are inevitable differences of opinion, he does not however proceed to dismiss as wrong a figure of award because it does not correspond with the figure of his own assessment. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some respect, and so arrived at a figure, which was either inordinately high or low.

15. On liability, the respondent submitted that in determining liability, the court guided by causation and blameworthiness while applying common sense to facts of each case. Respondent submitted that the appellant did not call any witness nor tender any evidence in support of their case or challenge respondent's evidence; therefore, on how the accident occurred was not controverted/challenged. That the appellant cannot be heard to say the trial magistrate given that the respondent evidence was the only evidence on record; there was therefore no evidence to demonstrate how the deceased contributed to the accident.

16. Respondent submitted that it is clear from record that the deceased was not crossing the road voluntarily but he was doing so to escape from danger created by the driver of the matatu; that the trial magistrate appreciated the fact that the deceased was crossing the road to avoid being hit.

1. Respondent submitted that the duty of care of a person crossing the road voluntarily is not the same as of a person trying to escape from danger created by the defendants; and as such issue of contribution of liability wholly or partly cannot arise at all be it in law or fact. Respondent quoted **Halsbury's Laws of England 4th Edition Ed.Vol.12(1) Para 856 P.318** where the principle of contributory negligence

and or Volenti are not applicable even when the decision of endangered plaintiff turns out to be wrong as long as such plaintiff is escaping from the danger created by such a defendant and such a plaintiff acted reasonably. The same principles was considered by the court of appeal in the case of **Farrah V Kenya Ports Authority [1992]eKLR** as follows:

> **A man is not bound to wait until disaster befalls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence, to take reasonable precautions to avoid injury to himself. In Jones v Boyce (1816) 171 ER. VOL.P.540 the situation was not dissimilar from the instant one. The plaintiff was a passenger in a horse drawn coach and saw that the coupling reen had broken, and that the horses were careering down the slope. Fearing coach would overturn and he would be injured he jumped off with the consequences that his leg was broken. In leaving the case to jury LORD ELLENBORUGH said:-"To enable the plaintiff, to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the conduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation." "Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were effective, did this circumstance create security for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril." After the address the jury found for the plaintiff and awarded him pounds 30 damages. So in this case the test is did the plaintiff, (here (the appellant) act as a reasonable and prudent man would have done?**

17. Respondent submitted that the authorities cited by the appellant are distinguishable as the claimant was either crossing the road voluntarily or voluntarily reengaging in a dangerous activity or alternatively where parties adduced evidence in support of their respective cases unlike this case where the appellant never adduced evidence.

18. Respondent further submitted that the fact that the deceased was pushed 25 meters and matatu did not stop immediately buttress PW2's evidence that the vehicle was being driven carelessly, at high speed and it was swaying on the road; that evidence of PW1 police officer cannot outweigh evidence of PW2 who was present when the accident occurred and that the evidence of PW2 alone suffices to prove liability as there is no legal limit as to how many witnesses ought to testify; that the trial magistrate was satisfied with her evidence in that she commented that her evidence was clear as to how the accident occurred.

19. In respect to quantum, the respondent submitted that in determining income the court does not need to rely on documentary evidence only but even oral evidence or opinion of someone knowledgeable in the matter also suffices to prove income/profession to the required standard as court must accord with real situations and have regard to the local circumstances surrounding each and every claim.

20. That evidence adduced by 2nd respondent is that the deceased was operating a bar business and used to earn kshs.70,000 per month and that she produced single business permit for the business; that from the business he was able to buy a plot and built a house and also pay school fees. Respondent submitted minimum income for private business is not provided for and in the absence of documents to base calculation, it is proper case for the court to make intelligent guess or assumption and come up with a reasonable figure.

21. Respondent submitted that a party should not be denied a claim for failing to develop a sophisticated business/income records and or accounting procedure/method. Plaintiff cited the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros V Augustine Munyao Kioko [2006] eKLR** where the court held that:

> **"Although there was no special proof by way of receipts that the Plaintiff is entitled to funeral expenses, this court will allow a sum of Kshs.100,000/=. In my view, this is a reasonable expense which cannot be ignored merely because the plaintiff could not produce any receipts in support of the same. In deciding this, this court is well aware that special damages must not only be specifically proved but also proved. However, there are cases, as in this one where the court will be called upon to apply its wisdom and decide the case of light of social realities of the day. It is very hard for people attending to burial procedures of their beloved ones to concern themselves with matters of details such as receipts for every expense in contemplation of a suit which they may not even be aware of at the time of the burial. To insist on strict legal rules in such a case would not only amount to a denial of justice but also present the court as being out of touch with the reality."**

22. Respondent argued that the appellant has failed to point out any misdirection on part of the magistrate while adopting kshs.45,000 as deceased's monthly income.

23. Respondent further submitted that the appellant has introduced new arguments and authorities, which were not raised in the lower court to challenge the decision of the trial magistrate; and that the decision should be challenged within the context within which the trial magistrate dealt with the matter.

**ANALYSIS AND DETERMINATION**

24. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that I never got the opportunity to take evidence first hand and observe demeanor of witness. For this I give due allowance.

25. On liability, I have perused the record and note that PW2 is the only eyewitness. She stated that she was heading to Mau Narok with the deceased when after alighting from a vehicle; she walked with the deceased between the barrier and the road. While walking, they heard

screams. On looking behind, she saw motor vehicle registration number KBD 358T coming at a fast speed and was swerving on the road. She said the screams were from people warning them of the vehicle. She said that she crossed the road to avoid being hit, as there was nowhere to run to.

26. PW2 further testified that she saw the vehicle hit the deceased who was also crossing the road to avoid the vehicle. She said the vehicle did not stop and the deceased was moved to a distance of 25 meters after the collision. She added that if the vehicle was not swerving on the road, the deceased would not have been hit. In reexamination, PW2 said they were heading to a home on the left side of the road and not intended to cross the road and if not for the screams, they would have continued walking.

27. In the case of **Farrah V Kenya Ports Authority [1992]eKLR** where the court of appeal held as follows:-

> **"A man is not bound to wait until disaster befalls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence, to take reasonable precautions to avoid injury to himself…If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were effective, did this circumstance create security for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril."**

28. In the instant case, record show that the appellant never adduced evidence to controvert PW2's evidence of how the accident occurred. There is therefore no contrary version given on how the accident occurred. The trial magistrate noted that PW2 as clear in her evidence that there was nowhere to run to as they were next to a wall and a ditch. There is no doubt that the deceased was forced to cross the road to avoid danger created by the vehicle's driver and was hit in the process. There is no doubt that if the driver of the vehicle herein had exercised due care and had control of the vehicle, the deceased would not have crossed the road and the accident would not have occurred. The deceased was placed in a situation, which forced him to cross the road to avoid danger. From the foregoing, there is evidence to demonstrate the deceased's contribution to occurrence of the accident.

29. The trial magistrate did not therefore err in finding the appellants 100% liable for the accident.

30. On the deceased's income, the deceased's wife PW3 produced in court single business permit to confirm that the deceased was running a business. The record of his accounts were not however produced, as they were copies. It is not however disputed that he was running a business, which earned him income. In the absence of record, the trial magistrate was earning kshs.70,000 per month. In the absence of business record and in the absence of any legal guide in estimating earnings in private business, the trial court looked at what his wife stated as activities undertaken by the decease from income generated from the business which including paying school fee, building a house and maintaining a family as a guide in arriving at a reasonable figure as estimate of his monthly earnings.

31. Whereas I agree that the income cannot be arrived without some degree of speculation, the fact that the awarded sum will be paid in lump sum has to be taken into consideration; the attendant costs associated with the running of the business which now not be incurred; there are uncertainties associated with business which may affect the projected income. It is also important to put into consideration that the business may continue running under management of family member; putting all the above into consideration, I find that the figure of kshs.45,000 per month on the higher side. My view is that a sum of kshs.,000 would be reasonable in the circumstances.

32. On the issue of multiplier, the deceased was 43 years old. He was in business. There is no set limit of age for one to run business. Even at old age, a business can continue running well depending on persons placed to manage it. The trial magistrate applied multiplier of 13 years, which I find reasonable.

33. On the issue of double allocation the court of appeal in **James Nthwiga Kanake & Another V Aileen Mukanjeru** held as follows:-

> **…in the case of KemfroAfrica t/a Meru Express Services (1976) & Another V Lubia & Another (No. 2) (1987)KLR 30 the court of appeal was categorical that the words to be "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 Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in mathematical deduction. Accordingly, what is required in order to avoid double compensation is for the court to have in mind the award under Law Reform Act when making an award under Fatal Accidents Act. In my view this is a better way of constructing Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reforms Act Cap 26 Laws of Kenya. Otherwise, there will be no need to bring a suit under both statutes only for award under one to be deducted from the award made in the other. Indeed, in the Kemfro case, the court declined to deduct kshs.25,000 that had been awarded under Fatal Accidents Act Cap 32 Laws of Kenya on the basis that the trial court had taken into account the said award. This court is still on the same persuasion."**

34. The term taken into account has been clearly explained in the above case. It does not mean deducted from award under Fatal Accidents Act but considered while making award under the Act.

35. I note from the judgment that the trial magistrate made consideration of the award under Law Reform while awarding under fatal accidents Act; it comes out that in his mind, he intended to award under separate headings but not to award all under one and then deduct for the other.

36. The trial magistrate noted the holding of court of Appeal on the issue of double award and expressed herself in the judgment by stating that the court in awarding is meant to take account of the amount awarded under Fatal Accidents Act. This clearly confirm that she took into consideration of the kshs.100,000 she awarded under Law Reform while making award under Fatal Accidents Act. One cannot therefore

conclude that she did double allocation.

37. On the issue of loss of consortium the Court of Appeal in the case of **Salvadore De Luca Vs. Abdullahi Hemedi Khalil & Another [1994] eKLR,** held as follows:-

> **"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Kshs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."**

38. In the instant case the deceased's wife prayed for loss of consortium and **servitium.** The trial magistrate found that the deceased's wife lost comfort and companionship as a result of his death. Appellant said the award is not provided in law. Whereas I agree with their argument, there is both statute law and case law. This court is bound by the principle of *stare desicis*. The court of appeal having found as stated in the above-cited case, I am bound by the decision. Going by the court of appeal decision, I find that the trial magistrate never erred in awarding damages for loss of consortium.

**39. FINAL ORDERS**

1. Appeal on liability is dismissed

2. Appeal on quantum partly succeed as follows

    i. Award for loss of consortium is upheld

    ii. Award under loss of dependency partly succeed. Monthly income reduced to kshs.30,000 per month. The multiplicand and ratio of 2/3 to remain.

    iii. Award under special damages to remain

3. Each part to bear own costs of the appeal.

**Judgment dated, signed and delivered at Nakuru this 25th day of July 2019.**

**……....**

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Ms. Oliech holding brief for Kawira Counsel for Appellant

Mr. Githui holding brief for Ndungu Counsel for Respondent