No. 398/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 72 OF 2004

DAVID MAKAU……..……..….APPELLANT

VERSUS

MAUA MUTIE NDUNDA (SUING ON BEHALF OF THE ESTATE OF

MUTIE NDUNDA MAKAU…….....RESPONDENT

(Being an appeal from the original judgment in Machakos Chief Magistrate's Court Civil Case No. No. 143 of 2003 by Hon. J. Karanja on 15/7/2004)

JUDGMENT

1. The respondent, **Maua Mutie Ndunda a** legal representative of the Estate of **Mutie Ndunda Makau** filed a suit pursuant to the provisions of the **Fatal Accidents Act** and the **Law Reform Act** on behalf of herself and the entire estate. The suit arose out of an accident the deceased was involved in on or about the **17th July, 1993** along **Machakos Kitui** road near **Kwa Nthei.** The claim was for general and special damages.
2. The defendant, **David N. Makau** who was said to be the owner of motor-vehicle Registration Number KRF 779 that hit the deceased as he cycled denied liability and pleaded that the deceased was either to blame for the accident or substantially contributed to it.
3. The trial magistrate having heard the case analyzed evidence adduced and found the appellant liable for the accident. He awarded the plaintiff a total sum of **Kshs. 470,000/=.**
4. Being dissatisfied by the judgment entered the appellant appealed on the following grounds.-

i. **That** the learned trial Chief Magistrate erred in law and in fact in finding that the respondent had established her case against the appellant on balance of probabilities.
ii. **That** the learned trial Chief Magistrate erred in law and in fact by finding the defendant wholly liable for the accident contrary to the evidence adduced at the trial indicating that the deceased wholly or contributed to and/or caused the accident and further failed to take into account all the material facts before him to apportion liability between the appellant and the defendant.
iii. **That** the learned Chief Magistrate erred in law and in fact by making an award of **Kshs. 400,000/=** which is manifestly excessive.
iv. **That** the learned trial Chief Magistrate erred in law and in fact by awarding general damages for loss of expectation of life and loss of dependency of Kshs. 70,000/= and 400,000/= respectively which were excessive in view of the age and in the absence of proved income of the deceased at the time of death and when there was no pleading on the nature of business of the deceased and the income he was earning.

5. The appeal was canvased by way of written submissions.
6. This being the first appellate court, I am duty bound to re-evaluate the evidence, assess it and make my own conclusions remembering that I have not seen nor heard the witnesses and make such allowance. (See ***Selle versus Associated Roter Boat Company Ltd. [1968] E.A. 123, 126).***
7. On liability, **PW2 Joseph Kyangango Nthuli,** the eye witness saw a motor-vehicle moving towards the same direction the deceased was going. It was moving at a high speed and it hit the deceased from the rear before veering off the road. On cross examination, he denied an allegation that the deceased was attempting to move to the other side of the road. DW1, **David Mbindyo Makau** who was driving the subject accident motor-vehicle stated that he was driving at 80kph. He saw two (2) cyclists. He horned to warn them and they moved following each other. While 50 meters away, one of them moved to the other side of the road. He swerved to avoid the catastrophe but he could not remember what happened. The cyclist was hit and thrown into the air by his motor-vehicle.
8. It is submitted that liability should have been shared between the deceased and appellant at 50:50. The appellant herein was driving his motor-vehicle along the road. As a driver he owed a duty to other road users like motorists and cyclists and even pedestrians. He was therefore required to exercise a duty of care in his manner of driving. The eye witness to the accident PW2 stated that he moved at a high speed and hit the deceased dragging him along to the other side of the road following the impact. The appellant stated that he was moving at 80KPH. He saw the deceased while 50 metres away. On seeing this other road users he ought to have slowed down. He did not recollect what happened. Everything happened so fast, he did not know what happened.
9. PW2, the eye witness however, gave an account of what happened. The appellant hit the deceased from behind. The impact is what made him veer off the road. The deceased had been riding his bicycle on the side of the road. It was after the impact that the vehicle dragged him to the other side of the road. Without evidence to the contrary, it was obvious that the deceased did not exhibit some careless conduct on his part that made him prevent the consequences of the appellant's duty of care. He had taken safety by driving off the road. From the foregoing, there was no fault on the part of the deceased therefore the trial magistrate did not misdirect himself by reaching the decision that the appellant was the one liable. I confirm the decision to hold the appellant **100%** liable for the accident.

Quantum

10. It is important to take note of the case cited of ***Kenya Bus Services*** and ***Another versus Fredrick Mayende[1991]* 2KAR 232, 235** where it was stated thus:-

"***The principles on which the Appellate Court will interfere with a trial judge's assessment of damages are now settled in Kenya Kneller J.A (*** *as he then was****) put it thus in Robert Msioki Kilavi versus Coastal Bottlers Ltd [1985] 1 KAR 891 at 895:-***

"***The Court Appeal in Kenya, then should, as its forerunners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.(Singh virus Singh and Honda[1955] 22E.A CA 125, 129; Butt versus Khan[1977] 1).***

11. Special damages claimed were not specifically proved therefore the learned trial magistrate declined to award anything on that head.
12. I have perused submissions filed by both counsels in the Lower Court. On the head of pain and suffering counsel for the respondent asked for **Kshs. 20,000/=** while counsel for the appellant proposed on award of **Kshs. 5000/=.** Evidence adduced was that the deceased died instantly. In the year **1989** per the authority cited of ***Julius Kamau versus Njue Kiarie and Another–HCCC No. 5725 of 1989,* Kshs. 10,000/=** was awarded for such a claim. Similarly in the case cited by the appellant, ***Fredrick Gatara Mungai versus George N. Kiboronji and James Njoroge Nairobi HCCC No. 1993*** of **1990** Kshs. **10,000/=** was awarded for pain and suffering in respect of a deceased who died on the same day. Therefore **Kshs. 10,000/=** should have been awarded on that

particulars head.

Loss of Expectation of life.

13. In awarding **Kshs. 70,000/=** the learned trial magistrate took into consideration authorities cited by both counsels for the respondent and appellant. The appellant had proposed **Kshs. 100,000/=.** Although the trial magistrate did not give the reasons for arriving at the decision to make the award, he clearly stated that **Kshs. 70,000/=** was adequate compensation on that head. The appellant conceded that it is reasonable. Therefore I have no reason to interfere with it.
14. The trial magistrate adopted a multiplier of **10 years,** a multiplier of *Kshs. 5000/=* -dependency ratio of **2/3**. The deceased was *51 years* old. PW1 stated that he was a handcraft carver and vender. He used to sell his merchandise in Nairobi and Mombasa. He earned **Kshs. 30,000/=** per month and he would give her Kshs. **10,000/=** per month. PW3 his brother said he used to do the same business as the deceased and he would make **Kshs. 35,000/=** per month. However, no evidence was adduced to establish the fact that the deceased was in the handcraft business and was earning upto Kshs. **35,000** /= per month. Adopting a multiplicand of **Kshs. 5000/=** per month was therefore erroneous. There having been no evidence, of his possession the deceased should have been taken to have been a general casual labour. According to the **Regulation** of **Wages and Conditions** of **Employment** labour worker based in a municipality like Machakos was entitled to a minimum wage of **Kshs. 1306/=** per month. No evidence having been led to the contrary in respect of the multiplier of **ten (10) years** adopted, I find that the deceased should have been expected to continue leading a health life therefore **10 years** was a reasonable estimate. The dependency ratio of 2/3 was in accordance with the law. Since the deceased had a wife and children who depended on him, this court is compelled to interfere with damages awarded because of the wrong principle of law adopted by the trial court in reaching the sum to be considered in awarding the same.
15. Having evaluated the evidence on record afresh, it is apparent that the appeal succeeds partially. The award in respect of the respondent will be as follows:-

Pain and suffering: Kshs. 10,000/=

Loss of expectation of life: Kshs. 70,000/=

Loss of dependency: Kshs. 1306 x 10 x 12x 2/3=

104,480/=

Total - Kshs. = 184,480/=

16. The respondent shall also be entitled to costs and interest in the Lower Court.
17. Costs of the appeal shall be borne by each party.
18. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23RD** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE