REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 13 OF 2015

JOSHUA MURIUNGI NG'ANATHA……..…….…….APPELLANT

AND

BENSON KATAKA LEMUREIYANI(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LOKUSHUK JOHN (DECEASED)…..…..RESPONDENT

(BEING AN APPEAL FROM THE WHOLE OF THE JUDGMENT OF HONOURABLE E.M. KADIMA (MR) RM ON 26TH NOVEMBER 2014 IN SENIOR RESIDENT MAGISTRATE'S COURT CIVIL SUIT NO 146 OF 2012 IN VOI)

BENSON KATAKA LEMUREIYANI(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LOKUSHUK JOHN (DECEASED)…….PLAINTIFF

VERSUS

JOSHUA MURIUNGI NG'ANATHA ……..…….…….DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 20th November 2012 and filed on 22nd November 2012, Lokushuk John(hereinafter referred to as "the deceased") was carefully crossing standing (sic) off the road along Nairobi-Mombasa Highway around Mackinon Trading Centre when the Defendant, his driver, agent and/or servant negligently drove, managed and/or controlled Motor Vehicle Registration Number KBJ 499C causing it to hit the deceased as a result of which he sustained fatal injuries and his estate suffered loss and damage.

2. Suit was filed on behalf of the deceased by Benson Kataka Lemureiyani, his personal representative in which the following reliefs were sought:-

(i) General damages

(ii) Kshs 50,400/= Special Damages as per Paragraph 6 hereinabove

(iii) Costs and interest thereof

(iv) Interest on (i), (ii) and (iii) at court rates

(v) Any other relief this Honourable Court may deem fit and just to grant.

3. In his judgment delivered on 26th November 2014, Hon E.M. Kadima Resident Magistrate entered judgment in favour of the Respondent against the Appellant in the following terms:-

(1) Loss of Dependency

½ x 15,000 x 12 x 20 **Kshs 1,800,000/=**

(2) Loss of Expectation of life **Kshs 50,000/=**

(3) Pain & Suffering **Kshs 20,000/=**

(4) Special Damages **Kshs 50,000/=**

Kshs 1,920,000/=

Plus costs and interest of the suit (sic) calculated thereon from the date of judgment.

4. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, on 3rd December 2014, the Appellant filed its Memorandum of Appeal dated 2nd December 2014. The grounds of appeal were as follows:-

(1) THAT the Learned trial Magistrate erred in facts and law in holding that the Respondent/Plaintiff had proved his case on a balance of probability and consequently finding that negligence wholly lies on the part of the Appellant/Defendant.

(2) THAT the Learned trial Magistrate erred in facts and law in totally disregarding the evidence that was adduced by the Appellant/Defendant and his witnesses and the exhibits produced therein, more particularly the findings of the Inquest Case No 15 of 2012 which held that the deceased herein was to blame for causing his own death.

(3) THAT the Learned Trial Magistrate erred in facts and law in failing to appreciate that the findings of the Inquest Case No 15 of 2012 as adduced by the Appellant/Defendant were binding upon the court and had a bearing in determining the issue of liability.

(4) THAT the Learned trial Magistrate erred in facts and in law in failing enumerate (sic) **the relevant provisions of the Law that stipulate that Inquest proceedings are merely persuasive findings and not binding before the court.**

(5) THAT the Learned Magistrate erred in facts and in Law in quantifying damages payable to the Respondent/Plaintiff when the Respondent/Plaintiff had failed to prove his case on a balance of probability.

(6) THAT the Learned trial Magistrate erred in facts and in Law in awarding exorbitant and excessive Quantum of damages not based on any judicial authorities or precedence that would stipulate the rationale in arriving at the appropriate Quantum of damages.

(7) THAT the Learned trial Magistrate erred in Law and in facts by disregarding the submissions and authorities supplied by the Appellant/Defendant which codify the principle that Inquest proceedings are binding upon the Courts and the Appellant/Defendant therefore should be discharged from any liability thereof.

5. The Appellant's Record of Appeal was dated 25th September 2015 and filed on 28th September 2015. His Written Submissions were dated 15thJuly 2016 and filed on 18th July 2016 while those of the Respondents were dated 2nd September 2016 and filed on 5th September 2016.

6. When the matter came before the court on 5th September 2016, the parties' advocates requested for a Judgment date herein having relied entirely on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. TheAppellant consolidated and/or confined his Grounds of Appeal into the following:-

> **(1) Whether the Learned trial Magistrate erred in law and fact in finding the Appellant/Defendant negligent and wholly liable for the death of the deceased herein despite the evidence to the contrary?**
>
> **(2) Whether the Learned trial Magistrate erred in law and in fact by awarding exorbitant and excessive damages not based on any judicial authorities and/or precedents that would stipulate the rationale of arriving at an appropriate Quantum of damages?**
>
> **(3) Whether this Honourable Court should set aside the Judgment of the trial court in SR.M..C. No 146 of 2012 and substitute the same with an order for dismissal of the suit with costs to the Appellant?**

8. On his part, the Respondent listed the questions for determination by this court as follows:-

> **(1) Whether or not the findings in Inquest No 15 of 2012 were binding on the Trial Court herein;**
>
> **(2) Whether or not the Respondent proved its case on a balance of probabilities.**
>
> **(3) Whether or not the Learned Trial Magistrate awarded exorbitant and excessive damages.**

9. This being a first appeal, this court is under a duty to re-evaluateand assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

10. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

11. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties' respective Written Submissions, it was clear to the court that the issues for consideration and determination were ideally the following:-

> **(a) Who was liable for the accident herein and to what extent?**
>
> **(b) Were the damages awarded by Learned Trial Magistrate premised on the wrong principles so to have resulted in being manifestly excessive and exorbitant warranting interference by this court?**

12. The said issues were therefore dealt with under the distinct heads shown hereinbelow.

I. LIABILITY

A. ADMISSIBILITY OF FINDINGS OF THE INQUEST CASE

13. Grounds of Appeal Nos (2), (3), (4) and (7) were all related and were therefore dealt with under this head.

14. The Appellant argued that by dint of Section 107 of the Evidence Act Cap 80 (Laws of Kenya), the onus was on the Respondent to prove that the death of the deceased was a result of his negligence and/or his carelessness due to speeding on his part. He argued that the Learned Trial Magistrate ought to have considered the findings of the Inquest Case No 2 of 2015(hereinafter referred to as "the Inquest").

15. He argued that the proceedings and the Ruling of the Inquest would, no matter the extent, have assisted the Trial Magistrate in determining who was negligent for the fatal injuries that were sustained by the deceased. He relied on the case of **Stephen K. Kubai vs Mikelina Amatu & Another [2006] eKLR** in this regard.It was therefore his submission that the Learned Trial Magistrate erred in finding that he was to blame contrary to the findings of the said Inquest.

16. The Respondent pointed out that Section 385 of the Criminal Procedure Code Cap 75(Laws of Kenya) provides that a Magistrate of first and second class or one specially empowered by the Chief Justice shall be empowered to hold inquests. He stated that the purpose of such inquests is to establish what caused the death of a deceased person and their findings do not establish the liability or lack thereof of parties therein and being persuasive in nature, they do not bind a civil court.

17. He submitted that the Learned Trial Magistrate arrived at the correct conclusion in not exonerating the Appellant because the witnesses in the Inquest were not cross-examined and that the Appellant could still be held liable in tort as was held in the case of **Charles Munyeki Kimiti vs Joel Mwenda & 3 Others [2010] eKLR**that he relied upon.

18. In criminal cases, which include traffic offences, the prosecution is required to prove a case beyond reasonable doubt.Any conviction that is not appealed from is conclusive evidence that the person so convicted as he was charged as is provided in Section 47A of the Evidence Act. The said section stipulates as follows:-

> **"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

19. This does not, however, follow that such a convicted person will be found wholly liable in civil proceedings that a complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil proceedings.

20. In the same breathe, the fact that a person has been exonerated in an inquest does not discharge him from any liability in tort if negligence is actually established. Similarly, a person who has been found wholly liable in inquest proceedings need not necessarily be found to be wholly liable in civil proceedings.

21. The trial court will be obligated to hear the civil case independent of the findings of an inquest and determine the case before it on a balance of probability by establishing who between the parties before it is liable for injury, damage or loss that has occurredand to determine to what extent they are liable. All the parties are therefore required to demonstrate in such trial court that the other party is wholly to blame or contributed to the causation of the incident in question.

22. In the case of **Charles Munyeki Kimiti vs Joel Mwenda & 3 Others**(Supra)Lenaola J rendered himself as follows:-

"It is clear that the Resident Magistrate upon inquiry absolved them from blame. It does not however follow that the inquest exonerates the respondents from tort. If negligence is established…just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence…"

23. In the case of **Chemwolo & Another v Kubende [1986] KLR 492**at page 498, the Court of Appeal stated the issue thus:-

"With respect, it was not for the learned judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well-known that both parties to an accident might have driven carelessly and each could be convicted to careless driving for their respective types of carelessness….. ….It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of proceedings in the traffic case."

24. The Respondent was therefore correct in submitting that the Learned Trial Magistrate was not bound by the finding of the Inquest and he could enquire into the evidence that was placed before him in the civil case. While this court was not persuaded by the Appellant's arguments that the Learned Trial Magistrate should not have found that he was to blame for the accident herein, the said Learned Trial Magistrate was not expected to ignore the findings of the said Inquest as the same could give direction on how to apportion liability between the Appellant and the deceased herein.

25. In this respect, Grounds of Appeal Nos (2), (3), (4) and (7) were not merited and the same are hereby dismissed.

B. APPORTIONMENT OF LIABILITY

26. Grounds of Appeal Nos (1) and (5) were dealt with together as they related to the question of liability.

27. The Appellant stated that Kainan Mohammed (hereinafter referred to as "PW 1") told the Trial Court that he did not know who was to blame for that accident herein and that he failed to ascertain the speed the speed his vehicle was travelling at. He also contended that neither PW 1 nor PW 3 pointed a finger at him for having caused the said accident and the Learned Trial Magistrate erred in restricting himself to uncontroverted evidence of the Respondent's witnesses. His further contention was that the Appellant did not call any witness to show that the deceased was the one who caused the accident.

28. On his part, the Respondent averred the Appellant was wholly to blame for the accident. He stated that PW 1 testified that he was in a hotel at an area called Mackinon facing the Highway when he saw a man on the left side of the road. Suddenly a motor vehicle appeared driving to Mombasa and hit the man.

29. It was his **opinion** (emphasis court) that the man wanted to cross the road towards the main town. He added that the man had not crossed the road. It was then he **heard a sound** (emphasis court) and the motor vehicle stopped slightly over thirty (30) metres. He said that he could not say who was to blame for the said accident.

30. It was his testimony that the Appellant's vehicle was being driven at a very high speed and stopped about thirty (30) metres from the point of impact which was off the road and that the Appellant's motor vehicle's windscreen shattered as a result of the impact.

31. Benson Katana Mureiyani (hereinafter referred to as "PW 2") was the deceased's brother. He said that he received a call from the Respondent who was his brother informing him of the accident herein. During his Cross-examination, he stated that he was told that the said accident had been caused by one Joshua

Nkenata.

32. According to the evidence of No 54424 CPL David Mwangi (hereinafter referred to as “PW 4), there was an Inquest that enquired into the circumstances of the accident and that the same showed that the deceased was to blame for the same. The Appellant called Richard Walukhanja (hereinafter referred to as “DW 1”) who tendered in evidence the Inquest file and confirmed that the deceased was found to have been wholly liable for the accident.

33. It was evident from the testimony of all the witnesses that none of them actually saw what happened at the time of the accident. PW 1 only opined what he thought the deceased wanted to do, an opinion he reiterated during his Cross-examination. The only evidence that could assist the court was the Inquest proceedings which wholly blamed the deceased for the said accident.

34. If this court was to accept the Respondent’s arguments that the Learned Trial Magistrate should not have relied on the findings of the said Inquest, it would mean that his claim would fail as there were no witnesses who could testify that the accident occurred as he alleged and that the Appellant was liable for the same.

35. Indeed, the onus was on him to prove that the accident occurred as a result of the negligence of the Appellant in line with Section 107 of the Evidence Act that the Appellant relied upon to submit that a party who desires a court to make a finding in his favour as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

36. As the defending party, the Appellant was under no obligation to adduce any evidence to assist the Respondent in proving an assertion. The only time a rebuttal will be required from a defendant is where a plaintiff has proved a fact. The Learned Trial Magistrate therefore erred in finding that the Respondent’s case was uncontrovertedas PW 1 who could be considered as the only direct witness gave an opinion of what he thought the deceased wanted to do and only heard a sound.

37. Having said so, it was apparent from the injuries that the deceased sustained and the shattering of the windscreen of his motor vehicle that the Appellant was driving at a very high speed. He may not have been reckless or careless. However, his speed was high. He was expected to maintain a proper look out for other road users as it is not uncommon for other road users to do the unexpected on the roads.

38. If the deceased had been hit and sustained injuries that were not fatal, if the said motor vehicle stopped immediately after the collision and the windscreen of his motor vehicle was not shattered, this court could have perhaps been persuaded to find that the Appellant was driving at a reasonable speed.

39. Evidently, both the Appellant and the deceased were to blame. The question that now arises is to what extent were the deceased and the Appellant to blame.

40. The Appellant was in control of a legal machine, to wit, the motor vehicle as compared to the deceased. He was expected to exercise due care and diligence especially when driving through a built up area such as where the accident herein occurred. He failed to do so and caused the deceased fatal injuries. The above notwithstanding, following the Inquest, the deceased was wholly blamed for the misfortune that befell him.

41. Doing the best that it could, this court found that apportionment of liability at 60%-40% against the deceased to have been reasonable in the circumstances of the case herein and it is so apportioned.

II. QUANTUM

42. The Respondent’s claim was both under the Fatal Accident’s Act Cap 32 (Laws of Kenya) and Law Reform Act Cap 26 (Laws of Kenya).The court dealt with the same under the following heads.The Appellant did not have objection to the sums of Kshs 20,000/= and Kshs 50,000/= that were awarded for pain and suffering and loss of expectation of life under the Law Report Act. This court did not therefore

disturb the same.

A. FATAL ACCIDENT'S ACT CAP 32 (LAWS OF KENYA)

43. In assessing the damages under this head, the court had to consider the multiplicand, the multiplier and dependency ratio. The same have been dealt with as shown hereunder.

AA. MULTIPLICAND

44. According to PW 2, the deceased was working as a GSU officer at Mackinon at the material time of the accident and earned a salary of Kshs 24,000/=. He tendered in evidence a copy of the deceased's pay slip that was found in the deceased's wallet. During his Cross-examination, he confirmed that the deceased earned a net salary of Kshs 8,886/=.

45. He pointed out that he had proposed a multiplicand of Kshs 15,000/= during the Trial but he wanted the same enhanced to Kshs 21, 654/= being the gross income in the sum of Kshs 24,145/= less the statutory deductions in the sum of Kshs 2,491/=.

46. On its part, the Appellant proposed that the net sum of Kshs 12,509/=. It referred the court to the case of **Milka Wanjiku Muthea vs Daniel Kipkirong Tarus & Another [2015] eKLR** and **Joseph Ndichu Kariri vs Daniel Kipkirong Tarus & Another [2015] eKLR**where Mulwa J adopted the net salary as the multiplicand.

47. This court accepted the Respondent's view that the deceased's Gross Salary includes the allowances payable and in the circumstances that net pay was Kshs 21,554/=. The same will thus be adopted as the multiplicand herein.

BB. MULITIPLIER

48. It was PW 2's evidence that the deceased was born in 1986 and was not married. The Appellant did not controvert the evidence of the deceased's age. The Learned Trial Magistrate adopted a multiplier of twenty (20) which the Appellant urged this court to uphold. The same therefore remained undisturbed.

CC. DEPENDENCY RATIO

49. According to the evidence of PW 2, the deceased used to assist his two (2) younger sisters and a brother in the payment of their school and/or college fees and his mother who was asthmatic.

50. Paragraph (6) of the Plaint showed that the deceased's dependants were:-

(1) Resiiei Mureiyani Mother

(2) Benson Kataka Lemureiyani Brother (Adult)

(3) British Jack Mureiyani Brother (Adult)

51. Under Section (4) (1) of the Fatal Accidents Act, it is clear who a dependant of for whose benefit a claim under the said Act can be brought. It provides as follows:-

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child**(emphasis court) **of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be**

divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

52. It was therefore evident that save for the deceased's mother, the brothers could not purport to benefit in their claim under the Fatal Accidents Act. This was also a position that was held by Asike- Makhandia (as he then was) when he was confronted with a similar issue in the case of **Multiple Hauliers Co Limited vs David Lusa [2012] eKLR.**

53. Dependency is a matter of fact and must be proved. However, it is expected that a child in an African setting is expected to assist his parents. This was an observation that has been held in several cases.

54. In the case of**Kenya Breweries Ltd vs Saro (1981) KLR 408,** the Court of Appeal sitting in Mombasa stated as follows:-

"In the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact."

55. Kneller, JA (as he then was) in **Hassan –Vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457** made similar observation when he stated that:-

"The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy (sic)**at its worst."**

56. It was therefore expected that being unmarried, the deceased used 2/3 of his salary on himself and used 1/3 of his salary to assist his mother as was ably submitted by the Appellant herein. Indeed, this dependency ratio has been adopted in several cases involving deceased persons who died leaving no spouses or children.

57. In one such case that was cited in the case of **Njue Gitonga Nthiga vs Edward Nyamu Kibunyu [2013] eKLR** that the Respondent referred this court to, the case of **Bustrack Limited vs Wilfridah Achola Omondi & Another [2010] eKLR,** the court therein adopted a dependency ration of 2/3 where the deceased therein left a spouse and five (5) children.

58. The Learned Trial Magistrate herein adopted a dependency ration of ½ which this court found not to have any legal basis as no evidence was led to prove this fact leading to a wholly erroneous estimate of the damages to be awarded. In fact, the said Learned Trial Magistrate did not lay basis on how he arrived at the said dependency ratio of ½. The same is hereby set aside and replaced with a dependency ratio of 1/3.

59. This court therefore tabulated the damages under this at Kshs 1,731,600/- which was made up as follows:-

1/3 x 21,645 x 12 x 20 Kshs 1,731,600/=

B. SPECIAL DAMAGES

60. The Appellant urged this court to reduce the Special Damages to Kshs 24,000/= from the sum of Kshs 50,000/= that had been awarded by the Learned Trial Magistrate. On his part, the Respondent argued that the damages in the sum of Kshs 50,000/= were strictly proven and persuaded this court to uphold the

same.

61. In the Plaint, the Respondent claimed a sum of Kshs 50,400/= made up as follows:-

(a) Police Abstract Report Kshs 200/=

(b) Death Certificate Kshs 200/=

(c) Funeral Expenses Kshs 25,000/=

(d)Legal expenses for obtaining letters of Administratio Kshs 25,000/= Kshs 50,400/=

62. A perusal of the proceedings that PW 2 submitted receipts in the sum of Kshs 16,000/= being funeral expenses. The claim for Kshs 500/= being search fees was not included in the Plaint. Indeed, parties must be bound by their pleadings. The same is hereby rejected. The court also noted that the receipts in support of the funeral expenses were in the name of a neighbour. They were not strictly proven and ought to have been rejected.

63. However, as it is expected that a deceased's family will have incurred some expenses, this court adopted the figure of Kshs 24,000/= which was proposed by the Appellant. It was not clear how this sum was tabulated but since the Appellant had conceded to the same, this court opted to adopt the same.

64. Accordingly, having considered the evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court came to the conclusion that the Learned Trial Magistrate misdirected himself on some of the awards necessitating this court to interfere with the same.

DISPOSITION

65. In this respect, this court hereby varies the judgement of the Learned Trial Magistrate of Kshs 1,920,000/= computed as foresaid and instead enters judgement in favour of the Respondent against the Appellant for the sum of Kshs 730,240/=made up as follows:-

(1) Loss of dependency 1/3 x 21,645 x 12 x 20 Kshs 1,731,600/=

(2) Loss of Expectation of life Kshs 50,000/=

(3) Pain & Suffering Kshs 20,000/=

(4) Special Damages Kshs 24,000/= Kshs 1,825,600/=

Less 60% contribution on the part of the deceased Kshs 1,095,360/= Kshs 730,240/=

Plus costs and interest thereon at court rates.

66. It is so ordered.

DATED and **DELIVERED** at **VOI** this **25th** day of **October 2016**

J. KAMAU

JUDGE