REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 118 of 2010

DAVID KAJOGI M'MUGAA ***(Suing as the legal representative and administrator of*** *the estate of the deceased)*

PETERSON MUTHAURA KAJOGI
…….....….....APPELLANT

VERSUS

FRANCIS MUTHOMI .....
……..... RESPONDENT

(Being an appeal from the judgment and decree of the learned Senior Principal Magistrate Hon. S.M. Githinji in Nkubu Civil Case No. 81 of 2008 delivered on 22nd September 2010)

J U D G M E N T

The appellant was the plaintiff at the lower court. The appellant had sued the respondent claiming special damages of Kshs. 31,428/=, general damages under the Law Reform (Act Cap 32), costs and interest at court rates.

The respondent filed defence denying liability and on without prejudice and admission of liability averred that the accident was caused wholly or substantially contributed to by the negligence of the deceased.

The appellant gave evidence in support of his claim and called three witnesses on his part whereas the defendant gave evidence in support of his defence and called no witness.

The learned trial magistrate dismissed the appellant's suit with costs. The appellant being aggrieved by the trial court's judgment preferred this appeal.

The appellant in his Memorandum of Appeal filed on 6.10.2010 against the trial court's judgment delivered on 22nd September 2010 set down ten (10) grounds of appeal listed as follows:-

1. The learned trial magistrate erred in law and fact in finding that as the respondent's driver was not charged with a traffic charge and was not blamed by the police and he was therefore not to blame for the accident.

2. That the learned trial magistrate erred in law and fact in that he disregarded evidence of PW2 an eye witness which was to the effect that indeed the driver of the subject motor vehicle No. KRW 633 hit the deceased from behind and therefore the driver was to blame for the accident.

3. The learned trial magistrate further erred in law and fact in that he failed to find that the finding by the traffic police was only an opinion of the police and the same was binding to the court in evidence as the police officers were not at the scene at the time of the accident.

4. The learned trial magistrate erred in law and fact in that he over emphasized the opinion of the police when the same had no probative value under the circumstances of this case.

5. The learned trial magistrate erred in law and fact by finding that the evidence of PW2 was not corroborated when the same was not challenged by the respondent at all.

6. The learned trial magistrate further erred in law and fact in that he failed to find that the case before the court was a civil case and the appellant had indeed proved the elements of negligence as required by the law and thereby the court imposed a higher degree of proof on the part of the appellant and thereby the court arrived on a wrong finding.

7. The learned trial magistrate erred in law and fact in that he found that the evidence of appellant and his witnesses did not prove to the required standards the particulars of negligence pleaded at paragraph 4 of the plaint and inspite of the respondent having pleaded particulars of contributory negligence against the deceased and the fact that the respondent had conceded contributory negligence in his submissions.

8. The learned trial magistrate erred in law and fact in that he failed to assess the general damages payable to the appellant if the suit had succeeded inspite of the submission on the same by both the appellant and the respondent.

9. The learned trial magistrate erred in law and fact in that he disregarded the appellant's submissions and judicial authorities both on liability and quantum of damages with the resultant miscarriage of justice to the appellant.

10. The learned trial magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the appellant had proved his case against the respondent on a balance of possibilities and thereby arrived on wrong findings on the issues before the court.

The appellant in his Memorandum of Appeal prayed for the following orders:-

1. The appeal herein be allowed and the lower court's judgment be set aside.

2. This Honourable court be pleased to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter judgment for the appellant against respondent both on liability and quantum of damages as prayed.

3. This Honourable Court be pleased to assess the general damages payable to the appellant and award the appellant the costs of this appeal and in the lower court.

The court record show that on 26th May 2011 when the matter was mentioned before Honourable Lady Justice Kasango, she gave directions that appeal be determined by way of written submissions and the matter was set down for mention on 7th July 2011 when court was to receive written submissions. That on 7th July 2011 the court set down the matter for judgment on 17th November 2011.

On 17th November 2011, when the parties appeared before me, no judgment had been written by Hon. Lady Justice Kasango and I set the appeal down for highlighting on 21st February 2012. That on 21st February 2012 the learned counsel for the appellant Mr. Kiogora orally submitted that he was consolidating ten grounds of appeal to two.

He submitted that the first ground of appeal is that the trial court in its judgment imposed a higher burden of proof in a civil matter and disregarded the authorities on that ground as set out on pages 2 and 3 of the appeal. He submitted that the burden of proof in a civil matter is on balance of probability as opposed to that of a criminal matter where it is beyond reasonable doubt. The second appellant's ground of appeal is on liability. The appellant counsel submitted that the respondent had conceded to liability at 80:20 in favour of the appellant. That trial court did not consider that issue of liability as having been agreed upon. That the respondent had also submitted that appellant was entitled to an award of Kshs. 81,000/= which trial court did not consider. The counsel also faulted the trial court by failing to assess damages that the court would have awarded to the appellant in case he was successful.

The counsel for the respondent on his part he submitted that he was relying on his written submissions. The appellant's written submissions were filed on 9th June 2011 whereas the respondent's submissions were filed on 7/7/2011.

The appellant's case is that PW1 David Kanyugi M'Muga is father to the deceased Peterson Muthaura Kanjogi who died as a result of road traffic accident. PW1 received report of his son's accident whilst at home. He was told of the accident by Kinoti Elias his nephew. That PW1 obtained limited grant of Letters of administration which he produced at lower court as exhibit 2, Death Certificate of the deceased as exhibit 1, which showed that the deceased at the time of his death was aged 23 years. That his son who was not married was a farmer. That his brothers and sisters were benefiting from his farming. That he was earning about Kshs. 2,500/= per month from crops sold. That after the accident the deceased was taken to Nkubu Consolata Hospital. That PW1 paid medical bill of Kshs. 9,393/=. PW1 testified that the deceased used to earn Kshs. 15,000/= from tomatoes per month, Kshs. 20,000/= from French beans. That he was assisting his mother Tabitha Makena, his brother and used to give PW1 Kshs. 11,000/= per month. That following the deceased death, he lost the support. The deceased died 6 days after the accident. The accident was on 28th November 2007. PW1 testified that the vehicle involved in the accident was owned by Francis Muthomi. PW1 testified that the accident was witnessed by Zachary Mbiti amongst other people.

That PW1 stated that he obtained police abstract, Death Certificate for which he paid Kshs. 50/=. During cross-examination, PW1 testified that his son's earning was over Kshs. 10,000/= per month. PW1 testified that he did not have proof of the deceased income. PW1 testified that the deceased did not have any bank account.

P.W.2. on his part introduced himself as a mason. He stated that on 28/11/2007 at around 12.30pm he was walking along Nairobi-Nkubu area. That he was keeping to the left side of the road. That a man passed them while riding a bicycle. He was cycling towards Nkubu. He was on the left side. He was not moving fast as there was ballast ahead, about 2 metres off the road. That while the cyclist was about 20 metres a vehicle came. That its left, co-driver's door was open and it was making noise. That P.W.2 jumped off the road to avoid being hit. PW2 testified that the cyclist did not check behind. That he was hit by the vehicle. He was hit by its left front side. PW2 further testified that the vehicle stopped 30 meters ahead of the cyclist. The driver got out and locked the door which was open. The vehicle was pushed to start. It had stopped on the grass, off the road. The victim was placed in the vehicle and rushed to the hospital. P.W.2. stated that he called father of the cyclist to check on him at the hospital. The witness stated that he heard people say the owner of the vehicle was Francis Muthomi. PW2 testified that the vehicle registration No. was KRW 635 Datsun Salon. PW2 stated that the owner of KRW 635 was to blame for the accident. PW2 stated that the driver of motor vehicle KRW 635 struggled to lock the door while driving and consequently got off the road. The witness said the cyclist had not joined the main road from a feeder road. That the victim was not riding the bicycle on the middle of the road. He was not riding in a zig-zag manner. That the driver of the motor vehicle never hooted to warn the cyclist but the vehicle door was the one which was making noise. PW2 testified that the victim passed away later after the

