REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 37 OF 2013

CONSOLIDATED WITH

CIVIL APPEAL NUMBER 38 OF 2013

ISAAC MICHAEL OKENYE (Suing as the Legal Representative of the Estate of the Late Marcyline Moraa Maiko)..... APPELLANT

VERSUS

LACHEKA LUBRICANTS LIMITED.....1ST RESPONDENT

SAMUEL NDUNGU NJOROGE.....2ND RESPONDENT

(Being an appeal form Judgment/Decree and orders of Honourable Komingoi Senior Principal Magistrate delivered on the 28th Day of February 2013)

JUDGMENT

1. **Background**

Nakuru High Court Civil Appeal No. 37 of 2013 was filed by the Respondents, Lacheka Lubricants Limited and Samuel Ndungu Njoroge who were defendants in the trial court case Nakuru **CMCC No. 167 of 2011** whereas **HCA No. 38 of 2013** was filed by the plaintiff in the same case, and against the defendants, now Respondents.

2. In their separate Memorandum of Appeals both parties were dissatisfied with the trial Magistrates finding on liability that the deceased and the owners and driver of the accident vehicles were equally to blame at 50:50 basis.

On *quantum* of damages, the Appellant has urged the court to enhance the award of damages while the Respondents have urged for reduction of the award on general damages.

For those reasons, the two appeals were consolidated upon application on the 24th March 2015, and HCA No. 38 of 2013 chosen as the lead appeal.

3. The grounds of **Appeal in HCA No. 37** are in summary that the trial magistrate erred in law and fact in failing to give due consideration to the evidence of the driver of the accident vehicle and the investigating officer and apportioning liability equally between the deceased and the driver.

It is further stated that the adoption by the trial Magistrate of an income of Kshs.20,000/= in assessing

loss of dependancy per month in the absence of conclusive evidence that the deceased was employed was erroneous and the 2/3 multiplicand for the father and mother of the deceased as Dependants was an error.

The appellant in **HCA 38 of 2013** was dissatisfied with the apportionment of liability as well as the adoption on damages for lost years as inordinately low by applying a multiplier of 15 years for the deceased who was 20 years old at the date of her death. Further, they faulted the trial magistrate's failure to award special damages towards special damages.

4. The appeals are premised on the plaint dated 28th February 2011 and filed on the 21st March 2011 but Amended on the 1st April 2011.

The plaintiff (Appellant in **HCA No. 38 .2013**) sued as the legal representative of the Estate of the Late Mercyline Moraa Maiko who died in a traffic road accident upon being knocked down by the Respondents motor vehicle KBG 403E on the 3rd September 2010 along the Nakuru/Eldoret road. At the date of the accident, the deceased was 20 years old a single woman and her dependents were stated as her father and mother. Particulars of negligence by the driver of the vehicle where stated among them being excessive speed in the circumstances, driving without due care and attention of other road users and failing to apply brakes in time to avoid the accident. Damages were sought under both the Law Reform Act and Fatal Accidents Act, together with special damages of Kshs.25,000/= being fees for application for letters of administration. No funeral expenses were pleaded.

5. The driver and owner of the accident vehicle denied the claim in their statement of defence and in turn blamed the deceased pedestrian for failure to take care of her own safety while crossing the said road at night by running onto the path of the accident vehicle when it was not safe to do so and failure to take any avoiding action in time to avoid the accident.

6. Upon hearing of the suit, the trial Magistrate made findings that both the driver and the deceased were equally to blame at 50:50 basis and proceeded to assess *quantum* of damages under both acts to a total sum of Kshs.1,260,000/= being 50% share of contributory negligence.

7. As the first appellate court, it is my duty to re-consider and re-evaluate the evidence tendered before the trial court and come up with my own findings and conclusions.

See **Mwanasokoni -vs- KBS & Others (1982-88) I KAR 278 and Selle and Another -vs- Associated Motor Boat co. Ltd & Another EA (1068) 123.**

To do the above, I shall consider th evidence tendered in **HCA No. 38 of 2013** as the lead appeal.

8. **<u>The Appellants Appeal</u>**

PW 1 was the father and legal representative of the deceased, a female 20 years old. It was his evidence that the deceased had not worked but was preparing to go for further studies having completed form 4 class. He did not witness the accident. He produced the death certificate and grant of letters of administration. It was his testimony that the family had great expectations towards their daughter in expected financial assistance upon completion of studies and obtaining a job. He named a child Bitengo as the daughter of the deceased on cross-examination but no documents were produced to prove existence of such child, nor was it stated as a dependant in the plaint.

9. **PW2 one Nehemiah Manono** was a passenger in the Accident vehicle about 7.00a.m.- 7.30.m. at Ngata Bridge together with the deceased. It was his testimony that at the bridge, he alighted on the left side together with the deceased then the deceased crossed from the left to the right when a canter from Eldoret direction came and hit her and she fell on the road and, that the Canter did not stop. He stated that the vehicle was at high speed as the road was steep towards Nakuru and that it was coming downhill and the road had three lanes and she was hit on the third lane near the left side of the road. He further testified that there were bumps on that section of the road, and that he did not take the Registration Number of the vehicle as it sped away.

10. Upon cross examination, he stated that it was getting dark but one could see as he was standing about 5 metres away and that upon being hit, she fell on the middle of the road, that the vehicle was not on its right side, that the vehicles left body hit her. He did not record a statement at the police station.

11. **PW3 was PC. Christopher Kiarie**, a police officer attached to Nakuru police base. He produced the police abstract in respect of the accident. The accident was under investigation. He was not the investigating officer so could not explain how the accident occurred. He did not produce the police file or a sketch plan of the scene.

12. **PW4 Alex Ochanda** testified that he had gone to wait for the deceased who was coming from Nairobi, and that while he stood at the left side of the road as one faces Eldoret side, the deceased alighted and had almost finished crossing the road that had three lanes, and while on the extreme end lane where he was, a vehicle from Eldoret direction, a Canter hit her and she fell down on the road and the vehicle did not stop. He blamed the driver of the Canter for driving at a high speed where there were bumps. He testified that the deceased was not running but walking.

13. On cross examination, this witness testified that the Canter was going down hill and that she was hit on the lane that goes to Nakuru, and had crossed from the other side, and she fell on the third land as she had finished crossing the two lanes from Eldoret, and that it was drizzling. He testified that due to the impact, he knew the vehicle was at high speed. He too blamed the driver of the Canter.

14. **The Respondent's Evidence** was tendered by **DW2. Samuel Ndungu Njoroge** the driver of the motor vehicle registration Number KBG 403E. It was his evidence that while near the Ngata bridge, it was about 8.30p.m. and the road was clear, traffic was heavy and there were no bumps, was dark and had full lights on and was driving at a speed of between 70-80 Kilometres per hour going downhill towards Nakuru.

He testified that as he drove downhill, he saw something like a piece of polythene paper flying then he applied brakes then suddenly the vehicle hit the person, then stopped suddenly, but decided to drive away as the area was a dangerous place to stop but reported to the police who went and took the deceased to the hospital. He was not charged with any traffic offence.

15. It was his testimony that he was driving on the left side of the road and that the deceased was hit by the right side of the vehicle, and that he tried to avoid hitting her but she was too close.

16. Upon cross examination, the accident driver testified that he had 30 years experience as a driver and the road had three lanes and he was on the extreme left lane, and was going down hill and a stage was ahead, and that there were no bumps. He reiterated that his speed was at 70-80 kilometers per hour. He stated that the pedestrian came from the right to the left and he saw her when she was too close and running.

17. I have and read the judgment delivered on the 28th February 2013. The trial Magistrate did consider the evidence as evidenced by her analysis of the evidence and exhibits tendered to arrive at the findings upon the issues on both liability and *quantum* of damages.

It is on record that the said Magistrate considered evidence of each witness and specifically evidence of PW2 and PW3 the eye witnesses who other than stating that the vehicle was being driven at high speed, could not estimate the speed the vehicle was moving at, for good reason that they were not inside the vehicle, and it was dark.

