



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 248 of 2007

**JACKSON N. MUTYETUMO t/a PAJU INVESTMENTS...1ST APPELLANT
DARIUS MUTYOTA MAILU.....2ND APPELLANT
VERSUS**

**MARY MENZE MATHUKU & HUMPREY MUNENE
KABURU (Suing as the Administrators of the Estate of
MICHAEL GITONGA KABURU (Deceased).....1ST RESPONDENT
BOARD OF DIRECTORS OF
ST. JOSEPH GIRLS HIGH SCHOOL.....2ND RESPONDENT**

(An appeal from the judgment of the Honourable Ag. Chief Magistrate at
Nairobi Milimani Commercial Courts (C.W. Meoli) dated 14th March, 2007
in Civil Suit CMCC No.6087 of 2003)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Mary Menze Mathuku and Humprey Munene Kaburu, (hereinafter referred to as the 1st respondent). The 1st respondent had sued in their capacity as the administrators of the estate of Michael Gitonga Kaburu (hereinafter referred to as the deceased). The suit was filed against Jackson Mutyetumo t/a Paju Investments, and Darius Mutyota Mailu, hereinafter referred to as the 1st and 2nd appellants.
2. The suit was a claim for damages under the Fatal Accidents Act and the Law Reform Act arising from the death of the deceased. The deceased died as result of an accident involving motor vehicle registration No. KAE 836Y (hereinafter referred to as the lorry), and motor vehicle KAG 663F (hereinafter referred to as the school bus). The deceased was lawfully travelling as a passenger in the school bus which belonged to the Board of Directors St. Joseph Girls High School, hereinafter referred to as the 2nd respondent. The lorry belonged to the 1st appellant whilst the 2nd appellant was the authorized driver of the lorry. The 1st respondent contended that the accident was caused by the negligence of the 2nd appellant.
3. The 1st and 2nd appellants filed a joint defence in which they denied the 1st respondent's claim, maintaining that the accident was caused by the negligence of the driver of the school bus. It was further maintained that the suit against the appellants was misconceived, fatally defective and an abuse of the Court process. Pursuant to leave granted by the Court, the appellants issued a 3rd party notice to the 2nd respondent, seeking indemnity or contribution against the 2nd respondent.

4. In response to the third party notice, the 2nd respondent filed a statement of defence contending that the appellants' claim against it was statute barred and offends the provisions of section 13A of the Government Proceedings Act, Cap. 40. The 2nd respondent further contended that if the accident occurred, then the same was caused by the gross negligence of the 1st appellant or his agents or servants.
5. Apparently there were other suits also arising from the accident involving the lorry and the school bus. On 29th September, 2004, it was agreed by the parties in all the cases that Civil Suit No. 607 of 2003, which was the suit filed by the 1st respondent be heard and tried, as a test suit for purposes of determining the issue of liability in all the suits arising from the same accident. All the other suits were stayed pending the determination of the 1st respondent's suit.
6. During the hearing in the lower Court, three witnesses were called in support of the 1st respondent's case. These were P.C. Anne Katuta, a police officer then attached to Voi Traffic Base, Munguti Mutisya, and Mary Menze Mathuku, the wife to the deceased. Briefly their evidence was as follows.
7. The deceased was a graduate teacher employed by the Teachers Service Commission (TSC) and working in Kaloleni Secondary School. On the material day, the deceased and about 22 members of staff of Kaloleni Secondary School were in the school bus travelling to Mombasa. About 3 kilometers before they arrived at Manyani, the school bus collided with a lorry which was stationary in the middle of the road. The deceased was stuck in the wreckage resulting from the collision. Efforts to rescue him were futile, and he died while frantic efforts were still being made to rescue him.
8. The deceased's wife learnt of the accident and proceeded to Voi Hospital Mortuary where she identified her husband's body. She reported the matter at Voi Police Station. P.C. Ann Katuta, produced a police abstract report of the accident which confirmed that the driver of the lorry was charged and convicted of the offence of causing death by obstruction. The 1st respondent obtained letters of administration for the estate of the deceased which were produced in evidence, together with the death certificate in respect of the deceased.
9. The deceased's wife testified that the deceased was earning a salary of Kshs.30,000/= and was supporting his family which included his wife and one son. At the time the deceased died the deceased's wife was pregnant and gave birth to another son a month after her husband's death.
10. The 2nd appellant testified in support of the defence. He explained that on the material day he was driving the lorry to Mombasa. He was transporting maize to Mombasa for a client. Before he arrived at his destination, at about 11 p.m., the lorry started leaning on the right. He stopped on the road to check and noted that the rear tyres had come off. He tried to move off the road but part of the lorry remained on the road. He put leaves in front of the lorry and at the rear of the lorry. He also put a life saver on the rear and put the hazard lights of the lorry on. Because he feared for his safety, he released the client to go to the police at the road block to seek help. About 2 hours later, the 2nd appellant saw some torch light in the bushes nearby, so he fled and hiked a lift to Voi Police Station where he reported the matter.
11. Together with the client who had also arrived at the Police station, they waited for the police until 5 a.m. when they were escorted back to the scene. They arrived at the scene at 5.30 a.m. and found that a school bus had rammed into the rear of the lorry. The 2nd appellant recorded a statement with the police. Later he was arrested, charged, convicted and sentenced to serve one year imprisonment. He denied having left the lorry at the centre of the left lane, or having failed to put any warning signs. He maintained that he did his best to remove the lorry from the road and also put warnings for other road users. He contended that the driver of the school bus was to blame for not keeping a proper look out.

12. Counsel for each party filed written submissions, each urging the trial Magistrate to find in favour of his client. For the 1st respondent, it was submitted that the evidence adduced before the trial Court, was sufficient to establish that the accident was wholly caused by the 2nd respondent, who left the lorry parked dangerously on the road, and did not put any warning signs. The trial Magistrate was referred to proceedings of the Traffic Case against the 2nd appellant in which 12 witnesses testified that the lorry was left parked at the road without any warning signs. It was maintained that the lorry chevrons and rear reflectors were not visible as they were obstructed by a canopy. The trial Magistrate was therefore urged to find the respondent fully liable. On the issue of quantum, the trial Magistrate was urged to award a sum of Kshs.10,000/= for pain and suffering, Kshs.150,000/= for loss of expectation of life, Kshs.100,000/= for loss of consortium, Kshs.4,160,000/= for loss of dependency, and Kshs.20,100/= for funeral expenses.
13. For the appellant, it was submitted that although the deceased could not be blamed for the accident, since he was a passenger in the 1st appellant's motor vehicle, the issue of liability as between the appellants and the 2nd respondent was one of serious concern. It was pointed out that the evidence of P.C. Anne Katuta had no probative value on the issue of negligence, as she did not investigate the accident but merely produced the police abstract report, judgment in the traffic case, and the police file. It was submitted that the evidence of the eye witness, Munguti Mutisya did not prove any negligence against the 2nd appellant as he did not see the manner in which the accident occurred, but only saw the school bus swerve and bang into the lorry. It was noted that the evidence of this witness was also contradictory, and could not be the basis for laying blame on the lorry driver or the school bus driver.
14. It was submitted that the defence witness explained why he had to leave the lorry where he did. The witness further explained that he did in fact put warning signs behind and in front of the lorry. It was maintained that the evidence of the defence witness showed that the driver of the school bus was the one to blame for the occurrence of the accident, as he failed to keep a proper look out whilst driving the school bus. It was submitted that the fact that the school bus rammed into the lorry was *prima facie* evidence of the negligence of the 2nd respondent's driver. It was submitted that the fact that the 2nd appellant was charged and convicted causing death through obstruction, did not mean that he was entirely to blame for the accident.
15. Reliance was placed on the following authorities:
- § ***Wilfred Ndumba Kirima vs. James Kiogora Mboroki and Another, Nrb HCCC No. 147 of 1993***
 - § ***Gian Singh Panesar & Others vs. Lochab & Another [1966] EA 401***
 - § ***Chemwolo & Another vs. Kubende, [1986] KLR 492***

The Court was urged to apportion liability as between the defendant and the third party at 10:90%.

16. In her judgment, the trial Magistrate found that the accident was caused by obstruction created on the road by the lorry. She found that the 2nd appellant had left the lorry on the road in a manner and condition which was dangerous to the public. She further found that the 2nd appellant did not put any warning signs or hazard lights to warn other road users. She found that the 2nd appellant was fully to blame for the accident. Under the Fatal Accidents Act, she accepted that the deceased income was Kshs.22,841/= excluding taxes. Adopting a multiplier of 23 years and a dependence ratio of 2/3 the trial Magistrate awarded a sum of Kshs.2,890,000/= as loss of dependency. The trial Magistrate further awarded Kshs.10,000/= for pain and suffering and Kshs.100,000/= for loss of expectation of life under the Law Reform Act.

17. Being aggrieved by that judgment the appellants have lodged this appeal raising 5 grounds as follows:
- (i) That the Honourable learned Magistrate erred in law and in fact by failing to consider and appreciate the fact that since the 2nd respondent's school bus rammed into the rear of the 1st appellant's stationary lorry, then the 2nd respondent was contributorily negligent for the said accident.
 - (ii) That the Honourable learned Magistrate erred in law and in fact, by accepting the evidence of the 2nd appellant's conviction of a traffic offence in Voi SRMCC Traffic Case No. 3813 of 2001 as the final basis for establishing negligence against the appellants at one hundred percent (100%) and thus failed to consider or appreciate the fact that the 2nd respondent was also contributorily negligent for the said accident due to the fact that its school bus rammed into the rear of the 1st appellant's stationary lorry.
 - (iii) That the Honourable learned Magistrate erred in law and in fact by failing to consider or appreciate the fact that the 2nd respondent's deceased driver was contributorily negligent for the said accident for failing to be on a proper lookout while driving the school bus so as to avoid colluding into the 1st appellant's stationary lorry.
 - (iv) That the Honourable learned Magistrate erred in law and in fact by failing to consider or appreciate the judicial decision cited by the appellants in their submissions on the issue of liability and thus failed to apportion liability between the appellants and the 2nd respondent.
 - (v) That the Honourable learned Magistrate erred in law and in fact by awarding the 1st respondent a sum of Kenya Shillings Three Million (Kshs.3,000,000/-) in respect of general damages, as the said award was manifestly excessive, considering the legal principles governing the calculation of loss of dependency in respect of a Deceased's Estate and the authorities cited by the appellants in their submissions.
18. Following an agreement by counsel, written submissions were exchanged and filed and the Court invited to determine the appeal based on those submissions.
19. For the appellants, it was submitted that although the 2nd appellant was partly to blame for the accident, the 2nd respondent's driver was also to blame for failing to keep a proper look out, while driving the school bus, causing it to ram into the rear of the lorry. It was argued that although the conviction of the 2nd appellant confirmed that there was evidence of negligence on the part of the 2nd appellant, the Court was still obliged to establish and make a finding whether the driver of the school bus was also negligent. It was submitted that the nature of the impact and the resulting fatality, was a clear manifestation that the school bus was being driven at a high speed.
20. The appellants previous submissions made in the lower Court in regard to the evidence adduced on behalf of the respondents were reiterated. The Court was urged to find that though the 2nd appellant was negligent by creating an obstruction, the driver of the school bus was also negligent in failing to keep a proper look out and failing to take appropriate action to avoid the accident. The Court was therefore urged to find the 1st appellant and the 2nd respondent both to blame for the accident, and the trial Magistrate was wrong in finding the 2nd appellant 100% liable. It was submitted that liability should have been apportioned at 10% against the appellant and 90% against the 2nd respondent.
21. In support of these submissions, counsel for the appellants relied on the following authorities:
- ***Henley vs. Cameron [1948] 65 TL 17***
 - ***William Jay & Sons vs. J.H. Vevers Limited [1946] All E.R. 646***

- ***Wilfred Ndumba Kirima vs. James Kiogora Mboroki and Another, Nrb HCCC No. 147 of 1993***
- ***Gian Singh Panesar & Others vs. Lochab & Another [1966] EA 404***
- ***Chemwolo & Another vs.***
- ***Asal vs. Muge & Another 2001 KLR 2002***
- ***Davies vs. Swan Motor Company***

22. With regard to the award in respect of damages, it was submitted that the award in respect of lost years/loss of dependency was manifestly excessive considering the multiplier and the redundancy ratio adopted. It was argued that the deceased having been aged 30 years being employed as a teacher he was set to retire at a mandatory age of 55 years and given the preponderances of life a multiplier of 15 would have been more appropriate. The case of ***Jacinta Priscila Muthembwa vs. Kenya Bus Services Limited and Another Nrb. HCCC No. 1332 of 1999*** was relied upon for that proposition.
23. With regard to dependency ratio, it was submitted that the deceased's wife was employed as an accounts clerk earning a salary of Kshs.9,000/= which she was using to educate her children. It was maintained that the deceased and his wife must have contributed jointly to the upkeep of the family and therefore a dependency ratio of half rather than the conventional ratio of 1/3 would have been more appropriate. Counsel therefore submitted that using the deceased monthly income of Kshs.22,841/=, a multiplier of 15 years, and a dependency ratio of ½, loss of dependency should have come to Kshs.2,055,690/=. Counsel therefore urged the Court to allow the appeal.
24. For the 1st respondent it was submitted that the trial Court found the 2nd appellant wholly to blame for the accident, as it was clear that the lorry was left parked on the road, and no warning signs were put to warn other drivers. It was maintained that the judgment of the lower Court was proper and reasonable and that the 2nd appellant was wholly to blame for the accident and 1st appellant is vicariously liable. It was maintained that if any apportionment of liability was to be done, the 2nd respondent should bear no more than 10%.
25. On quantum, it was submitted that as at the time of his death, the deceased being aged 30 years, had 25 years to work before reaching the retirement age of 55, and therefore the multiplier of 23 adopted was reasonable. It was argued that the dependency ratio of 2/3 for a married person has been a long established principle and therefore the ratio was proper. The Court was urged to note that in actual fact, the loss of dependency calculated with a multiplier of 23 and a dependency ratio of 2/3 was much more than the sum of Kshs.2,890,000/= which was awarded. The Court was therefore urged not to interfere with the award.
26. For the 2nd respondent the Court was urged not to interfere with the findings of the trial Magistrate on liability. Firstly because the findings were consistent with the pleadings filed and evidence on record. It was noted that the evidence adduced before the trial Magistrate was consistent with the findings of the Traffic Court that the 1st appellant's lorry was left stationary on the road without any warning signs in a manner that was dangerous to the public Secondly it was submitted that the evidence confirmed that the cause of the accident was the obstruction created on the road by the appellant's lorry in circumstances which did not aid visibility.
27. Thirdly it was submitted that the trial Magistrate was right in rejecting the 2nd appellant's evidence, as his evidence was not convincing. It was further submitted that the appellant did not adduce any evidence to show that the driver of the school bus failed to keep a proper look out. It was submitted that there was no demonstration by the appellant that the trial Magistrate acted on wrong principles in reaching her finding on

liability. It was submitted that contributory negligence was an issue of fact which had to be proved by evidence.

28. It was submitted that the 2nd appellant was not present when the accident happened and could not therefore testify as to how the accident happened. It was maintained that the 1st respondent's witness testified that the 2nd respondent's driver swerved in an effort to avoid the accident, and that was sufficient evidence to negate any element of contributory negligence. The Court was urged to reject the case of **Wilfred Ndumba Kirima vs. James Kiogora Mboroki and Another** (supra), as circumstances were different. It was maintained that there was nothing to warrant apportionment of liability between the appellant and the respondents. But if the Court was inclined to apportion any liability against the 2nd respondent, then it should be no more than 10%.
29. On the issue of quantum, it was submitted that the deceased's pay slip showed that his monthly net salary was Kshs.12,317/= and therefore the trial Magistrate ought to have used the net monthly salary as the multiplicand as that was the disposable income. The Court was therefore urged to allow the appeal against the assessment of damages.
30. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also given due considerations to the submissions which were filed before the lower Court and before this Court. The grounds of appeal can be simply classified into two. Firstly, whether the trial Magistrate was right in finding the appellant fully liable for the accident. And secondly, whether the award in respect of general damages for loss of dependency was manifestly excessive.
31. On the issue of liability, it was not disputed that arising from the accident subject of this suit, the 2nd appellant was tried and convicted by the Traffic Court of the offence of causing death by obstruction through leaving the lorry on the road, in such a position and manner as to be dangerous to the public, having regard to the nature, condition and use of the road. That conviction not having been set aside, it forms a clear basis for the finding that the accident was caused by the negligence of the 2nd appellant in leaving the lorry on the road in a dangerous manner. The question is whether the accident was wholly caused by the negligence of the 2nd appellant or whether the driver of the school bus contributed in any way to the accident.
32. In the third party notice the appellants gave particulars of negligence against the driver of the school bus as follows:
- (i) Driving the said motor vehicle without due care and attention.
 - (ii) Driving dangerously recklessly on the road without due regard to other road users.
 - (iii) Attempting to overtake another motor vehicle without due regard and thus ramming into motor vehicle KAE 836Y.
 - (iv) Failing to stop, swerve or in any other way so to control motor vehicle registration number KAG 663F so as to avoid the accident.
 - (v) Causing the motor vehicle registration number KAG 663F to ram into motor vehicle registration number KAE 863Y.
33. During the trial in the lower Court, the 2nd appellant conceded that he was not present when the accident occurred. Therefore he could not testify as to the circumstances in which the accident occurred. That is to say that the 2nd appellant could not substantiate any of the particulars of negligence alleged against the driver of the school bus. Counsel for the appellants relied on the circumstances of the accident, in particular the nature of the impact and the resulting fatality as a manifestation that the school bus was being driven at a

- high speed. That may well be so. Nevertheless, in the particulars of negligence high speed was not alleged.
34. The fact that the school bus rammed into the lorry was not in dispute. The main reason for this is obviously the fact that the lorry was an obstruction on the path of the school bus. The situation was made worse by the fact that it was at night, and there were no warnings placed near the lorry. Nevertheless, the school bus had head lights and the driver of the school bus was expected to be alert. The school bus driver therefore ought to have seen the lorry if he was indeed maintaining due care and attention as he was driving, particularly because the lorry was said to be on a straight stretch of the road. Therefore the school bus driver was also negligent to some extent. The trial Magistrate was wrong in failing to apportion any negligence against the school bus driver. I would apportion liability at 80% as against the 2nd appellant and 20% as against the school bus driver.
35. With regard to loss of dependency the deceased's payslips were produced in evidence and it is clear from them that the deceased's salary excluding tax and statutory deductions was Kshs.22,841/=. Although the net pay indicated on the payslip was in the region of Kshs.12,300/=:, the net pay excluded deductions in respect of Savings and Credit Co-op Shares and Loans, all of which ought to be taken into account in considering the deceased's income as the loans and shares are benefits of the deceased. I find therefore that the trial Magistrate rightly adopted the sum of Kshs.22,841/= as the deceased's monthly income.
36. With regard to the multiplier, the deceased having been aged 30 years, and being a teacher whose retirement age was then 55 years (now 60 years), the multiplier of 23 years adopted by the trial Magistrate was reasonable and took into account the uncertainties of life. With regard to the dependency ratio, the trial Magistrate adopted a dependency ratio of 2/3 which is the conventionally accepted dependency ratio. The fact that the deceased's wife was employed was not sufficient to negate the generally accepted dependency ratio.
37. Using the multiplier of 23, dependency ratio of 2/3 and the deceased's income of Kshs.22,841/=:, the damages for lost years ought to have been Kshs.4,202,744/=: . Therefore, the total damages awarded of Kshs.3,000,000/=: for both damages under the Law Reforms and Fatal Accident Act, was neither excessive nor based on wrong principles as to justify the intervention of this Court.
38. The upshot of the above is that the appeal succeeds only to the limited extent of apportioning liability as against the appellants and the 2nd respondent at 80:20%. The judgment of the trial Magistrate is confirmed subject to that apportionment of liability.
39. I award the 1st respondent costs of this appeal, the appellants and the 2nd respondent sharing the costs in the ratio of their liability.
- Those shall be the orders of this Court.

Dated and delivered this 4th day of December, 2009

H. M. OKWENGU
JUDGE

In the presence of: -

Njoroge for the appellants

Kamau for 1st respondent and holding brief for Nzillani for the interested party

Eric, court clerk