accident. P.W.2. in being cross-examined, he stated that the victim was a farmer. He was growing bananas. That the victim was riding a bicycle. PW2 testified that he heard the vehicle door making noise while about a metre behind him. PW2 testified that the victim was about 20 metres ahead of the motor vehicle. PW2 testified that he saw the driver of motor vehicle KRW 635 trying to lock the door. PW2 stated that the victim never escaped as he did not hear the door noise. That the door was open as the victim was hit. That the driver locked the door after the accident. The witness said he told the court what he saw and heard. He stated the deceased was not crossing the road. PW2 stated that the victim fell on the grass about 3 metres from the road after he was hit by the motor vehicle. That the victim was pushed off the road by impact after he was hit. PW2 testified that the victim was not hit while on the road. PW2 stated that one vehicle had passed before the accident. He said he did not record statement with police. He stated that he was not called to give statement nor was he called to give evidence in a traffic case against the driver.

The witness in re-examination testified that the accident was not at the junction to Mitunguu but 20 metres ahead. PW2 also stated that the victim was hit while on the main road but not when joining the main road.

P.W.3. introduced himself as mother to the deceased. She stated that the deceased was a farmer and was helping her, her husband and her children. PW3 stated that she is aged 48 years. That following his death, she lost the support. On being cross-examined, she averred that her son was earning Kshs. 16,000/= from selling bananas, tomatoes and French beans.

P.W.4. introduced himself as No. 72742 P.C. George Kimithia attached to Nkubu Police Station. PW4 testified that he had personal file No. IAR/F/110/07 in respect of an accident which occurred on 28.11.2007. That it was fatal accident at about 12.30pm at Michiune along Nkubu – Chuka Road involving motor vehicle registration KRW 635 Datsun Salon and a pedal cyclist namely Peterson Muthaura. That the pedal cyclist was hit by the said motor vehicle and sustained injuries. He was rushed to Nkubu Mission hospital where he later died while receiving treatment. P.W.4. stated that the covering report by the investigating officer showed that the pedal cyclist joined highway from a feeder road without care and was hit by the motor vehicle. That the report did not state which side of the vehicle hit the cyclist. That the accident was investigated by No. 54448 Sgt. Osangini, who at the time of the hearing of the case was at Eldoret Traffic Office. P.W.4. produced the police Abstract as exhibit 3.

In cross-examination, the witness confirmed file had no statement of any eye witness. PW4 testified that the investigating officer went to the scene of the accident.

The defendant in support of his defence called one Phineas Muthuri who introduced himself as the driver of Francis Muthomi, the defendant. He stated the vehicle is Datsun Saloon registration No. KRW 635. That he had been driving the said vehicle for 2 years and that he is still driving it. That he was employed in 2005. That he was driving it on 28th December 2008 from Mwichiune heading to Nkubu. That before getting to Winners Academy, he was involved in an accident. That a pedal cyclist emerged from a feeder road on his left side. That he was on left lane. He joined the road and also faced Nkubu. The pedal cyclist was ahead of the witness. The defence witness stated that he was driving at 40 kilometer an hour and that there was a bump ahead. The defence testified that the cyclist went over it and served to the middle of the road. The witness averred he was still on his lane on the left side. That the cyclist was on the Centre of the left lane. That the witness testified that he braked and swerved to avoid the cyclist. That on the side mirror of the left side of motor vehicle Registration No. KRW 635 touched the cyclist's bicycle on the rear rack. The bicycle fell. That the witness took the cyclist to Nkubu Hospital. The defence witness testified that there was an oncoming lorry from Nkubu direction, and he could not swerve on the right as the lorry was very close.

D.W.1. on being cross examined he testified that he was driving motor vehicle KRW 635. That the accident was at about midday. That there was rainfall and there was also mist. That one could see 30 to 40 metres ahead. That he was driving at a speed of 40 KPH. He admitted that the accident was at Winner's Academy, were there were no bumps then. DW1 admitted that the place is straight. DW1 testified that the deceased emerged from left side as one faces Nkubu and DW1 saw the deceased when he was 3 metres

ahead. DW1 testified that the cyclist joined the main road safely. That DW1 stated that he followed the cyclist as he was ahead of him. DW1 testified the accident was not as cyclist joined the main road. That they went until the cyclist was 2 metres ahead. That the cyclist hit some slight bumps. DW1 testified that he braked the vehicle and it skidded and it did not stop. It skidded 3 metres ahead and stopped. That as the vehicle skidded the accident occurred. DW1 stated that the rain made the vehicle not to stop immediately he applied brakes. He admitted that was not in the defence. DW1 testified that the vehicle had new tyres. DW1 testified that at the time of the accident there were pedestrians along the road. He stated that he does not know Josphat Mbiti (PW2) nor does he know the pedestrians who were there at the time the accident occurred. DW1 admitted that the deceased was not crossing the road when the accident occurred. DW1 stated that both the cyclist and himself were on their right (correct) side of the road. DW1 stated that the door of motor vehicle was not opening on its own. DW1 stated the deceased hit a bump and rode in a zig-zag manner.

In re-examination D.W.1. testified that the cyclist was 3 metres ahead of him. DW1 testified that there was not enough braking distance. DW1 stated that the cyclist rode in zig-zag manner and lost control. DW1 stated that after the cyclist joined the road he only went 2 metres before the accident.

The appellant in grounds 1, 2, 3, 4, 5, 6, 7, 9 and 10 faults the trial court for finding the appellant had not proved his claim on issue of liability as to the required standard, consequently, trial court made an error in dismissing the appellant's suit.

This court in this first appeal has duty and obligation to re-analyze, and evaluate the evidence made by lower court before coming to its independent decision in this appeal.

There is no dispute on evidence on record that an accident occurred along Nkubu-Chuka road involving motor vehicle KRW 635, driven by driver of the respondent and a pedal cyclist the late Peterson Muthaura. The appellant called an eye witness, P.W.2. one Josphat Mbiti who testified that on the material day, the deceased passed him while riding a bicycle towards Nkubu Trading Centre. That they were on the same side of the road. That while the cyclist was about 20 metres a vehicle came from behind the cyclist. That its co-driver's door was open. It was making noise and he swerved to avoid it. That the cyclist did not check behind and was hit by the vehicle. He was hit by its left front side. The vehicle stopped 30 metres ahead of the deceased. The respondent's witness D.W.1. Phineas Muthuri stated as follows:-

"I remember 28/11/07. I was driving the said vehicle. I was from Mwichiune, heading to Nkubu. Before I got to Winners Academy. I got involved in an accident. A pedal cyclist emerged from a feeder road on my left. I was on left lane. He joined the road and also faced Nkubu. He was ahead of me. He was about 3 metres ahead of me. I was about 40 kilometers per hour. There was a bump. He went over it and served to the middle of the road. I was still on my lane, left. He was on the Centre of the left lane. I braked and swerved to avoid him. The side mirror of the left side touched his bicycle on the rear rack. The bicycle fell."

The witness on being cross-examined he stated:-

"I was driving motor vehicle Reg. No. KRW 635. The accident was at about midday. There was rainfall. There was also mist. One could see 30 to 40 metres ahead. I was at a speed of 40 metres ahead. I was at a speed of 40kph. The accident was near Winner's Academy. There were no bumps then. There is a slight corner near Kigene Car Wash. There is a straight stretch of about 200 metres at the place. The place is straight. Deceased emerged from left side as one face Nkubu. I was also on the left lane. I saw him 3 metres ahead. He joined main road safely. I followed him as he was ahead of me. The accident was not as he joined main road. We went till he was 2 metres ahead. He hit some slight bumps. I braked the vehicle, and it skidded. It did not stop. It skidded 3 metres ahead and stopped. As vehicle skidded is when collision occurred. The rain made the vehicle not stop immediately I applied brakes. That is not in my defence. The deceased made me apply brakes. The vehicle had new tyres."

P.W.4. in his evidence stated as follows:-

"I have personal file No. IAR/F/110/07. It is for an accident which occurred on 28/11/2007. It was a fatal accident at about 12.30pm at Michiune along Nkubu-Chuka road. It involved motor vehicle Reg. No. KRW 635 Datsun Saloon and a pedal cyclist, namely Peterson Muthaura. The pedal cyclist was hit by the said motor vehicle and sustained serious injuries. The said vehicle rushed him to Nkubu Mission Hospital, where he later died while undergoing treatment. The covering report by the Investigating Officer shows the pedal cyclist joined highway from a feeder road without due care and was hit by the motor vehicle. It is not stated which side of motor vehicle hit him. Police abstract was issued to Peterson Muthaura. The accident was investigated by No. 54448 Sgt. Osangiri, who is now at Eldoret Traffic Office.

The evidence by P.W.2. and D.W.1. who were at the scene at the time of accident are in agreement that the deceased was not hit by motor vehicle Reg. No. KRW 635 as he joined the Nkubu -Chuka Road. P.W.2. has in his evidence not mentioned the deceased joining the main Nkubu-Chuka road from any feeder road. D.W.1. stated that the deceased joined the main road safely and that he followed him as he was ahead of him which is contrary to trial court's finding that accident occurred when the deceased joined main high way from a feeder road while cycling without ensuring it was safe to do so.

D.W.1 as he was driving behind the deceased who was ahead of him by 3 metres ought to have slowed down and as an experienced driver who had been driving the vehicle in question since 2005, he ought to have kept safe distance. That D.W.1. ought to have slowed down and kept a reasonable safe distance from the deceased and more so bearing in mind that it was raining and it was misty and one could only see 30 to 40 metres ahead. D.W.1. claim the vehicle had new tyres and he was driving at a speed of 40 kph and when he applied brakes the vehicle skidded and it did not stop. P.W.2. testified that the vehicle stopped 30 metres from the point of accident. I do not find it convincing that D.W.1. was driving at 40kph and on applying brakes the vehicle stopped 30 metres away. D.W.1. must have been driving at a very high speed and not keeping safe distance from the cyclist ahead of him.

D.W.1. in his evidence in chief talked of deceased hitting a bump and losing control but in cross-examination he admitted there were no bumps then at the place where the accident occurred. D.W.1. never in his evidence-in-chief explained why he could not swerve to the left to avoid hitting the deceased if he saw the deceased was cycling at the Centre of the left lane.

I find that the trial court did not address itself on the evidence of D.W.1. The evidence of P.W.2. did not need to be corroborated on its truth. The respondent did not state that P.W.2. was not one of the pedestrians at the scene. There was no basis of the trial court not finding the evidence of P.W.2. to be credible. The evidence of P.W.2. was to some extent supported by the evidence of D.W.1. especially on the time and the place where the accident occurred and also the fact that the deceased was at the road at the material time cycling towards Nkubu and at the time the accident occurred.

The appellant's counsel referred me to the case of **Bhupinder Singh Bhangra vs. Joel Tumei Koech Eldoret HCCA No. 12B of 2002 (Eldoret)** in which case Honourable Justice M.K. Ibrahim held the driver responsible for the accident as he had an opportunity to slow down but did not do so.

The appellant's counsel also referred me to the case of **Antony Musita & Another vs. Purity Gatakaa & 2 others HCCA No. 2 of 2009 (Meru).**

Hon. Lady Justice Kasango held in the above mentioned case the evidence of investigating officer was not binding to court as the same contained an opinion of a police officer.

In this appeal, the trial court stated that the police blamed the deceased for the accident and the police findings agreed to some extent with the defence case. PW2's evidence is not corroborated and it is truth, given the police findings is doubtful.

The trial court failed to observe and note that the investigating officer's report could not be said to be

conclusive as to the occurrence of the accident and who was to blame as the officer was not at the scene at the time of the occurrence of the accident. That the report had no statements of eye witnesses. That the report was not thorough as both P.W.2. and D.W.1. admitted in their evidence there were witnesses to the accident. That no sketch plan was produced giving details as to the point of impact, where the deceased lied and where the vehicle stopped after the accident.

I therefore do not agree that the evidence of an investigating officer alone can be conclusive as to who is to blame for the accident nor can it be said to be binding on the court and I hold such evidence is mere opinion to the court, which court can accept or reject for various reasons.

The appellant's counsel also referred me to the case of **Henry Mwobobia vs. Muthaura Karauri & Another HCCC No. 104 of 1991 (Meru)** in which case Honourable Justice D.K.S. Aganyanya, *(as he then was)* stated:-

"The standard of proof in criminal cases is slightly higher than that of civil cases. In the former cases must be proved beyond any reasonable doubt while in the later the burden of proof is on a balance of probabilities."

The appellant also relied on the case of **Veronica Kanorio Sabari (*Legal representative of Chabari M'Ngaruni)* vs. Chinese Technical Team for Kenya National Sports & 2 others HCC Case No. 376 of 1989 (Meru)**, Honourable C.O. Ong'udi, (*as he then was)* stated:-

"The onus is on the plaintiff to prove his case on the legal standard necessary. In a civil case the standard is on a balance of probability. It differs from those standards of proof required in a traffic case on a charge of causing death by dangerous driving. The acquittal of the 3rd defendant by a traffic court cannot preclude his prosecution in a civil case on a claim for damages as the court in the latter applies a different standard of proof. I shall therefore disregard the said acquittal and proceed to examine the evidence as a whole."

In this case, the fact that investigating officer found that D.W.1. was not to blame for the accident do not bar the appellant from pursuing a claim for damages in a civil suit. The court is not barred by investigating officer's report from hearing and determining a civil claim for damages nor is the court bound to follow investigating officer's opinion in reaching its decision in a civil claim.

The respondent's counsel referred me to the case of **Statpack Industries vs. James Mbithi Munyao Civil Appeal case No. 152 of 2003**. Honourable Justice Alnashir Visram, (*as he then was)* stated:-

"Coming now to the more important issue of 'caution', it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

In the case of **Bencivenga vs. Amimo [1986] KLR 269** Honourable Justice Abdullah, *(as he then was)*, stated:-

"In my view, the defendant who lived in that vicarage for some time, must have been aware of the traffic on the road and the obstruction of the high hedge on the driveway. As a prudent driver, it was his duty to stop and check for the traffic on both sides of Forest Road before emerging on to that road. He did not do so and the result was the collision between his motor vehicle and the motor cycle. He is, therefore, liable."

In the circumstances of this case, considering the evidence of P.W.2. and that of D.W.1. and as to how the accident is said to have occurred, I find that the driver of motor vehicle Reg. KRW 635 did not drive the vehicle as a prudent driver. He did not keep safe distance as he drove behind the deceased as expected of a prudent driver. He failed to slow down as he followed the deceased from behind and must have been

driving at an excessive speed as when he applied brakes, the vehicle skidded and hit the deceased stopping at a distance of about 30 metres from the scene of accident. He failed to swerve off the road to avoid hitting the deceased. I find D.W.1. was more to blame for the accident and apportion liability at 60:40 in favour of the appellant.

In view of the foregoing, I find that the appellant's ground of appeal on liability succeed.

The appellant's ground of appeal No. 8 and 9 of Memorandum of Appeal faults the trial court for failing to assess the general damages that would have been awarded to the appellant had the appellant succeeded at the trial court.

That the trial court had failed to assess the general damages that would have been awarded to the appellant had he succeeded at the trial court. This court having decided on issue of liability at a ratio of 60:40 in favour of the appellant has then to proceed to assess the general damages awardable to the appellant.

The appellant referred me to the case of **Alice Mboga vs. Samuel Kiburi Njoroge** in which Honourable D.M. Rimita (*as he then was)*, awarded the deceased Kshs. 25,000/= for pain and suffering of Kshs. 150,000/= for loss of expectation of life in which case the deceased was aged 53 years.

In the case of **Jacob Ayiga Maraja & Francis Karani vs. Simeon Obayo (suing as the administration of estate of Thomas Ndaya Obayo C.A. No. 167 of 2002 (Kisumu)**. Court of Appeal stated:-

"In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs. 4,000/- per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the 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 record 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail. On ground two, we know of no law or any other requirement that a self-employed carpenter must retire at age 55."

