

its memorandum, namely:

- 1. THAT the learned magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the plaintiff.*
- 2. THAT the learned trial magistrate erred in law and in fact in entering judgment in favour of the plaintiff.*
- 3. THAT the learned magistrate misdirected herself on the assessment of quantum on loss of dependency in the sum of Kenya shillings 800,000/= when there was no proof of dependency and income of the deceased.*
- 4. THAT the learned magistrate misdirected herself on the assessment of quantum on pain and suffering in the sum of Kenya shillings 10,000/= when the deceased died on the spot.*
- 5. THAT the learned trial magistrate erred in law and in fact by disregarding the evidence by the appellant.*
- 6. THAT the learned trial magistrate erred in law and in fact in failing to give reasoning for her determination and finding.*
- 7. THAT the learned trial magistrate erred in law and in fact in basing her decision on the plaintiff's evidence that was not corroborated and which failed to discharge the burden of proof.*
- 8. THAT having made a finding of fact that the plaintiff crossed the road from the wrong side, the learned magistrate misdirected herself in finding liability at 50% - 50%.*
- 9. The learned trial magistrate erred in law and in fact by disregarding the plaintiff's evidence in toto.*

4) The above grounds may be summarised into 2 main grounds namely:

- i. Whether or not the learned trial magistrate erred in her finding on apportionment of liability.*
- ii. Whether or not the learned trial magistrate erred in her finding on quantum.*

5) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions

6) The 1st issue for determination is whether or not the learned trial magistrate erred in her finding on apportionment of liability. The appellant submits that the trial court erred in apportioning liability equally. The appellant is of the submission that the pedestrian was wholly to blame for failing to observe traffic rules and that the trial court should have dismissed the case with costs to the appellant.

7) The appellant cited the case of **Caren Ouma Oyugi Okwiri –vs –emergency Relief Supplier Ltd and another (2017) eKLR** where the court found that the issue of negligence had not been proved, as the deceased was a pedestrian crossing the road in an undesignated area, who failed to use the pedestrian bridge thus assumed the risk that befell him. The court dismissed the case with costs to the defendant.

8) The respondents on the other hand submit that the trial court's decision on apportionment of liability is justified hence it should not be faulted.

9) Richard Maina (PW2) testified that on the material day of the accident that, he was at the Mathare stage along Thika-Nairobi highway. He said he saw the deceased knocked down by the appellant's motor vehicle registration no. KBH 402P, when the deceased had finished crossing the road. PW2 further stated

that the driver was at high speed and had the driver been at a lower speed, he would have swerved to avoid the accident.

10) DW1, confirmed that he knocked down the deceased while driving the said KBH 402P along Thika Road. In apportioning liability equally, the trial magistrate noted that the driver was negligent, in that the area where the accident occurred was a stage and the driver ought to have been careful in order to avoid the accident. On the part of the deceased, the trial magistrate observed in her judgment that, the deceased ought to have taken care of her own safety as there was a pedestrian flyover near where she was, which she could have used, but at the same time being the driver, DW1 ought to have driven at a speed that would enable him control his vehicle in any eventuality. I am convinced that the trial magistrate arrived at the correct decision on liability.

11) The second issue for determination is whether or not the learned trial magistrate erred in her finding on quantum. The appellant submits that the trial court awarded ksh.800,000 for loss of dependency on a multiplier of 20 years at a sum of ksh.5,000, being the minimum wage at the ratio of 2/3 since the deceased was unmarried and with two children. The appellant states that dependency was not proved and therefore this should not have been awarded by the trial magistrate and relied on the case of **Elizabeth Chelagat Tanui & Another –vs- Arthur Mwangi Kanyua (2013) eKLR** where it was stated inter alia that, under Section 4(1) of the Fatal Accidents Act that only his wife, children and parents are entitled under the statute, upon proof of dependency. It therefore follows that proof of dependency is key and in this case documentary evidence would suffice but the same was not availed.

12) The respondent on the other hand submits that dependency was not proved. On the issue of damages, the respondent cited the case of **Butt –v- Khan (1977) 1KAR**, which laid down the principles upon which an appellate court will disturb an award for damages as follows;

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

13) PW1 testified under oath that the deceased died and left behind two children and herself who entirely depend on her and cited the case of **Silas Mugendi Nguru –vs- Nairobi Women’s Hospital (2014) eKLR** where it was stated inter alia that:

“the deceased estate is entitled to damages for pain and suffering, loss of expectation of life and for lost years. They are claims under the Law Reform Act, Cap 26, Laws of Kenya.”

14) I am convinced that the damages awarded by the trial magistrate should not be disturbed. They were well founded under the Law Reform Act and the Fatal Accidents Act.

15) In the end, I am persuaded to agree with the respondents submissions. I find no merit in this appeal. It is dismissed in its entirety. In the circumstance of this case, I am of the view that a fair order on costs is to order which I hereby do, that each party bears its own costs.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent