REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 91 OF 2012

M'RARAMA M'NTHIERI …….....….....APPELLANT

-VERSUS-

LUKE KIUMBE MURITH …….....…RESPONDENT

JUDGMENT

Primary suit

[1] The Appellant is the personal representative of the estate of Stanley Mworia M'Rarama, deceased. The Appellant sued the Respondent in NKUBU PMCC NO. 16 of 2009 for (a) general damages under the Law Reform Act and Fatal Accidents Act; (2) Special damages of Kshs. 52,512; (3) Costs of the suit; (4) interest on (1),(2) and (3) above; and (5) any other relief that the court may deem fit and just to grant. The Appellant averred in the plaint that the Respondent was the beneficial owner of motor vehicle registration.KAJ 812W, make Toyota Corolla. That on or about 7th day of November 2008 at Kariene - Ka-Moi area along the Meru-Nkubu road, the Deceased was walking on the pedestrian path on the left side of the road, way off the tarmac when the Respondent so negligently, carelessly and recklessly drove, and controlled motor vehicle registration no. KAJ 812 Wand caused it to hit Stanley Mworia M'Rarama. The claim was based on the Law Reform Act and Fatal Accidents Act.

[2] The Respondent denied the claim and filed defence dated 25th September, 2009. He pleaded that he was a total stranger to the facts of the case as stated. But in the alternative, he pleaded contributory negligence on the part of the deceased.

[3] The case was heard by S.M. Githinji, Senior Principal Magistrate (as he then was) and he delivered his judgment in the matter on 27th August, 2012 in which he found liability at 50% for each party and awarded;

(a) Loss of expectation of life ……Kshs. 30,000

(b) Loss of dependency ……..Kshs. 15,000

(c) Special damages …… Kshs. 26,256

Total ……..Kshs. 71,256

Appeal

[4] The Appellant was aggrieved by the said judgment and filed this appeal. He listed the following three (3) significant grounds of appeal:

> **(1) The Honourable trial magistrate erred in fact in apportioning liability at 50:50 as between the deceased and the Respondent inspite of the overwhelming evidence pushing to a greater degree of negligence on the part of the Respondent.**
>
> **(2) The Learned trial magistrate further erred in law in awarding the Appellant and the estate of the deceased a global sum of Kshs. 30,000/- in that he did not**
>
> > **a) Employ any multiplicand despite finding that the deceased was 30 years at the time of his death.**
> >
> > **b) Employ any multiplicand despite there being evidence that the deceased used to earn Kshs. 10,000/- per month derived from bananas and coffee and that he used to support the parents. Even if there was no evidence of income, the learned trial magistrate should have employed the minimum wage principle.**
> >
> > **c) Award any damages for pain and suffering despite there being evidence that the deceased did not die immediately after the accident.**
>
> **(3) The judgment was against the weight of evidence.**

His major prayers in the Appeal are two: (1) that this court reevaluate the evidence on liability and award less degree of liability on the deceased; and (2) Re-assess the general damages under the Fatal Accidents Act. The Appeal was canvassed by way of written submissions which are on record.

EVIDENCE

The Appellant's

[5] The Appellant called two witnesses. PW1, one Daniel Mongeru who told the trial magistrate that on 7thNovember, 2008 he was at Kangeeta in a canteen at 9.00 p.m. He was walking along Meru-Nkubu road towards Meru direction. He was going to the house of Matungu. Then a vehicle approached from Meru towards Nkubu; he said the vehicle was speeding. The deceased was also walking on a pedestrian pathway towards Nkubu. He was walking on the left side of the road. Suddenly the said vehicle hit the deceased, then a blue gum tree and overturned on the left side of the road. He told the court he picked the deceased and placed him on a footpath. Then a Dr. Kimathi, took the deceased in his vehicle to the hospital. He identified the vehicle that hit the deceased as KAJ 812W, Saloon.

[6] In cross-examination, PW1 said that at the time of the accident, it was raining and was dark. At the time of hitting the deceased, the vehicle had not passed him. But again he said that he saw it when it hit the deceased as he could also see the deceased from the other side of the road. He insisted that the vehicle was off the road when it hit the deceased. He refuted defence counsel's suggestion that the vehicle went off the road in order to avoid hitting the deceased. He said that he was able to see the deceased as well as the occurrence of the acceded because the vehicle had its headlights. He said he did not know the deceased to be insane at all.

[7] **PW2 M'Rarama M'Ntheri Andrew** is the father of the deceased and he narrated how he received the sad news of his son's accident from Geoffrey Kiunga; he called him on phone on 7th November, 2009 at 9.00 p.m. But he went to the scene of the accident the following day and saw the tree that the vehicle had hit. He also went to Meru Police Station and to Meru General Hospital and found out that his son had passed on. He then obtained a Police Abstract for the accident. He then had his son buried. He told the court that his late son was a farmer in coffee and bananas which earned him 20,000/- per month. The deceased son used to help PW2 and his mother Alice Kaguri. He said that his son was healthy and well at

the time of his death. He was mentally stable. He was not sure of deceased age but said that as per medical documents he was 30 years old.

[8] PW3, a police officer No. 64120 P.C. Abdul Hassan was plaintiff's last witness. He produced the police abstract for this particular accident that occurred on 7th November, 2008 at 7.30 p.m. along Nkubu-Meru Road at Itego Area. PW3 and Corporal Wachira visited the scene and observed that it was raining and misty. The weather was not clear. The sketch plan shows the vehicle was 20 meters off the road into the ditch. The vehicle belonged to the defendant who was also the insured. The sketch plan also showed that the point of impact was 1 (one)meter inside the road on the right as you face Nkubu from Meru. He concluded therefore that if the vehicle was going to Nkubu from Meru, then it was not in its lane during the accident. In cross-examination he stated that the vehicle ought to have kept left. But he again said that they did not find any fault with the driver and so an inquest was opened.

Respondent's case

[9] The defendant testified. He said that on the material day he was driving his vehicle registration number KAJ 812W from Meru to Nkubu. But at Kariene Ka-Moi it was drizzling and was foggy. He was at a speed of 80 Kph when he saw a man running from right side of the road to his side. The person was about 10 meters from the vehicle and so he braked and hooted but in vain. He swerved to the left. At that time the approaching vehicles had not passed yet and so he could not have swerved and he did not swerve to the right side. He told the trial magistrate that he tried to avoid the deceased by all means. He said he was not charged with any offence arising from the accident although the police had told him that they would charge him.

[10] In cross-examination he confirmed that he was at a speed of 80kph at the time of the accident. He also confirmed that he could only see about 50 meters as the weather was foggy. He only reduced his speed when he saw the deceased at about 10 meters away.

[11] The above is the evidence the way I discern it from the recordings by the trial magistrate.

DETERMINATION

[12] Parties canvassed this appeal by way of written submissions which I have considered. According to the Appellants' submissions the trial magistrate erred in law and fact in apportioning liability at 50:50% inspite of the overwhelming evidence in favour of the Appellant. The Appellant submitted that the trial magistrate erroneously stated that it was not clear who between the driver and the deceased caused the accident yet PW1 who witnessed the accident clearly narrated how the accident occurred. The witness blamed the Respondent for the accident. According to the Appellant the trial magistrate was wrong in finding that he was not able to discern how PW1 could see at night when it was raining and misty. Yet, Meru-Nkubu is a busy road and the headlights of on-coming vehicles as well as the culprit vehicle provided light for PW1 to see. But what is important as per the Appellant was that evidence adduced showed that the concerned vehicle was not on its side when it hit the deceased. And that the trial magistrate had rightly found that *"given how the vehicle behaved after it hit the deceased, I cannot say it was moving at such reasonable speed."* The Appellant lamented that with this kind of evidence the trial magistrate apportioned liability at 50:50%.

[13] The Respondent on the other hand sounded caution that the Appellate Court's duty to re-evaluate evidence of the trial court must be done with the recognition that it neither saw nor heard the witnesses. They relied on the case of **Rishi Hauliers Ltd –vs- Josiah Boundi[2015] eKLR and Simon Taveta vs. Mercy Mutitu Njeru [2014]eKLR**. The Respondent submitted that there was material contradiction between the evidence of PW1 and PW3. They also submitted that DW1 evidence also showed that the deceased was hit in the middle of the road and not off the road. According to the Respondent, the finding of the trial magistrate was therefore based on the evidence adduced. He did not therefore base his decision on wrong principles. The Respondent relied on the concept of contributory negligence and duty of care by *Charlesworthon Negligence*, third Edition at Para 186, and *Halsbury's Law of England*, 4th Edition; and concluded that each party i.e. the deceased pedestrian and the Respondent, (driver) owed a duty of care to

one another as road users. A pedestrian in the very least also has to take care of his own safety while walking along the road.

[14] This Court notes that the evidence adduced by PW1 and PW3 differed on the actual point of impact. PW1 seem to suggest that it was off the road whilst PW3 provided a sketch plan for the scene of the accident which show that the part of impact was I meter into the road. DW1 gave a different account altogether except he said that the point of impact was in the middle of the road. But there is one critical matter which PW1 and PW3 agree on; that the point of impact was on the right side of the road from Meru to Nkubu which means that the Respondent's vehicle was not on its correct side. What is surprising is that the police did not prefer any charges against the Respondent but instead recommended an inquest without any explanation. Besides this fact, other matters are important for a complete determination of such appeal. It was dark, raining and misty. Visibility was not clear despite the fact that PW1 told the trial court that the headlamps of the concerned motor vehicle were on and so he could see well. The intensity of the said light from the vehicles' headlamps in a rainy and misty day, and at night was not properly described as to enable even tis court to say that visibility was clear to the extent of the witness was able to discern the minute details of the accident and the positioning of the deceased and the vehicle at the very point of impact. These are matters which ought to be borne out from the evidence but was not so. Therefore, relying on the evidence adduced, the trial magistrate was quite in order when he held that:

> **". . . It is not clear how he [PW1] was able to see at night, the stated bad weather, raining and foggy." [Square brackets and addition therein mine]**

I have carefully considered the judgment of the trial magistrate and he also considered the contradiction on the part of impact in the evidence of PW1 and PW3 as well as the duty of care on pedestrians walking along the road. The trial did not stop there. He also took into account the speed of the vehicle at the time of the accident and related it to the circumstances of the accident; it was at night, raining and foggy day. And he concluded that the Respondent did not drive at reasonable speed given the circumstances. The totality the trial magistrate's overall impression of the entire circumstances of the accident and the final decision to apportion liability on the basis of 50:50 % was based on the evidence tendered and cannot therefore, be faulted by this court. Indeed, he did not commit any error in principle or base his said decision on wrong principle. His finding was based on evidence and appropriate legal principles on contributory negligence. On that basis this court hesitates very much to interfere with such finding of fact by the trial court as it has not been shown that the finding was based on no evidence or was as a result of error in principle or application of wrong principle of law. I dismiss the grounds on liability and affirm the decision of the trial court in apportioning liability on 50:50% to the deceased and the Respondent.

On Quantum

[15] The Appellant argued that the trial magistrate erred in finding that it was not proved that the deceased had an income yet PW2's evidence showed that the deceased used to earn Kshs. 10,000 (per month from coffee, banana and potatoes with which he used to support the Appellant and his wife. The Appellant cited the cases of **Jacob Ayiga vs Simeone Obayo CA No. 162 of 2002** and **Kimatu Mbuvi vs Augustine Munyao Kioko [2006]eKLR** where the Court of Appeal held that the view that the only way to prove earnings is by production of documents would do a lot of injustice to very many Kenyans who are illiterate, keep no record and yet earn their livelihood in various ways. They submitted further that, even if income is not proved the trial magistrate should have used the minimum wage principle as the multiplicand. He argued that inspite of finding that the deceased was aged 30 years at the time of his death; the trial magistrate did not apply any multiplier. According to the Appellant the deceased would have worked upto the age of 65 years and so a multiplier of 30 years was most appropriate. Therefore, they proposed the award under loss of dependency should have been:

> **10,000 x 12 x 30 x 1/3 = 1,200,000.**

[16] The Respondent was of the contrary view; that there was nothing wrong in a court making a global figure rather than engaging in speculative arithmetic. According to the Respondent, the trial magistrate exercised his discretion properly: not unreasonable and he did not take into account irrelevant factor in

assessing loss of dependency. To the Respondent, there are no hard and fast rules in assessment of damages or that a multiplier must always be applied in all case which is merely method of assessment of damages and not a principle of law or dogma. Its application depends on facts of the case. They stated that, as the deceased had no source of income and did not have any dependants, the global figure awarded is reasonable. On this they relied on **Rishi case (supra), Albert Odwa vs Githimu Guthenji [2007] eKLR** and **Joseph Kikongo Madolio vs Charles Peter Mugo and another [2007] eKLR.**

[17] Let me state that, it is not true that the deceased did not have any dependants. See paragraph 5 of the plaint which clearly stated the dependants of the deceased to be; (1) M'rarama M'Ntheri (father); and (2) Alice Kaguri (Mother). The Appellant led evidence that the deceased used to support them out of his commercial activity of sale of coffee and bananas. Income of Kshs. 10,000 was pleaded in the plaint. But the question is: whether in the circumstances of the case a multiplier was feasible on some income that was not clear? I am wholly in agreement with Ringera J (as he then was) in the case of **Kwanzia Vs Ngalali Mutua & another** that:

> **"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."**

[18] PW2 testified that the deceased was a farmer of coffee and bananas from the sale of which he used to get Kshs. 20,000 per month. He also told the trial court that the deceased used to help him as well as the deceased's mother out of these earnings. He said that he used to do shopping for his mother and could also buy food items and clothes for them. But for purposes of the law, much more was needed to prove these statements that were made by the PW2. It needed not be documentary evidence or proof but evidence to show that the deceased had coffee bushes or banana plantations and that he was selling coffee and bananas in the market was needed. None was provided except the evidence of PW2. With due respect, it is time claimants realized that the burden of proving what they allege rests on them and that a court of law will not act on unsubstantiated evidence to assume income or dependency of a deceased person. And again, I must state here that a person who has been appointed to be the personal representatives of estate of the deceased must realize that they owe a duty to the estate to take such steps and actions that are for the benefit of the estate and all the heirs of the estate; at least they are expected to tender evidence that will prove the cause of action which they have filed on behalf of the estate. I say these things because an otherwise good case may be lost on sheer failure to produce evidence that was available or easily obtainable. In this case the evidence that was adduced is not enough to compel a court of law to infer or conclude that the deceased had the income averred to in the plaint. It would, therefore, be inappropriate to insist on a multiplied approach being used in this case. From the evidence adduced, the court could only apply the multiplier method based on speculation or assumption of income of the deceased-something a court of law should never do. See Ringera J (as he then was) in **Kwanzia Vs Ngalali Mutua & another** (Supra).As this court is properly guided on the law, it is not prepared to go the route of speculation despite the great respect for the departed. Accordingly, the argument on multiplier fails and I reject that ground of appeal. That does not however mean that the estate was not entitled to an award for loss of dependency simply because there was no documentary evidence to prove income. Courts of law have said time and again that dependency is not a matter of documents or certificates as many people in Kenya earn their livelihoods in varied ways yet they do not keep records for one reason or other. Some are illiterate and insistence on formal documents or certificates as proof of earning will deprive many Kenyans remedy which is otherwise deserved. See what the Court of Appeal said in the case of **Jacob Ayiga & Another vs. Simeon Obayo [2005] e KLR** that:

> **‘’We do not subscribe to the view that the only way to prove the provision of a person must be by production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their**

> **livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things''.**

Therefore despite lack of documentary proof of dependency or income, the evidence available showed dependency and therefore, instead of involving self in conjecture and speculation, the law provides for global or lumpsum award for loss of dependency. Accordingly, and in the circumstances of this case, a global award is most appropriate and the trial magistrate was therefore right in so holding. However, was the award of Kshs. 30,000 for loss of dependency reasonable in the circumstances of this case? Quantum of the award is in contention herein. The Appellant said it was inordinately loss and also erroneous. I have decided on the latter part. I now turn to examine whether the award is inordinately low but after consideration of the evidence adduced.

[19] I have already held that there was proof of dependency. The deceased was aged 30 years and the law provides expectation that such person would have had a long time to work and support his family were it not that it was cut short by the death. The trial magistrate, albeit was right in discarding the multiplier method and gave a global award, he did not base his award on anything. Although assessment of damages is a matter of discretion of court; but the discretion must be exercised judicially and judiciously; that is to say, it must be exercised in accordance with defined principles of law; not capriciously; not whimsically; not on nothing. The trial magistrate did not consider the above factors. The trial magistrate simply stated that:-

> **''However given that the deceased was an adult, he must have been assisting his parents in one way or another. For loss dependency I find a sum of 30,000/= sufficient and reasonable''.**

The trial magistrate found that the deceased assisted his parents although he was no emphatic on that finding. Nonetheless, with that finding the trial magistrate ought to have based his discretion of defined legal principles or be guided by judicial or legal consideration in assessment of quantum of damages. He did not do any of those. That kind of exercise of discretion is capricious and will be interfered with by the appellate court. In considering the evidence before the court and the age of the deceased and the assistance to parents, damages should be reasonable. The trial magistrate did not take into account these relevant factors in assessing damages on loss of dependency. Again, in the circumstances of this case the award given, is so inordinately low that it must be a wholly erroneous estimate of the damages. I am guided by the test on when the appellate court will interfere with, that is, if the trial magistrate:-

a. **Took into account an irrelevant factor or**
b. **Left out of account a relevant factor or,**
c. **The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by our own Court of Appeal. For further illumination on this see:

1. **Kanga V. Manyoka [1961] EA 705, 709, 7013**
2. **Lukenya Ranching and Farming Co-op. Society Ltd V. Kavoloto [1979] E. A. 414, 418, 419**
3. **Kemfro Africa t/a Meru Express & another v. A. M. Lubia & another (1982 – 88) 1 KAR 727**
4. **C. A Civil Appeal No.66 of 1982 Zablon Manga v. Morris W. Musila (unreported)**

Ingredients (b) and (c) above are present here and on that basis I set aside the award of Kshs. 30,000 on loss of dependency and I will make my assessment of damages in lieu thereof. The age of the deceased is important as his assistance to his parents will benefit from longevity of life were it not cut short by this untimely death. Even if the banana plants and coffee bushes are still available or as suggested by the trial magistrate, a worker should be employed to maintain them, the dependency and contribution of the

deceased is not diminished or abrogated completely. See the decision of the Court of Appeal on this aspect in the case of **Hellen Waruguru Waweru vs. Kiarie Shoe Stores Limited [2015] eKLR**.See also the case of **Palm Oil Transporters & another vs. WWN [2015] eKLR, Regina Wambui Njenga vs. R.K. Obura & another [2009] eKLR,** and **Put Sarajevao Gen. Eng. Co. Ltd vs. Esther W. Njeri & 2 Others [2015] eKLR**. All cases I have considered has awarded a global sum of between Kshs. 350,000 to Kshs. 1,000,000 on loss of dependency. I am persuaded, therefore, that a sum of Kshs. 500,000 for loss of dependency is most reasonable. Accordingly, I award a sum of Kshs. 500,000 for loss of dependency.

[20] The trial magistrate also refused to grant an award for pain and suffering and his reasoning was that:

> **‘’For pain and suffering its nil as no evidence was adduced showing the deceased was conscious at any time given the moment between the accident and the time he met his death’’.**

However, the evidence before the trial magistrate was that the deceased died on 8.11.2008 whereas the accident was on 7.11.2008 at around 7.00 am. The cause of death was ‘’Head & Chest injuries’’ (R.T.A). There was absolutely no reason for denying the award of pain and suffering. This limb of the appeal must succeed. The Respondent did not address this limb of the appeal at all in his submission. I find and hold that the trial magistrate erred in law in rejecting an award for pain and suffering. I accordingly award pain and suffering to the Appellant and the estate of the deceased in the sum of Kshs. 50,000/-. The judicial authorities for pain and suffering range between 10,000 and 70,000/-.

The Upshot

[21] The liability remains at 50:50%. The award of loss of life expectancy and special damages remain as were awarded by the trial magistrate, i.e. Kshs. 60,000 and 52,512 respectively. Ultimately, upon apportionment of liability, the following is the final judgment of the court in favour of the Appellant, the dependants and the estate of the deceased, and against the Respondent:

(a) Loss of Dependency.....Kshs. 250,000

(b) Loss of expectation of life.....Kshs. 30,000

(c) Pain and suffering.....Kshs. 25,000

(d) Special damages.....Kshs. 26,256

TOTAL.....Kshs. 331,256.

I also award costs on the judgment sum and interest at court rates from the date of this judgment. Cost shall be taxed by the taxing master. It is so ordered.

Dated, signed and delivered in court at Meru this 23rd day of November 2015

F. GIKONYO

JUDGE

In the presence of:

Mr. Kibiti for appellant

M/s Mutheo for Kariuki for respondent

F. GIKONYO

JUDGE