REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 95 OF 2009
MARTHA N. ABISI
ZABLON OTANDI ARAKA……APPELLANTS
-VERSUS-
JOSEPH OMBASA NYANDEMA
(Suing as personal representative of
FRED GEKONGE **(Deceased)**…….…….RESPONDENT
JUDGMENT

The respondent was the plaintiff and the appellants were the defendants in the suit filed in the Senior Resident Magistrate's court at Keroka. In that suit, the respondent sought as against the appellants general damages, special damages of Kshs. 38,810/=, costs and interest.

The suit was brought by the respondent against the appellants jointly and severally for his own benefit and for the benefit of the dependants of **Fred Nyandema Gekonge,** deceased under the **Law Reform** as well as **Fatal Accidents** Acts. Apparently the 1st appellant was the beneficial owner of motor vehicle registration number KBA 414E Toyota Saloon then registered in the names of **Said Abeid** while the 2nd appellant was her authorized driver.

On 5th May, 2008 at about 6.40p.m. the deceased was walking along Keroka-Masimba road when at Ichuni area, the 2nd appellant as aforesaid recklessly, negligently and or carelessly drove, controlled and or managed the said motor vehicle such that he caused it to veer off its path and collide with deceased fatally injuring him. The respondent attributed the said fatal accident to the negligence of the 2nd appelalnt which included driving at an excessive speed in the circumstances, failing to keep proper lookout, driving without due care and attention, driving a defective motor vehicle, overtaking at a corner near a shopping centre in total disregard to the environment obtaining thereat and failing to stop, slow down, swerve or in any way so to manage or control the motor vehicle as to prevent the said accident. As a result of the accident, the 2nd appellant was arrested and charged before the Keroka Senior Resident Magistrate's court vide traffic case number 70 of 2008 with the traffic offence of causing death by dangerous driving. The 1st appellant by virtue of being the beneficial owner of the subject motor vehicle and the 2nd appellant having been her authorized servant was vicariously liable for the acts, omissions and or negligence of the 2nd appellant. At the time of his death, the deceased was aged 20 years, was in good health and was a cobbler who had a promising future. His dependants were listed as the respondent, who was his father, **Esther N. Gekonge**, mother and **Ruth Makori**, wife. The respondent spent a total of Kshs. 38,810/= in funeral expenses which he claimed against the appellants as special damages.

The appellants filed a joint a statement of defence. They denied generally the respondent's claim. In particular, they denied the beneficial ownership of the vehicle by the 1st appellant nor that it was under the control or being driven by the 2nd appellant at the material time. The occurrence of the accident was denied too as well as the particulars of negligence attributed to the 2nd appellant by the respondent. Special damages, particulars pursuant to statute and the fact that the deceased was aged 20 years and a cobbler at that were all denied. Alternatively the appellants pleaded that if such accident occurred then it was wholly caused or substantially contributed to by the negligence of the deceased in that he failed to stop and give way to the appellants motor vehicle, failed to observe the highway code, walked carelessly and recklessly, had no regard for other traffic on the road, ramming into the motor vehicle, walking on the wrong side of the road in a zig zag and haphazard manner. The fact of the 2nd appellant being charged with a traffic offence as a result of the accident was denied as well. Otherwise the

suit was incompetent, bad in law, inept, did not disclose any cause of action and was incurably defective liable to be dismissed.

The hearing of the suit commenced before **J. Were** on 5th January, 2003. The respondent testified that the deceased was his nephew who passed away on 5th May, 2008 in a road traffic accident at Ichuni. However he never witnessed the accident. He only went to the scene and saw blood. He found the offending motor vehicle having been towed to the police station. The deceased died on the spot. He tendered in evidence the death certificate. He also tendered in evidence the police abstract. He incurred Kshs. 38,810/= in funeral expenses in terms of the coffin, mortuary fees, venue fees, postmortem fees, food and transport. He also carried out an official search for the motor vehicle at the motor vehicle registry at a fee. He also petitioned at a fee for a grant of letters of administration Ad Litem. The police abstract showed the owner of the motor vehicle as the 1st appellant whereas a search showed the owner was infact **Said Abedi**. The deceased passed on at the age of 20 years and used to sell shoes. The witness did not however know how much he was earning from the trade. He was married to **Ruth Kwamboka Makori** who gave birth to **Nyandema Nyandema** on 10th December, 2008 after the deceased had passed on. The deceased too had parents **Gekonge Nyandema Benjamin** and **Esther Gekonge,** both alive. He had a brother and 5 sisters whom he supported.

Cross-examined, he stated that the deceased was his nephew. His wife and parents were all alive. He conceded though that he did not witness the accident. Therefore he could not tell who was to blame. The deceased was a cobbler but used to sell shoes as well. He was not aware of his monthly earnings. However he was certain that the deceased used to assist his family with food.

The respondent also called **James Nyamweya** as a witness. On 5th May, 2008 at about 5.00p.m. he was from Precious Talent Academy in the neighbourhood of Ichuni area where he used to teach. As he walked on foot near St. James School, a motor vehicle headed towards Keroka from Masimba attempted to overtake another motor vehicle and in the process hit a pedestrian and threw him on the road. The pedestrian died on the spot. That vehicle stopped at the scene but the one that was being overtaken did not stop.

Cross-examined, he admitted that the deceased was a son of his cousin. The motor vehicle that hit the deceased stopped at the scene. He witnessed the accident from about 200 metres away. The deceased was on his right side of the road. The overtaking motor vehicle went off the road and hit the deceased, throwing him on to the road. It was a saloon car.

Finally, the respondent called **P.C James Kichuru**. He testified that on 5th May, 2008, the police received a report of an accident involving motor vehicle KBA 414E and a pedestrian, the deceased. The scene was visited by **Sgt Anjere** who was no longer in the police service. He investigated the case and recommended that the driver of the motor vehicle be charged for causing death by dangerous driving. The driver though had not been apprehended. He had been released on cash bail.

Under cross-examination he stated that he had a sketch plan of the accident. There were no bumps along the stretch where the accident occurred. The driver of the motor vehicle was to blame.

The appellants offered no evidence in rebuttal to the respondent's evidence. In other words they closed their case without calling any evidence in rebuttal.

Upon evaluation of the evidence on record, rival written submissions and the law, the learned magistrate returned a verdict in favour of the respondent. He found the appellants 100% liable for the accident. In terms of damages, he made the following awards:-

a.	Pain and suffering	Kshs. 10,000.00
b.	Loss of expectation of life	Kshs. 80,000.00
c.	Loss of dependency	Kshs. 600,000.00
Total		**Kshs. 690,000.00**
d.	Less (a) and (b)	Kshs. 90,000.00
Sub total		**Kshs. 600,000.00**
e.	Add special damages	**Kshs. 28,200.00**
Grand Total		**Kshs. 628,200.00**

It is against this judgment and decree that the appellants lodged this appeal. They set forth 8 grounds of attack in their memorandum of appeal. These are:-

"1. That the learned trial magistrate erred in law by failing to give a concise statement of the case, the points for determination and reasons for his decision in his judgment delivered on the 30th day of April, 2009.

2. That the learned trial magistrate erred in law by failing to find that the respondent did not prove his case on a balance of probability and or to the standards required of him and erred in law and fact by shifting the onus of proof to the appellants.

3. That the learned trial magistrate erred in law and in fact in finding that the 1st appellant was the owner of the motor vehicle registration number KBA 414E and the 2nd appellant was the 1st appellant's driver against the overwhelming evidence to the contrary.

4. That the learned trial magistrate erred in law and in fact in failing to consider the appellants submissions and failed to consider the High Court and Court of Appeal decisions which were binding on him.

5. That the learned trial magistrate erred in law and in fact in holding the appellants liable against the evidence to the contrary.

6. That the learned trial magistrate erred in law and in fact in admitting the documents as exhibits contrary to section 35 of the Evidence Act.

7. That the learned trial magistrate erred in law and in fact in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.

8. That the learned trial magistrate erred in law and in fact in awarding special damages and yet the same were not pleaded and strictly proved and not payable in law or otherwise..".

When the appeal came up for hearing before me on 4th May, 2010, counsels for the appellants as well as respondent agreed to canvass the same by way of written submissions. However as it turned out only the appellants filed their submissions which I have carefully read and considered alongside cited authorities. The respondent did not advance any reasons why he did not find it necessary to file his written submissions.

The absence of written submissions of the respondent notwithstanding, this court as a first appellate court has a duty to reconsider the evidence adduced before the trial court, evaluate it itself and draw its own conclusions. In doing so it has to bear in mind that it neither saw nor heard the witnesses and therefore cannot be expected to make any findings as to their demeanour. See **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A 123**.

The evidence of the respondent and his witnesses as correctly pointed out by the learned magistrate was uncontroverted, unchallenged and not unrebutted. The averments of the appellants in their joint statement of defence in the absence of any evidence to back them up remained mere averments and or allegations. So that on the question of liability, the learned magistrate had only the evidence of the respondent and his witnesses to go by. There was the evidence of an eye witness to the accident in PW2. That evidence as to how the accident occurred and the motor vehicles involved stood alone. He also confirmed the involvement of the deceased in the accident. In the absence of any evidence to the contrary by the appellants the learned magistrate was bound to belief and act on the evidence of the respondent. Just like the learned magistrate, I have no doubt at all that the respondent proved his case on a balance of probability. I agree with the appellants though that it is a well established principle of law that a plaintiff suing in negligence must prove upon a balance of probability that a defendant was the registered owner of the motor vehicle involved in an accident. How is this done? In ordinary proceedings, a police abstract would suffice. In this case, the respondent duly tendered in evidence a police abstract which showed the owner of the vehicle as the 1st appellant and the driver as the 2nd appellant. That in the absence of any evidence to the contrary by the appellants was sufficient proof of ownership of the subject motor vehicle. If the appellants disputed these facts, it was upto them to tender evidence to the contrary. They should also have objected to the production of the police abstract in evidence. They did not. In any event the respondent produced a search certificate which showed the ownership of the subject motor vehicle. He also testified that the owner of the motor vehicle was **Said Abeid**. However it is instructive that the respondent sued the 1st appellant as a beneficial owner of the subject motor. There is nothing wrong with that. It was upto the said 1st appellant to testify and dispute that relationship with the vehicle attributed to her by the respondent. She did not. Accordingly the case of **Thuranira Karuri Ngeche –vs- Agnes Ncheche, C.A No. 192 of 1996 (UR)** is inappropriate and inapplicable. In my view, the factual findings of the trial court on the issue of liability were based on the evidence on record. There was no misapprehension of evidence as would attract my interference. The trial court's finding of liability at 100% stems from the evidence on record contrary to the submissions of the appellants. It is a trite law that this court is only entitled to interfere with the findings of fact by the trial court when it is shown that

it is based on no evidence, or misapprehension of the same. See **Makube –vs- Nyamuro (1983) KLR 403**. I discern no such misgivings in the circumstances of this case.

The appellants too have raised the issue of vicarious liability. That the respondent did not plead the issue of vicarious liability in the plaint. That submission cannot possibly be correct. In paragraph 8 of the plaint, the respondent has specifically alluded to and pleaded vicarious liability. In any event the appellants never canvassed the said issue before the learned magistrate as they led no evidence on it at all. Further it is settled law that vicarious liability need not be pleaded specifically. It can inferred from the circumstances of the case.

With regard to the complaint that the judgment crafted by the learned magistrate fell foul of the provisions of order XX rule 4 of the **Civil Procedure Rules**, I am unable again to agree with the appellants submissions. During the trial, the issues for determination by the court were two fold, liability and quantum. The learned magistrate addressed these issues in his judgment. He found the appellants liable and gave reasons. He proceeded to award damages and justified the awards as well. The judgment too contained a statement of the case. In my view the judgment sufficiently complied with the requirements of the law. The learned magistrate may not categorically and expressly isolated points of determination. However a careful reading of the judgment leaves one in no doubt at all that the judgment contained a statement of the case, points of determination, the decision thereon and the reasons for such decision as required by Order XX rule 4 of the **Civil Procedure Rules**. See also **Wamutu –vs- Kiarie (1982) KLR 481.**

I now turn on the question of quantum. It is now a well settled principle of law that an appellate court can only interfere with a trial court's discretion to assess damages where it is shown that the trial court applied wrong principles or where the damages awarded are so inordinately high or low as to amount to wrong estimate. See **Robert Musyoki Kitari –vs- Coastal Bottlers Ltd (1985) 1 KAR 891**. It is the case of the appellants that the award reached by the trial court was inordinately high and represented an entirely wrong estimate. Is that the case? I do not think so! There was unchallenged evidence that the deceased was married. He assisted his parents as well as his wife. Dependency was thus proved. There was also uncontroverted evidence that the deceased was a cobbler. He also sold shoes. Although the exact income of the deceased from these businesses was unknown, the learned magistrate assumed a monthly income of Kshs. 3,000/= and rightly so in my view. The deceased was aged 20 years at the time of his death. That fact was not disputed at all. In their submissions before the trial court, the appellants had proposed a multiplier of 25 years whereas the respondent had proposed a multiplier of 20 years. The learned magistrate opted for the appellants' multiplier. Who can blame him? The dependency ratio of 2/3 adopted by the learned magistrate was appropriate in the circumstance. On the whole, I cannot fault the learned magistrate in his approach to the assessment of damages. He also awarded special damages that were specifically proved. Perhaps the only quarrel I can pick with the learned magistrate is his application of the principle that the amount awarded under the **Law Reform Act** should be deducted for the award under the **Fatal Accident Act**. Thus the amount which ought to have been deducted should have been Kshs. 80,000/= only being loss of expectation of life. However the learned magistrate included Kshs. 10,000/= he had awarded for pain and suffering as well. This was wrong. Perhaps this is the only correction I will make with regard to the entire award. In the result the award now works out as hereunder:-

-	Pain and suffering	Kshs. 10,000.00
-	Loss of expectation of life	Kshs. 80,000.00
-	Loss of dependency	Kshs. 600,000.00
Total		**Kshs. 690,000.00**
-	Less loss of expectation of life	Kshs. 80,000.00
Subtotal		**Kshs. 610,000.00**
-	Special damages	Kshs. 28,200.00
Grand total		**Kshs. 638,200.00**

Save for the above minor correction, I see no merit in this appeal and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE