NO. 2739

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 68 OF 2005

NYAMIRA TEA FARMERS SACCO.....APPELLANT

-VERSUS-

WILFRED NYAMBATI KERAITA (suing as the personal representative of)

MARY NYABOKE KERAITA-Deceased.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. SMS Soita, Principal Magistrate in Kisii CMCC.No. 1423 of 2003 and

delivered on 30th March, 2005)

Nyamira Tea Farmers Sacco, **" the appellant"** brought this appeal challenging the decision of the subordinate court given on 30th March, 2005 in which **SMS Soita,** then Principal Magistrate at Kisii Law Courts gave a judgment in favour of **Wilfred Nyambati Keraita**, **"the respondent"** for a sum of Kshs. 835,812/= as general damages under the **Law Reform Act** and the **Fatal Accidents Act**. The appellant challenges the decision on both liability and quantum. A total of ten grounds of appeal are advanced by the appellant to wit that:-

"1. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff had not proved any loss under the law reform and Fatal Accident Act to warrant any award. The case had not been proved by the plaintiff's witness on the balance of probability. The entire evidence is incongruous with the award and the apportionment erroneous.

2, The learned magistrate erred in law and fact in admitting the grant of letters of administration which had been disowned by PW1 thus rendering its origin and legal propriety dubious.

3. The learned magistrate erred in law and fact in failing to appreciate that the late Mary Nyaboke Keraita actually authored, provoked and indeed overwhelmingly and or solely caused and or contributed to the accident leading to the claim in Ksii CMCC no. 1423 of 2003.

4. The learned magistrate erred in law and fact in failing to appreciate that even ownership of the motor vehicle KAN 813C which was in issue both in pleadings and evidence had not been resolved or proved by the plaintiff as legally envisaged.

5. The learned magistrate erred in law and in fact in awarding special damages which damages were neither pleaded nor proved.

6. The learned magistrate erred in law and infact in awarding costs of the suit to the plaintiff/respondent when no demand and or notice to sue was proved.

7. The learned magistrate erred in law and fact in failing to appreciate that the medical report and all the documentary evidence produced herein offended Section 35 of the Evidence Act Chapter 80 Laws of Kenya.

8. The learned magistrate erred in law and fact in his finding on the loss of dependence as there was no evidence such as birth certificates of (sic) germane documents to connect the alleged dependants with the late Mary Nyaboke Keraita to the effect that the said award screams arbitrariness.

9. The learned magistrate erred in law and fact in failing to appreciate that the suit culminating in the award was incompetent, in shambles and incapable of attracting damages awarded.

10. The learned magistrate erred in law by awarding excessive damages beyond the scope evidence and or legal entitlement……".

By a plaint dated 22nd December, 2003, the respondent as the administrator of the estate of **Mary Nyaboke Keraita** (the deceased) impleaded the appellant for damages, special and general, following the death of the deceased in a road traffic accident involving her and motor vehicle registration number KAN 813C. The respondent averred in the plaint that on or about 6th November, 2003, the deceased was lawfully walking along the verge of Kisii-Nyamira road when near Jogoo area, the appellant's driver, servant, or agent in the course of his employment with the appellant negligently drove and controlled the said motor vehicle which belonged to the appellant along the said road that he permitted it to violently collide with the deceased fatally injuring her. It was the contention of the respondent therefore that the accident was caused by the sole negligence of the driver of the vehicle who was then in the employment of the appellant. The particulars of negligence he attributed to the said driver were given in the plaint. As a result of the fatal injuries sustained as aforesaid by the deceased, she eventually passed on. It became therefore necessary for the respondent to mount the suit in the Principal Magistrate's court, Kisii, on his own behalf and on behalf of the deceased's dependants namely **Kevin Nyambati**, **Dorothy Nyambati**, **Millicent Nyambati** all aged 12, 18, and 6 years respectively and **Priscilla M. Keraita**, the deceased's mother aged roughly, 60 years. Apparently, at the time of her death, the deceased was aged 25 years old and was a businesswoman earning Kshs. 15,000/= per month from her open air hair saloon. He also claimed special damages.

The appellant filed its defence on 29th January, 2004 in which it essentially denied its ownership of the motor vehicle, the alleged accident, negligence and the particulars thereof attributed to it through the driver. It averred further that if the said accident occurred as alleged then the same was solely or substantially caused and or contributed to by the negligence of the deceased. It proceeded to give the alleged particulars of negligence it attributed to the deceased on that occasion. According to paragraph 3 of its defence, the doctrine of **res ipsa loquitor** was inapplicable to the circumstances of the accident. It denied further the death of the deceased, the applicability of the **Fatal Accidents** and **Law Reform Acts**

and the particulars pursuant to statute alleged. Special damages claimed were similarly denied.

During the trial of the suit before **SMS Soita,** then Principal Magistrate, the respondent called a total of three witnesses whereas the appellant called one witness.

In his evidence, the respondent told the Principal Magistrate that he was a matatu conductor and the deceased was his sister. On 6th November, 2003 he received a report that the deceased had been hit by a vehicle at Jogoo area and was taken to Kisii General Hospital. He went to the hospital and found her alive. She however passed on later that day. He reported the accident to the police and was duly issued with a police abstract. They spent a total of Kshs. 19,680/= on her funeral. After the burial, he obtained a limited grant to enable him lodge the suit. The deceased was operating a saloon at Omogonchoro market and also engaged in some farming. On the whole she used to earn Kshs. 15,000/= per month from her aforesaid business. She had 3 children mentioned in the plaint who relied on her for their upkeep. The respondent also relied on her for food, fees and clothing. She used to spent Kshs. 10,000/= per month on them. That is the magnitude of the loss they had suffered following her death for which they sought compensation.

Cross-examined, he stated that their mother was aged 60 years. He was older than the deceased. He did not witness the accident but was told about it by one, **Joash Nyakundi.** Though the deceased was operating a saloon, he had nothing to show for it. It was an open air saloon requiring no licences though. The deceased was not married. He also had nothing to show that the deceased actually earned Kshs. 15,000/= per month.
The report of the accident was received by P.C **Jared Hoseah Tinega** of Kisii police station. According to his testimony, he received report on 6th March, 2002. The accident involved motor vehicle KAN 813C owned by the appellant. It was a fatal accident. He later issued the police abstract.

The last witness called by the respondent was **Zipporah Kerubo**. On 6th November, 2003 while standing near a kiosk along Kisii –Nyamira road she saw a motor vehicle emerge from behind the deceased and hit her. It was a pick –up Toyota but did not stop. She rushed to the scene and took the deceased to Kisii general hospital. The offending motor vehicle was speeding. The deceased was besides the road and was not crossing.

Cross-examined, she stated that she only came to know the deceased as a result of the accident. She took her to the hospital with a good Samaritan. The deceased was walking. The vehicle hit her and went back on the road and spade off. The accident occurred at 11.30 a.m.
For the appellant, one **Cyrus Monyaga Nyangwara** testified. He was the driver of the fateful vehicle. On the material day he was driving motor vehicle taking money to Co-operative bank at Kisii. On their way back at Jogoo a lady came onto the road. He tried to avoid hitting her to no avail. He was hooting and had the lights of the vehicle on. He reported thereafter the accident to the police on patrol and took the money first. He conceded that he was speeding. He had put on the lights because he was carrying money.
Cross –examined he stated he was moving at a speed of 65 Kph. He saw the deceased about 25 to 30 metres away. When she was hit she was on the side. The road was under construction though.

In a reserved judgment delivered on 30th march, 2005, the learned magistrate found the appellant 90% liable for the accident. On quantum, he made the following awards in favour of the respondent

-Pain and suffering and loss of amenities. Kshs 10,000.00

-loss of life Kshs.100,000.00

-Loss of dependency Kshs.810,000.00

-Special Damages Kshs. 19,680.00

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Total **Kshs. 939,680.00**
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The appellant was aggrieved by the judgment and decree aforesaid hence this appeal.

When the appeal came up for directions before me on 30th November, 2010, parties agreed to canvass the same by way of written submissions amongst other directions. The written submissions were subsequently filed and exchanged. I have carefully read and considered them, alongside cited authorities.

This is a first appeal. On the authority of among other decisions **Selle.v. Associated Motor Boat Company Ltd (1968) E.A 123** this court as a first appellate court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusion of the trial court and also bearing in mind that unlike the trial court it neither saw nor heard the witnesses.

The facts in this appeal are largely not in dispute . There is no doubt whatsoever that the appellant's driver was involved in a fatal road traffic accident that led to the demise of the deceased. He was driving the appellant's motor vehicle in the course of his duties as a driver. Indeed he had just collected or delivered money from or to Co-operative bank of Kenya Kisii branch. It is also common ground that the deceased had children, infact three children, **Kevin Nyambati** aged 12 years, **Dorothy Nyambati** aged 8 years, **Millicent Nyambati** aged 6 years and her mother, **Priscilla M. Keraita,** aged about 60 years all of whom depended on her for their upkeep. It is also common ground that the deceased used to operate an open air saloon with no fixed monthly income though the respondent suggested that she used to earn Kshs. 15,000/= per month from her said business.
What was in dispute however, was who to blame for the accident. In so far as the appellant is concerned, the deceased was wholly to blame for the accident. She was the author of her misfortune as she jumped into the road without caring for her own safety. The appellant's driver tried as much as he could to avoid colliding with her but failed. On the other hand, it is the case of the respondent that the appellant's driver was wholly to blame for the accident as he drove the motor vehicle very fast and in a reckless manner. He emerged behind the deceased whilst over speeding and hit her fatally injuring her.

From the evidence on record, I think that the respondent's story is more plausible. It is conceded in evidence that the appellant's motor vehicle was transporting money to or from Co-operative bank Kisii. It is common knowledge vehicles ferrying money are driven very fast. That would explain why, it had its head lights on in the first place. The appellant's driver also confirmed that the road was under construction. That being the case, a speed of 65 Kph was certainly excessive. In any event the appellant's driver in examination in chief did concede that he was speeding. Infact I doubt very much that he was doing the speed alleged of 65 Kph. Had he been doing such speed and saw the deceased about 25-30 metres as he claimed, he would easily and definitely have controlled the vehicle such that he would have avoided the collision. As correctly submitted by counsel for the respondent, this court should and indeed does take judicial Notice of the speeds at which motor vehicles carrying money are driven and further must ask itself how many metres are required for a motor vehicle driven at 65 Kph to come to a standstill if not 10 metres on the tops.

Contrary to the submissions of the appellant, there was indeed an eye witness to the accident. That witness was PW3. She categorically stated that the accident occurred 20 metres a head of her. She was categorical also that the deceased was walking on the left side of the road as one faces Nyamira direction. The vehicle suddenly emerged from behind her, hit her and did not stop. If the deceased was knocked by the appellant's motor vehicle as aforesaid, then the motor vehicle was being driven on the wrong side of the road. The motor vehicle was coming from Nyamira direction and should have naturally been on the right side of the road when facing Nyamira and not where it hit the deceased.
The motor vehicle had occupants; police officers who were escorting the money to or from the bank. One of them was CPL **Robi** and was infact sitting in the front cabin with the driver. One would have expected that he would have been called by the appellant as a witness to back up its story regarding who was culpable for the accident. That he was not called for no apparent reason can only mean that the accident

occurred in the manner PW3 testified to.

From the totality of the evidence on record on the question of liability, I find just like the learned magistrate did that the appellant was substantially to blame for the accident. Its motor vehicle was being driven at a fast and excessive speed in the circumstances and more so when the road was under construction. Had the driver exercised due care and attention, he would have seen the deceased in good time, applied brakes and avoided colliding with her. Ofcourse I am not oblivious to the holding by the court of appeal in the case of **Karanja .v. Malelel (1983) KLR 142** that ***"in assessing blamewotheness the distinction is that the driver had a lethal machine (car) in her control. Apportionment of blame represents an exercise of a discretion with which an appellate court will not interfere with unless it is clearly wrong, based on no evidence at all or if the wrong principle is applied….."*** .

The deceased also bore some blame for the accident. Had she kept a proper look out as she walked along the said road, she should have noticed the presence of the motor vehicle approaching from behind and taken evasive action as appropriate. She did not and the trial magistrate felt that she contributed to the accident to the extent of 10%. I do not think I have any quarrel with that. In the result I quite I agree with the conclusion reached by the trial magistrate on the issue of liability.
On quantum, the case of **Kemfro Africa Limited T/A Express Service Gathogo Kanini –vs- A.M. Lubia and Olive Lubia (1982-88) 1KAR 727** teaches us at pg 730that:-

"…….The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **Ilango –vs- Manyoka (1961) E.A.705, 709,713; Lukenya Ranching and Farming Co-operatives Society Ltd –vs- Kavoloto (1970) E.A. 414, 418, 419…".**

This court follows the same principles in this appeal since the said authority is any event binding on this court.

The deceased was aged 25 years at the time she passed on. She had three young children and her mother aged 60 years who depended on her for their upkeep. She was unmarried and it is right to assume that most of her expenditure went towards the upkeep of the dependants. In the case of **Jackline Myeni Nzioka .v. Jetha Ramji Kera, NRB C.A. 154 & 155 of 1966 (UR),** it was held that dependency is a question of fact. The defendant has a duty to rebut the plaintiff's evidence on dependency. The evidence of the plaintiff in this regard was neither challenged nor controverted. In any event **Fatal Accidents Act** clearly stipulate that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the deceased. The dependants named in this suit are children and mother respectively of the deceased.

As already stated, the deceased was aged 25 years. She would have had at least 30 or more useful years on this earth but for her death. Having considered the evidence on record and submissions, I think that a multiplier of 25 years just like the learned magistrate held would be appropriate bearing in mind the vicissititudes of life and the fact that the loss of dependence would be paid in lumpsum and may be invested to generate more income for the dependants.

The deceased according to the unchallenged evidence used to operate an open air saloon at Omogonchoro market raking in a monthly income of Kshs. 15,000/= per month. The learned magistrate rendered himself thus on the issue ***"……I have noted no evidence was put forth on how much she was earning save for the word of the plaintiff …."*** I quite agree with this observation. The respondent is the one who claimed that she was earning 15,000/= per month without specific or credible evidence. The learned magistrate

too unilaterally decided to settle on the figure of Kshs. 9000/= as the multiplicant with a ratio of one third for the dependants. In my view, this was a gross misdirection on his part. Without any tangible evidence as to the existence of the open air hair saloon and how much it used to make monthly, I do not think that the trial magistrate had any basis for settling for the conventional figure of Kshs. 9000/=. In the absence of proof of income, the trial magistrate ought to have reverted to the Regulation of wages **(General Amendment Order 2005)** and which came into force on 1st April, 2004. It is to be noted that the judgment herein was crafted and delivered on 30th March, 2005. Using this as a guideline, the magistrate should have settled for a round figure for Kshs. 4,000/= as the multiplicant.

I also note that the learned magistrate erred in finding that a dependency ratio was 1/3 as opposed to the conventional 2/3. Noting the age of the dependants and the fact that the deceased was not married, there was no basis at all for the learned magistrate to depart from the normal practice.

Again in law and practice, where a claimant get awards both under the **Law Reform Act** and the **Fatal Accidents Act**, the former should be deducted from the latter. It is patently clear that the trial magistrate did not consider that he was required to deduct the award under loss of expectation of life from the grand total.

From the foregoing it is quite apparent that the trial court gravely erred when it came to computation of damages. The case of **Kemfro (supra**) is not way off the mark here therefore. Section 78 (1) of the **Civil Procedure Act** gives this court power on appeal to determine the case either finally, or remand the same, or frame the issues and refer them for trial court, or to take additional evidence or to require the evidence to be taken or to order a new trial. The errors or omissions committed by the trial court are errors of law which can be adequately addressed by this court instead of invoking the other options outlined above. I therefore choose to determine this case here and now.

I have perused the other grounds of appeal and nothing much really turns on them. For instance the issue of grant of letters of administration before the commencement of the suit by respondent was not seriously canvassed before the trial. In any event in his own testimony, the respondent stated that he ***"……procured letters of administration prior to filing of this suit…"*** The grant was made an exhibit. Secondly, the ownership of the motor vehicle which has been raised in this appeal was never in dispute. Again the issue was never seriously canvassed before the trial court. Further even though the issue has been raised in this appeal, the evidence of **Cyrus Manyanga**, puts that issue beyond preadventure. He confirmed that the subject motor vehicle was owned by the appellant as at 6th November, 2003 and indeed the accident occurred while he was driving the said motor vehicle as an employee of the appellant.

With regard to special damages, there is evidence that receipts in proof of the same were tendered in evidence. And even if there had been no such evidence, the trial magistrate could still have been entitled to make such an award if reasonable on the wise counsel of**Visram J.** as he then was,in the case of **Jane Kalumbu Mwanzia .v. Republic, NBI HCCC. No. 3177 of 1997 (UR)** when he delivered himselfthus**:-**

"……It is very hard for people attending to burial procedures of their loved ones to concern themselves with matters of details such as receipt for every expense in contemplation of a suit which they may not even be aware of at the time of burial. To insist on strict legal rules in such a case would not only amount to a denial of justice but also present the court as being out of touch with reality….".

In the upshot, I make the following determination in this appeal.

(i) **Liability:** The same is apportioned 90% 10% in favour of the respondent as the trial court found.

(ii) Quantum

(a)	Pain, suffering and loss of amenities	10,000.00	
(b)	Loss of expectation of life	100,000.00	
(c)	Loss of dependency 4,000 x2/3 x25x12	799,800. 00	
(d)	Special damages	19,680.00	
		929,480.00	
Less loss of expectation of life		100,000.00	
		829,480. 00	
Less 10%		82,948. 00	
Grand Total			**746,532. 00**

Save for the above corrections the appeal is otherwise dismissed with costs to the respondent . Interest on special damages shall be paid from the date of filing this suit while interest on the general damages awarded shall be paid from the date of delivery of judgment.

I will now invite parties to address me on the investment proposals for the share of damages due to the deceased's minor children. This too the learned magistrate failed to undertake.

Judgment dated, **signed** and **delivered** at Kisii this 31st Day of March, 2011.

ASIKE-MAKHANDIA

JUDGE.