WILLIAM MOMANYI .....APPELLANT

VERSUS

ZIPPORAH KWAMBOKA ABUNDA
(suing as personal representative of the Estate of
CHARLES ABUNDA MARIGA (Deceased).....RESPONDENT

JUDGMENT

This appeal is against the judgment of Opondo, SRM, in CMCC No. 746 of 2002 at Kisii. In the said case the respondent alleged that on 24th January 1999 her deceased husband was lawfully cycling along Keroka-Kiamokama road when the appellant negligently drove his motor vehicle registration **No. KAB 296 U**and caused it to hit the deceased occasioning him fatal injuries. In paragraph 7 of the plaint, the plaintiff stated, ***inter alia***:

"The deceased was a prosperous business man and the estate has now suffered great loss and damage."

The nature of the loss was not specified.

In the claim for special damages, the respondent pleaded, ***inter alia,***funeral and burial expenses amounting to Kshs. 40,000/=.

The appellant filed a statement of defence and denied that he was the owner of motor vehicle registration No. KAB 296 U. He further denied that the aforesaid accident was occasioned by his own negligence. He averred that the same was caused by the deceased's negligence and pleaded the particulars of such negligence. He also denied that the deceased's estate had suffered any loss and/or damage.

During the hearing, the respondent testified that together with her co-wife,

Zipporah, they had been issued with a limited grant of representation for purposes of filing the suit and receiving general and special damages arising therefrom. She did not know the exact manner in which the accident occurred but she produced a police abstract report. She also alleged that following the said accident, the deceased was taken to Hema Hospital when he was still alive and she paid to the said hospital a total of Kshs. 21,750/=. She produced three receipts in support thereof. The first one**(P. Exhibit 4a)** is for Kshs.21,000/= and is on account of inpatient treatment. **P. Exhibit 4b** is for Kshs. 250/= being mortuary charges and**P. Exhibit 4c**is for Kshs. 500/= on account of mortuary charges as well. It is therefore evident that the payment of Kshs. 21,000/= was not pleaded in the plaint since it did not form part of funeral and burial expenses.

The respondent further stated that the deceased left behind two widows and four children aged between 15 and 9 years. She said that the deceased supported them from the income earned in his retail business.

Although the respondent produced an Occupational Licence that was issued to the deceased by the Town Council of Keroka in an effort to prove that the deceased was a businessman, she did not adduce any evidence regarding the deceased's income. The deceased was 45 years old and not 37 as erroneously stated in the plaint, the respondent clarified. She said that the deceased died eight hours after his admission to Hema Hospital.

Samson Mogaka, PW2,testified as to how the accident occurred. He said that on the material day he was walking from Keroka going to Kiamokama. He was on the left side of the road. A cyclist (the deceased) came from behind and passed him. Shortly thereafter a motor vehicle registration No. KAB 296 U came from the opposite direction. The motor vehicle was being driven in a zig zag manner and at a

fast speed. The motor vehicle went to the side of the cyclist and hit him. Both the cyclist and the motor vehicle landed in a tea plantation. The witness stated that the collision was on the left hand side of the road heading to Kiamokama.

In cross examination, PW2 said that the deceased was riding downhill on a steep section of the road. He was therefore going fast. The section of the road is straight but is in a poor state as the tarmac thereon was nearly gone. He reiterated that the aforesaid motor vehicle was being driven in a zig zag manner.

The appellant, DW1, admitted that he is the owner of motor vehicle registration number KAB 296 U and that he was driving the same on the material day. He said that he was driving up a steep hill at a speed of 40-50 kilometers per hour. He saw a cyclist coming downhill towards him. He flashed the headlights but the cyclist took no heed. DW1 said that he swerved to the left side but the cyclist did not stop and he hit the right hand side of the vehicle's head lights when his vehicle was off the road. The cyclist flew over the motor vehicle and landed on the ground. DW1 checked on the condition of the cyclist and rushed to a police station and reported the accident. His motor vehicle was inspected and found to have had no pre-accident defects. He blamed the cyclist for the occurrence of the accident saying that he was riding at a high speed in the middle of the road. He added that the cyclist failed to stop even after he hooted and flashed his car lights.

Two witnesses who were passengers in DW1's vehicle also testified.

Zephaniah Gekonga, DW2, was on the co-driver's seat. He said that DW1 was driving his motor vehicle uphill when a cyclist emerged ahead of them. DW1 hooted and flashed the vehicle's headlights but the cyclist did not stop and proceeded to hit the motor vehicle when it was off the road. He asserted that the cyclist was doing a high speed and was in the middle of the road.

Ronald Bundi Nyaringo, DW3, was seated on the rear passenger's seat. He corroborated the evidence of DW1 and DW2 in all material aspects.

On the issue of liability, the learned trial magistrate stated, ***inter alia,***

"I find that it was fool hardy for the cyclist to be going downhill at a blind spot without bearing in mind the likelihood of meeting another road user. It's even more fool hardy for the defendant going uphill to think that he is not likely to meet another motor vehicle or cyclist or indeed a pedestrian. The injuries sustained by the deceased is proof that both were going at high speed. The defendant himself admitted that he knew the area as a notorious accident black spot, the road was rough, it was incumbent upon him to exercise more care than he did. … The sum total of the evidence before the court shows that the defendant was careless in failing to make use of the knowledge that the area was dangerous. He drove without thinking of other road users, who might emerge from the blind spot.

I accordingly find the defendant vicariously liable to pay compensation. Given the conduct of the cyclist, I do apportion liability at 90:10 in favour of the plaintiff."

None of the witnesses testified that the accident occurred on a blind spot. The evidence of PW2 was that the accident occurred along a straight stretch of the road but which was not in a good state of repair as the tarmac thereon was in patches.

DW1 gave similar evidence. He said he was going up a hill and had seen the deceased at a distance of 60 meters ahead of him. It is not therefore clear why the learned trial magistrate stated that the cyclist emerged from a blind spot. A blind spot is an area where vision is obscured. If the road was straight and a person could be seeing from a distance of 60 meters that cannot be described as a blind spot.

As regards quantum of damages, the learned trial magistrate awarded Kshs. 10,000/= for pain and suffering, Kshs. 80,000/= for loss of expectation of life, Kshs. 240,000/= for loss of dependency and Kshs. 21,750/= as special damages making a total of Kshs. 351,750/= before 10% contribution.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The grounds of appeal were as follows:

"1. That the learned trial magistrate erred in law and in fact in holding that the respondent had proved her case against the appellant to the required standards.

2. That the learned trial magistrate erred in law and in fact by apportioning liability at 90:10 in favour of the respondent notwithstanding the evidence before her which overwhelmingly showed negligence on the part of the deceased.

3. That the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence before her.

4. That the learned trial magistrate erred in law and in fact in awarding Kshs. 240,000/= as lost years without any basis, the respondent having not led any evidence in proof of the deceased's earnings.

5. That the learned trial magistrate erred in law and fact in awarding astronomical figures.

6. That the learned trial magistrate erred in law and in fact in failing to appreciate the principles

applicable in apportioning liability in negligence and in ignoring the evidence and submissions of the appellant."

Mr. Murimi for the appellant and Mr. Ogari for the respondent filed their respective clients' submissions which I have perused and duly considered.

In**MAKUBE –VS- NYAMURO** [1983] KLR 403, the Court of Appeal held that it would not normally interfere with the finding of fact by a trial court unless it is based on no evidence or a misapprehension of evidence or where it is shown that the trial judge acted on wrong principles in reaching his conclusion. That principle also applies where the High Court is considering an appeal from a magistrate's court.

The evidence on record does not support the learned trial magistrate's finding on liability. I have already stated that the accident in question did not occur at a blind spot. PW2, DW1, DW2 and DW3 all stated that the appellant was driving up a steep hill whereas the deceased was riding downhill. The road was straight and visibility was clear upto a stretch of about 60 meters ahead of the appellant's motor vehicle. There was also evidence that the appellant flashed the headlights of his vehicle and hooted but the cyclist did not stop as he was riding downhill at a very fast speed. The collision occurred off the road. PW2 alleged that the appellant was driving fast and in a zig zag manner. He further alleged that he left his side of the road and hit the cyclist and both the cyclist and appellant's motor vehicle landed in a tea plantation. On the other hand, the appellant said that he swerved to the left side of the road and the cyclist followed him up there. DW2 and DW3 gave similar evidence.

I think the learned trial magistrate failed to make a finding on the conflicting versions of evidence as to where the collision occurred at. It is unfortunate that none of the parties called the police officer who investigated the accident to testify as to what his findings were. Evidence by way of a sketch drawing and the measurements that are usually taken by the police at a scene of accident would have been very helpful.

It is trite law that when a court is faced with two conflicting versions of evidence regarding cause of an accident involving two parties and is unable to state with any certainty who bore greater degree of blame it should

hold both of them equally to blame for theaccident. See**BERKLEY – STEWARD LIMITED –VS- WAIYAKI**[1982- 1988] 1 KAR 1118. A similar holding was also made in **JIMNAH MUNENE MACHARIA –VS- JOHN KAMAU**, Civil Appeal No. 218 of 1998. The Court of Appeal delivered itself thus:

> **"It has been held in our jurisdiction and also in other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."**

In view of the foregoing, I set aside the learned trial magistrate's apportionment of liability and substitute therefor a holding that both parties were equally to blame and apportion liability at 50:50.

I now turn to assessment of damages.

The appellant's counsel was satisfied by the award of Kshs.10,000/= for pain and suffering and Kshs. 80,000/= for loss of expectation of life. His complaint is regarding the award for lost years and special damages. I will first deal with the special damages.

As earlier stated, the receipt of Kshs. 21,000/= dated 29th January 1999 was for inpatient treatment and no such claim was made in the plaint. It is trite law that special damages must be specifically pleaded and strictly proved. The claims for special damages that were pleaded in the plaint were as follows:

(a) Police abstract ……..……. Kshs. 100/=
(b) Death Certificate ……..…. Kshs. 50/=
(c) Funeral and burial expenses ……. Kshs. 40,000/=
(d) Cost of HCC Succ. Cause No. 269 of 1999 ……..….. Kshs. 8,000/=

No evidence was adduced in respect of (a) (b) and (d) above.

Only two receipts for Kshs. 250 and Kshs. 500/= were produced on account of mortuary expenses. The learned trial magistrate therefore erred in law and in fact in awarding the sum of Kshs. 21,000/= for inpatient treatment as it was not included among the items that were pleaded. The said award is set aside leaving a sum of **Kshs. 750/= only as special damages**.

As regards loss of dependency, there was no pleading as

to how much the deceased was earning and no evidence was tendered in that regard. The respondent's advocate had submitted before the trial court that since there was no evidence as to how much the deceased was earning, the court ought to adopt the sum of Kshs. 3,050/= as the recognized minimum wage and a multiplier of 20 years. He further urged the court to apply a dependency ratio of two thirds. This comes to Kshs. 488,000/= made as hereunder:

Kshs. 3,050 x 12 x 20 x $^{2}/_{3}$= 488,000/=.

On the other hand the appellant's advocate urged the trial court to assume that the deceased's monthly income was Kshs. 1,000/= and adopt a multiplier of 8 with a dependency ratio of one half which works out to Kshs. 48,000/=.

(Kshs.1,000x12x8x$^{1}/_{2}$=48,000/=)

The learned trial magistrate estimated the deceased's monthly income at Kshs. 3,000/= and adopted a multiplier of 10 and a dependency ratio of two thirds which works out to Kshs. 240,000/= (Kshs. 3,000 x 12 x 10 x $^{2}/_{3}$ = 240,000).

The appellant's counsel submitted that an award of **Kshs. 150,000/=** is reasonable on account of lost years and urged the court to award the same. I am persuaded that the award of Kshs. 240,000/= given by the trial court was without any proper basis. I am in agreement with the award proposed by the appellant's counsel and hereby set aside the award of Kshs. 240,000/= and substitute therefor an award of Kshs. 150,000/= for lost years.

It is an accepted principle of law that a deceased's estate should not benefit twice from the same accident by awarding both damages under the Law Reform Act as well as the Fatal Accidents Act where the benefits will be inherited by the same dependants. Where the damages awarded under the Law Reform Act devolve on the

same dependants, the court should bear that in mind in awarding the benefits under the Fatal Accidents Act. See **KEMFRO AFRICA LIMITED t/a "MERU EXPRESS SERVICES (1976)" & ANOTHER –VS- LUBIA & ANOTHER** (No.2) [1987] KLR 30.

In this regard, the sum of Kshs. 10,000/= for pain and suffering and Kshs.80,000/= for loss of expectation of life ought to have been deducted from the judgment sum but that was not done. I will proceed to do so, leaving the sum of Kshs.150,000/= awarded under the Fatal Accidents Act plus Kshs. 750/= as special damages.

Having apportioned liability at 50:50, the net sum payable to the respondent is **Kshs. 75,375/=**. I therefore set aside the judgment sum entered in favour of the respondent by the trial court and substitute therefor an award of Kshs.75,375/= as shown hereinabove. Each party shall bear its own costs of the appeal as well as of the lower court case.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.

23/3/2010

Before D. Musinga, J.

Mobisa – cc

N/A for the appellant

Mr. Ogari for the respondent

Court: Judgment delivered in open court on 23rd March, 2010.

D. MUSINGA
JUDGE.