In the case of **Bernard Maina (*suing on behalf of the estate of Joshua Kinyua Maina)* vs. Francis Ndicu HCCC No. 1503 of 1999 (Nairobi)** the court in assessing damages in respect of a deceased who died at the age of 23 used a multiplier of 20 years.

In the case of **Godfrey Thamu Kinyua vs. Charles K. Gicheru & others 340 of 1991 (Nairobi**) the court applied a multiple of 20 years in assessing damages in respect of a deceased who was 22 years old at the time of his death.

The deceased in this appeal was at the time of his death aged 23 years as per death certificate. He was not married and was survived by his father, mother and his young siblings. His father at the time of death of the deceased was 52 years and his mother 48 years.

Section 4 (1) of the Fatal Accidents Act specify who is entitled to benefit as a dependency.

"4(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child 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 administror 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 from 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 acting shall be commenced within three years after the death of the deceased person."

The appellant herein being father to the deceased is a dependent and is entitled to the claim within the Fatal Accidents Act. The deceased was a farmer and would have continued contributing to his father's and mother's welfare. He had other siblings. As a farmer, he would have worked beyond the conventional age now of 60 years old. On the other hand, life being what it is, he would and without a guarantee on one side have worked for less period than 60 years or on the other hand for more and even beyond 70 years as a farmer. I think a multiplier of 25 years would be reasonable in this case.

The deceased had no documentary evidence in support of his earnings. There is no doubt the deceased had earnings from sale of his crops from the farm but for sure, no one would say how much was the deceased earnings. It is a mere speculation. As to the deceased wages, and as submitted by learned counsel, it would be reasonable to allow the minimum wage as allowed by law. I would compute this at Kshs. 5,000/= per month as it may have been in or around 2008. The deceased would have thus supported his parents with a portion of this wage. I would apply 1/3 to this amount.

The appellant in support of specials produced official receipt for Death Certificate dated 30/1/2008 for Kshs. 50/=. That although the appellant did not produce receipts in support of funeral expense, I do take note of the fact that funerals are expensive affair, and taking into account of status of life of the deceased, I do award a figure of Kshs. 5,000/=, though the amount was specifically pleaded but strictly proved as required.

I therefore assess damages payable to the appellant as follows:-

a) Specials ***Kshs. 5,050/=***

b) General damages for pain and suffering

(not claimed) ***Nil***

c) General damages under

Law Reform Act ***Kshs. 140,000/=***

d) General damages under

Fatal Accident Act (5,000 x 25 x 1/3 x 12) ***Kshs. 500,000/=***

Total - ***Kshs. 645,050/=***

i) Less - General damages under

Law Reform Act - ***Kshs. 140,000/=***

Balance - ***Kshs. 505,050/=***

ii) Less - Contribution at 40% ***Kshs. 202,020/=***

Sum due ***Kshs. 303,030/=***

I did not award the appellant any amount for pain and suffering though the deceased died after 6 days after the accident and must have undergone a lot of pain and suffering because this relief was not pleaded in the plaint. If relief for general damages for pain and suffering had been pleaded, I would have awarded Kshs. 30,000/= for pain and suffering.

In the circumstances, the appeal is allowed and the lower court's judgment is set aside and substituted with the following award:-

a) Special damages Kshs. 5,050/=

b) General damages for pain

and suffering Kshs. Nil

c) General damages under

Law Reform Act Kshs. 140,000/=

d) General damages under

Fatal Accident Act Kshs. 500,000/=

Total - Kshs. 645,050/=

i) Less - General damages under

Law Reform Act- Kshs. 140,000/= Kshs. 342,020/=

ii) Less - Contributory negligence

at 40% - Kshs. 202,020/=

Balance due with interest from the date of this judgment Kshs. 303,030/=

e) Costs of appeal and court below to the appellant.

Dated at Meru this 8th day of May 2012.

J.A. MAKAU
JUDGE

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Delivered at Meru in open court in the presence of:-

1. Mr. Murithi h/b for Mr. Kiogora For appellant

2. Mr. M. Kariuki for respondent (absent)

J.A. MAKAU
JUDGE