18. I am satisfied too that the trial magistrate evaluated the respondents evidence, and that when the deceased emerged suddenly onto his lane, despite trying to avoid hitting her, it was too late as she was too close.

PW2 and PW4 confirmed that the deceased was hit on the 3rd lane, the lane used by vehicles coming from the of Eldoret direction.

From the above, the trial magistrate made findings that although the driver did not tell the court what effort he applied to avoid hitting the deceased, the allegation that he was driving at high speed was not proved, but again, that he did not do enough to avoid the accident. Based on the analysis, the trial magistrate apportioned blame equally.

19. I have re-evaluated the evidence. **Section 107 of the Evidence Act, Cap 80 Laws of Kenya** places the burden of proof of facts a party wishes to rely on the one who asserts. It is not enough to plead particulars of negligence and leave them to the court. In the case **Timsales Ltd -vs- Harun Wafula Wamalwa, Nakuru HCA No. 95 of 1995**, Musinga J (as he then was) rendered that in an adversarial system of litigation as is the case in Kenya, cases are tried on the basis of pleadings, issues of facts and law as framed and the burden of proof lies with the plaintiff and the degree of proof is on a balance of probabilities.

20. The investigating officer in respect of the accident did not testify. It is upon the evidence of PW1, PW3 and DW1 that the court may be able to make findings on culpability of either party.

The point of impact, going by the evidence tendered was on the left lane (3rd lane) as one faces Nakuru direction, and the correct lane of the canter vehicle that was coming from Eldoret direction. This confirms that the Canter vehicle was on its correct lane and that the deceased had crossed from the other side of the road and was about to finish crossing the road when she was hit, on the road, not off the road.

21. The appellant submits that there were bumps at the Section but the respondent driver denies such bumps on the section at the material time. The two eye witnesses stated that the driver was on high speed but could not estimate the speed.

The respondent submitted that speed in itself is not sufficient to prove negligence. Citing texts from **Charlesworth** on **Negligence Fourth Edition – Paragraph 214, Pages 93-94**, that:

> *"**It is the duty of a driver or rider of a vehicle to travel at a speed which is reasonable under the circumstances.***
>
> ***In determining what is reasonable, the nature, condition and use of the road in question, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on it are important matters to be taken into consideration."***

22. Evidence was lead that the road had three lanes, that it was dark, and the vehicle had its fulls lights on, and that traffic was low on the road. Whether it was drizzling or not cannot be confirmed as it was only the driver who stated so. There is too no evidence that the vehicle was being driven at high speed in the circumstances, having taken into account the nature of the road, traffic flow and the weather conditions.

What is clear is that the driver of the vehicle did not exercise due care and attention for other road users, in this case the pedestrian who had almost finished crossing the 3rd lane at the extreme left, the lane he was driving on. If he was, he could have seen the deceased in good time and try to avoid hitting her by swerving from the extreme left to the right, if indeed the vehicles full lights were on as has been stated.

23. On the other hand, the deceased ought to have taken care of her own safety by checking and confirming that it was safe for her to cross the road in view of the oncoming vehicles from Eldoret direction including the accident vehicle. She must have underestimated the speed of the vehicle and thus could not successfully cross the last lane before the vehicle hit her.

24. It is trite that when an accident occurs involving one or more vehicle or pedestrians, one or both must be held liable. In **Farah -vs- Lento Agencies and Multiple Hauliers -vs- Ralids Muthome Kimani(2015) e KLR** the Court of Appeal held that when there is no concrete evidence to determine who is to blame, both parties should be held liable.

25. In the present appeal the evidence as adduced is to the effect that both parties contributed to the accident as found by the trial court. But upon reconsideration and re-evaluation of the said evidence, it is very evident that the vehicle driver owed a higher duty of care to the pedestrian who had almost finished crossing the road. If indeed he had the vehicles lights on, and was driving at a speed consummerate with the circumstances stated above, then if he was watchful and careful, he would have seen the deceased in good time and would have been able to take steps to avoid knocking down the deceased.

See **David Kajojo M'mugaa -vs- Francis Muthomi (2012) e KLR** that upon consideration of the parties evidence and taken together, a court is able to arrive at balanced findings on the facts.

26. On those grounds, I am persuaded that the apportionment of liability on 50% basis against both the driver and the deceased was not based on the evidence tendered before the trial magistrate.

To that extent, it is my findings that the driver of the motor vehicle registration **No. KBG 403E** contributed to the accident at a higher percentage than the deceased. I therefore set aside the trial magistrates apportionment of liability at 50:50 basis, and substitute it with a finding that the **2nd respondent, Samuel Ndungu Njoroge, being the driver and agent of the 1st Respondent Lacheka Lubricants Ltd was 70% to blame and the deceased 30% to blame.** The appeal succeeds on the issue of liability to the extent above stated.

27. ***Quantum* of damages**

The deceased was 20 years old. No evidence of any earnings was tendered. The appellant testified that she had just finished form four and not worked and was preparing to go for further studies to the United States of America and that she had applied for a VISA.

In the statement of claim, the only Dependants stated are the appellant(father) and mother of the deceased. The trial Magistrate adopted an income of Kshs.20,000/= per month on the rational that if the deceased travelled to the United States of America to study as the evidence went, she would then be sending at least Kshs.20,000/= to her parents, against a multiplier of 15 years. The issue of the deceased's daughter was not pleaded in the plaint. It was not explained why, if the deceased had a child, that fact was not pleaded. On this basis the trial magistrate adopted a multiplicand of 2/3.

28. **Under the Law Reform Act**, no issue has been raised. The sum of Kshs.20,000/= damages for pain and suffering and Kshs. 100,000/= for loss of expectation of the use shall be up held.

29. **Under the Fatal Accidents Act**, the appellant submits that the multiplier of 15 years is too low and has urged enhancement to 40 years. On the other hand the Respondent submits that the multiplier of 15 years was not low but high, and has proposed a reduction.

Damages under the Fatal Accidents Act are awarded for the benefit of a deceased's dependants. In this case I find that the deceaseds dependants were her father and mother only.

As I have stated above no evidence was tendered of a child surviving the deceased. It is trite that parents have high expectations of financial and emotional assistance from their children especially at their old age.

30. There is no doubt therefore that the parents of the deceased suffered loss and damage due to her death. On the deceased income, no evidence was adduced on any form of income. The deceased was said to have been making arrangements to go for further studies. When one is a student, issue of income should not be considered in my view, unless proof is tendered that the student would at the same time be employed and earning some income on part time basis. No such evidence was adduced.

31. I agree with the respondents submissions that there was no proof of any income. The deceased had not been given a visa to travel for studies and there was no guarantee that it would be given, or even an offer for a job extended to her.

The trial magistrate was therefore wrong in adopting an income of Kshs.20,000/= per month on the above assumption and basis.

32. It is now trite that proof of income need not be by way of documentary evidence only. The deceased had finished form four studies, and was 20 years old. She ordinarily would have been doing some house work or farm work in her father's home. See **Hellen Waruguru -vs Kiarie Shoe Stores Ltd (2015) e KLR and also Mombasa Maize Millers Ltd -vs- MIM suing as the representative of JAM (deceased) 2916 e KLR.**

> **In Nyamira Tea Farmers Sacco -vs- Wilfred Nyambati Kerata Kisii Civil Appeal No. 68 of 2005 (2011) e KLR Asike Makhandia J stated:**
>
> ***"In the absence of proof of income the trial magistrate ought to have reverted to Regulations of Wages (General Amendment) Order 2005---"***

33. The trial magistrate in the present case plunged figures based on assumptions instead of using well known principles as stated in the above cases. The fact that the appellant stated that the deceased.

"had not worked before instituting the suit" in my view does not mean she was just lying idle, but must have been engaged in some form of activity and home chores which is quantifiable by way of wages guidelines, in the absence of other proof.

34. The deceased died on the 3rd September 2010. The wages guidelines for 2012 were produced before the trial court. It shows a sum of Kshs.8,800/=. Using my discretion and upon consideration of the circumstances, I am persuaded that a sum of Kshs.10,000/= would have been reasonable.

35. In opposing the award on lost years, and stating that it was too high the respondent cited the case **Mombasa C.A No. 59 of 2004 Roger Dainty -vs- Mwinyi & Others, the Judges adopted 10 years for a 27 year old, on the basis that:**

> ***"there is no guarantee of life for any period these days (sic) expectations of life is reduced by many risks to be encountered within modern living."***
>
> In the case **Board of Governors of Kangubiri Girls High School -vs-Jane Wanjiki & Another Nyeri C.A No. 35 of 2014(2014) e KLR** the Judges of Appeal stated:
>
> ***"The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason."***

The deceased was not said to have had bad health. She could have worked and lived to retirement age save for vagaries of life. No doubt she would have found some employment and her income would have increased with passage of time. Doing the best I can, and in exercise of my judicial discretion, I find a multiplier of 30 years more realistic as opposed to the 15 years adopted by the trial magistrate.

I therefore set aside the trial court's multiplier of 15 years, and substitute it with 30 years. See **Mombasa Maize Millers** (Supra).

36. On the multiplicand, I have stated that 2/3 used by the trial Magistrate was on the assumption that the deceased was survived by a young daughter besides her parents. The existence of the daughter was not proved. As a single young woman of 20 years, she would have been spending at least a 1/3 of her income towards supporting her parents and 2/3 on herself. I shall therefore set aside the 2/3 multiplicand and apply 1/3.

37. I have been urged to subject the award under Fatal Accidents Act to a deduction of the award under the **Law Reform Act,** assessed at Kshs.120,000/=. I shall not do so because while computing the award under Fatal Accidents Act, I have taken into account the award under the Law Reform Act. This in my

view is not double compensation.

In the the case **Hellen Waruguru Waweru (Supra) in Nyeri Civil Appeal No. 22 of 2014** the Learned Judges of Appeal expressed and explained the concept of double compensation. They explained that:

> ***"--- duplication occurs when beneficiaries of the deceased estate under Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as there are only awarded under the Law Reform Act, hence the issue of duplication does not arise."***
>
> ***See Section 4(1) of the Fatal Accidents Ac---"***

The loss of dependancy is therefore worked out as follows:

10,000 X 12 X 1/3 X 30 = 1,200,000/=.

This sum shall be substituted with the sum of Kshs.2,400,000/= awarded by the trial Magistrate at 100% basis.

38. The appellant pleaded special damages of Kshs.25,000/= as fees for application for grant. No receipts were produced in support. It is trite that any claim for special damages must not only be pleaded but also proved. There being no proof, the trial magistrate did not err in disallowing the claim.

Funeral expenses are allowed under the **Section 6 of the Fatal Accidents Act.** But these expenses were not pleaded. I find no basis upon which I may proceed to award the same. Had they been pleaded, I would have allowed a reasonable sum without proof.

39. In its totality, the Appeal succeeds partly, in the following manner:

> ***(a) Liability at 50:50 basis is set aside and substituted with contributory negligence of 70% against the Respondents jointly and severally and 30% against the deceased.***
>
> ***(b) Damages under the Law Reform Act of Kshs.120,000/= is upheld.***
>
> ***(c) Damages for lost years at Kshs.2,400,000/= is set aside and substituted with Kshs.1,200,000/=.***
>
> ***(d Special damages – nil***
>
> ***(e) The total sum in (b and (c) above being 1,320,000/= is reduced by 30% contributory negligence to Kshs.924,000/=, payable to the Appellant.***
>
> ***(f) Interest at court rates shall accrue from the date of the trial court judgment on the 28th February 2013.***
>
> ***(g) Each party shall bear its costs of the appeal.***
>
> ***(h) Findings on liability in this appeal shall apply to High Court Civil Appeal No. 37 of 2013.***

Orders accordingly.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N. MULWA

JUDGE