Manji Food Industries Limited v Karimba & 2 others (As the Legal Representatives of the Estate of Tarsisio Kimathi Karimba - Deceased) (Civil Appeal E017 of 2024) [2025] KEHC 7739 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7739 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E017 OF 2024

JK NG'ARNG'AR, J

JUNE 5, 2025

BETWEEN

MANJI FOOD INDUSTRIES LIMITED .... APPELLANT

AND

SILAS KARIMBA .... 1ST RESPONDENT

HONEST KAWIRA KIMATHI .... 2ND RESPONDENT

CYNTHIA KARWITHA .... 3RD RESPONDENT

AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF TARSISIO KIMATHI KARIMBA - DECEASED

(Being an appeal against the judgment and decree of the Hon. M Opanga , PM, delivered in Wang'uru on 13/2/2024)

JUDGMENT

1. Vide plaint dated 9/6/2021, the respondents filed the suit before the lower court on grounds that on 18/6/2018, the deceased was driving his motor vehicle Reg. No. KCG 741B along the Makutano-Wang'uru Road when the appellant's driver negligently drove motor vehicle KBF 847S Mitsubishi Lorry (herein the subject motor vehicle) that he crashed and collided with the deceased's motor vehicle KCG 741B thereby causing the deceased fatal injuries.

2. The appellant filed a statement of defence dated 28/6/2021 denying ownership of the subject vehicle and further denying any liability and blamed the deceased for the accident and sought orders that the suit be dismissed with costs.

3. The matter proceeded for hearing wherein the respondents called four witnesses whereas the appellant called one witness.

4. Vide judgment delivered on 13/2/2024, the trial court found the appellant to be 50% liable for the accident and awarded the respondents pain and suffering at Kshs. 30,000/=, loss of expectation of life at Kshs. 200,000/=, loss of dependency at Kshs. 6,596,031.20/= and special damages of Kshs. 134,200/=. The total was thus Kshs. 6,960,031.20/= less 50% thus Kshs. 3,480,015.60/=.

5. The appellant was dissatisfied with that judgment and filed the memorandum of appeal dated 5/3/2024.

The Appeal

6. The appellant filed the memorandum of appeal on three grounds being that: -

    1. The trial magistrate erred in law and fact by ignoring completely the corroborative value of the evidence tendered by the Police Officer in the trial thereby reaching the erroneous finding that liability should be apportioned in the ratio of 50:50.

    2. The trial magistrate erred in fact and law by failing to take into account the contradictory nature of the evidence tendered in support of the respondent's case on the issue of liability, thereby arriving at the erroneous conclusion that liability should be apportioned in the ration of 50:50.

    3. The trial magistrate erred in law by failing to consider the uncertainties of life in her contemplation of a multiplier, therefore awarding an exaggerated amount of damages.

7. The parties were directed to file written submissions and the appellant complied by filing theirs dated 19/7/2024 whereas the respondent's were dated 31/7/2024.

8. I have seen and considered those submissions as well as the grounds of appeal and I do note that there are only two issues for determination; the finding on liability and quantum on loss of dependence specifically, the quantifier applied. Indeed, both parties restricted themselves to those two issues in their submissions and I will proceed to determine the appeal limited to those two grounds.

Analysis and Determination

9. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424.

10. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR where the court held that: -

> "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 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."

Whether the issue of liability was properly determined

11. As already held, one of the issues for determination was the the apportionment of liability.

12. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as: -

> "Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

13. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR the Court held that: -

> "In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

14. From the record, it is undisputed that on 18/6/2018 an accident occurred between the Appellant's Motor Vehicle Registration KBF 847S and the deceased's vehicle registration KCG 741B wherein the deceased suffered fatal injuries.

15. The Respondent called four witnesses to support their case whereas the Appellant also called one witness.

16. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR the court in setting out the legal burden of proof in civil cases stated: -

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

17. Further in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 Kimaru J (as he then was) stated that: -

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

18. In this instance, the respondents witness PW3 one Fred Kaimenyi Iberi testified that on 18/6/2028 he was travelling in a matatu from Meru to Nairobi. That upon reaching Wang'uru market, the matatu driver stopped to refuel and he alighted to buy a bottle of water at a nearby shop. He testified that while there, he saw the deceased and his wife and greeted them as the deceased was well known to him as they had interacted severally for business. That they talked for a few minutes and separated. He testified that

the deceased was driving motoe vehicle registration number KCG 741B which PW3 knew belonged to him as he had seen the deceased driving it for more than a year. That he boarded the matatu and the deceased also started driving ahead of the matatu.

19. He further testified that upon reaching near Makutano junction, the deceased vehicle was around 100 meters ahead of the matatu. That he suddenly saw a Mitsubishi lorry coming from the opposite direction (Nairobi to Wang'uru) driving at a high speed and was overtaking a semi-trailer truck that was head of it. That suddenly, the vehicle lost control and headed straight to where the deceased's vehicle was and rammed into it so hard that a loud bang was heard. That he along with other passengers rushed to the scene to assist and he saw that the deceased's vehicle was badly mangled and he saw the deceased and his wife lay dead inside their vehicle. That a large crowed surrounded the scene and shortly after police officers arrived. He thus blamed the driver of the subject vehicle for carelessly driving it and causing the death of the deceased.

20. The respondent's also called PW4, Copral Gerogina Syokau who testified that the driver of motor vehicle KBF 847S was heading towards Wanguru direction and KCG 741B was heading to the opposite direction. That the driver of KCG 741B overtook another unknown motor vehicle and before he could reach his lane, he met head on with KBF 847S. That there was no finding on blame. On cross-examination, he testified that the vehicle that was overtaking was KCG 741B and the entry code in the OB was code 10 meaning improper overtaking. He testified that though there was an ongoing inquest, no one was blamed for the accident. On re-examination, he testified that when the entry was made in the OB, investigations were ongoing and no witness statements had been taken.

21. On its end, the appellant called DW1, one Geroge Owira Nyawara. He testified that he was the appellant's employee and that on 18/6/2018, he was driving the subject motor vehicle KBF 847S transporting products to Embu and left Nairobi at 6:00am. That at 8:45am, he was at Makutano-Mwea Road when the deceased who was speeding in motor vehicle KCG 741B from the opposite directions veered into his lane in an attempt to overtake another vehicle that was ahead of him. That he suddenly cut in front of the subject motor vehicle and rammed violently into the front of the subject vehicle and the deceased's vehicle fell into a ditch.

22. He testified that the deceased caused the accident as he drove at an extremely high speed and was overtaking when it was not safe. He testified that he was not driving at a high speed as the subject vehicle was big and had just passed a road block so it had not picked speed. On cross-examination, he testified that the point of impact was on the road but that neither he or his turn boy suffered any injuries. That the subject vehicle was however damaged as it fell the road on the left.

23. In its judgment, the trial court found that PW4 did not produce any sketch drawing of the scene of the accident to show for sure where the point of impact was. That even though the appellant's annexed documents that could have determined the point of impact, the same were not produced as exhibits. The trail court thus found that since each party blamed the other in equal measure,

24. In it's submissions before this court, the appellant submitted that the trial court did not address itself to PW4's testimony that the OB captured the entry that 'The deceased overtook another motor vehicle whose details were not captured and before he could reach his lane, he met with motor vehicle KBF 847S". That though the trial court found that the absence of sketch maps made it impossible to establish the point of impact, the statement in the OB made the point of impact clear as any sketch map could have. That failure to consider PW4's testimony was a way for the trial court to avoid addressing the contradictions in the respondents' witnesses on liability. That the evidence of PW3 and PW4 was contradicting thus the credibility and weight of that evidence was reduced.

25. It was further submitted that the OB entry was the basis of a police abstract and that the evidence of PW4 added credence and weight to the evidence of DW1. That the averments of PW3 were less likely whereas those of DW1 were more likely. That even thought the police did not witness the accident, that did not take away the value of PW4's evidence. That DW1 testified that the police were 200 meters away and though they did not witness the accident, the arrived at the scene and were able to view its immediate aftermath. That it was not possible for PW3 to see the accident happening and what he thought happened was not the actual case. It was thus submitted that even without producing more documents, there was enough evidence to establish the point of impact.

26. The respondents on the other hand submitted that PW3 was categorical that it was the driver of the subject vehicle KBF 847S that was overtaking another vehicle and as it was returning to its lane, it hit the deceased's vehicle causing his death and his wife's death. That though the appellant heavily relied on the evidence of PW4, he was not the investigating officer and did not visit the scene. That she also testified that an inquest file was opened as the investigations could not apportion blame on any particular vehicle. That if at all the deceased was to blame for the accident the same would have been captured in the police abstract. That the content of the OB could not be relied on as the same was not produced and further, investigations were still ongoing when the OB entry was made.

27. I have considered the testimonies and submissions before this court. I note that only one person witnesses the accident as it occurred, PW3. He testified that on the material day of the accident, he left Meru at around 6:30am heading to Nairobi and the matatu he was on board made a stop over at Wangu'uru market. DW1 similarly testified that he left Nairobi at 6:00am and the accident happened at 8:45am. Going by that alone, I am convinced that it was possible that PW3 was roughly at the same place and at the same time with the deceased's vehicle as well as the subject motor vehicle and it is likely that he witnesses the accident occurring.

28. I also note that the deceased vehicle was well known to him as he had seen the deceased driving it for more than one year. He had also met and talked to the deceased and his wife just minutes before the accident and both the matatu on which he was aboard and the deceased car started the journey at the same time. Noting that PW3 was only 100 meters away from the deceased's car, and further noting that the accident happened around 8;45am during the day, it is possible that PW3 witnessed the accident happening. The appellant's submissions that it was unlikely that PW3 actually witnesses the accident was incorrect noting that the appellant itself submitted that PW3 was seated at the front seat of the matatu he was on board. Being an eye witness, his testimony was indeed valuable.

29. Going by that alone, the respondents had put across a prima facie case of negligence as against the appellant. Did the appellant provide an answer adequate to displace that inference? DW1 testified that it was the deceased's vehicle that was overtaking and upon realizing the miscalculation, the deceased veered into the subject vehicle's lane, hit it and fell into a ditch. Though DW1 testified that the subject vehicle was not speeding as it had just passed a road block, I do note that the subject vehicle itself fell from the impact.

30. If at all the vehicle was being driven at such a slow pace noting that DW1 testified he had just passed a road block and the vehicle had not picked speed, it is unlikely that the subject vehicle would have fell from the impact of the accident. I say so noting that DW1 testified that it was a big vehicle whereas the deceased's vehicle was a Toyota S. Wagon. The only logical conclusion is that the subject vehicle was also likely to have been speeding and the impact was so huge that it caused the vehicle to fall.

31. There was also the testimony of PW4, the police officer. She testified that on the basis of the OB entry, it was the deceased's vehicle that was overtaking and was being driven at a high speed. To that end, doubt was cast on the respondents' case. However, PW4 further testified that though the entry was made 25

minutes after the accident it was not indicated who was the reportee. More importantly, though the appellant strongly relied on that entry, I do note that the OB extract was never produced for the trial court to confirm that entry as well as the entry of code-10 which was explained to mean 'improper overtaking'.

32. It would have indeed been a miscarriage of justice to expect the trial court to rely on a document that was not before it to make determination on liability. PW4's testimony on the OB extract would have carried weight if the same was produced for the trial court's consideration.

33. Moreover, in an interesting turn of events, despite alluding to the entry in the OB, PW4 testified that post investigations, none of the drivers could be blamed for the accident thus an inquest file was opened. She testified that an inquest was opened when no one could be blamed.

34. It is likely that the investigations were inconclusive despite the alleged entry made in the OB noting that investigations were carried out later on. Indeed, PW4 testified that when the entry was made in the OB, the investigations were still ongoing and no witness statements had been taken. The effect of this is that not only was the alleged entry not reliable noting that the OB extract was not produced before the trial court, the entry thereon, if proven, had been overtaken by events noting that both the initial investigating officer, and PW4, the current officer, had found no one to blame and instead opened an inquest file.

35. Contrary to the appellant's submission, PW4's testimony could not single handedly absolve the appellant's subject vehicle from liability. Moreover, I also note the discrepancy between DW1 and PW4 wherein PW4 testified that the subject vehicle fell on the right side of the road whereas DW1 testified that the subject vehicle fell of the road on the left.

36. Noting that both the deceased and DW1 were both drivers, they both owed themselves a duty of care, and also owed other road users a duty of care. I do take judicial notice that DW1 testified that the point of impact was on the road. He did not testify that he tried to swerve or even brake when he saw the deceased's oncoming vehicle. DW1 ought to have been driving at a reasonable speed noting that the accident happened near a market, and be able to take necessary measures to avoid the accident. The same applies to the deceased.

37. In the end, I do find that apportionment of liability at 50:50 was fair and just in the circumstances. There is no justification to interfere with the trial court's finding on liability.

Whether the trial court erred in failing to consider the uncertainties in life in her contemplation of a multiplier an thereby awarded an exaggerated amount

38. In Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5 the court held that: -

> " An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived"

39. Before the trial court, the appellant did not oppose the award for loss of dependency noting that there was evidence that the deceased herein died at 49 years and was a school principal earning Kshs. 74,954.90/= after deductions. It was also not opposed that the deceased was raising a young family thus a dependency ration of 2/3 was reasonable. The appellant however took issue with the multiplier of 11 years and instead proposed a 6 years multiplier.

40. In its judgment, the trial court found that the statutory retirement age was 60 years and thus adopted the respondent's multiplier of 11 years thereby awarding Kshs. 6,596,031.20/= under that head.

41. In its submission before this Court, the appellant argued that though the deceased outstanding years of employment were indicated on his pay slip, he still remained a human being and susceptible to the vicissitudes of life. That the court did not take that into consideration and thus adopted the entire remaining 11 years. This court was thus urged to set aside the multiplier of 11 years and instead apply that of 6 years and award a sum of Kshs. 3,597,888/=.

42. The respondents on their part submitted that assessment of damage was discretionary after the court assessed the circumstances. That the deceased was in good health and was employed by TSC thus the nature of his work was not dangerous to warrant consideration of vicissitudes in his line of work.

43. In the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another Nairobi HCCC No. 1638 of 1988(UR), Ringera, J. (as he then was) had this to say on the formula for computation of dependency: -

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents."

44. Faced with a similar situation, the court in Italbuild Imports Limited v Mutinda & another (Legal Representatives of the Estate of John Mwajanji Chinga - Deceased) (Civil Appeal E084 of 2023) [2023] KEHC 26631 (KLR) allowed a multiplier of 15 years and in so doing held that: -

> " It is not disputed that the deceased was 55 years at the time of his demise. No evidence was adduced to show that he was not in good health and that he would not have worked for another 15 years. Accordingly, I do not consider a multiplier of 15 years to be unreasonable. Additionally, the deceased was survived by a widow 7 children, 2 of which are minors aged 16 and 14 years. Clearly, they were dependent on him. In this regard I find that a dependency ratio of 2/3 is fair."

45. I find that the multiplier of 11 years to be reasonable. I further rely on the following cases: -

    a) In Alice Mboga v Samuel Kiburi Njoroge Nakuru HCCC No.357 of 1999 the deceased was aged 53 years. He was a printing technician at Egerton University. The court used a multiplier of 10 years holding that "he would have been required to retire in two years' time. But the nature of his work is such that he would have worked for private firms past 65 years.

    b) In Stephen Onsumu Kibagae –vs-Rebeka Mwango Simion & Anor [2014] eKLR, a multiplier of 9 years was upheld on appeal, for a deceased who was 57 years old.

    c) In Sokoro Plywood Limited & Another –vs- Njenga Wainaina (2007) eKLR, the High Court, while sitting on appeal, upheld the decision of the lower court to adopt a multiplier of 10 years in a case where the deceased was 60 years old.

46. In the end, I find that the trial court's decision was sound and the same is upheld.

47. The upshot is that the instant appeal is found to lack merit and the same is dismissed.

48. Noting that stay of execution pending appeal was granted on condition that the decretal sum was deposited in a joint interest account, I do hereby order the immediate release of the decretal amount to the respondents Counsel.

49. The respondents are awarded costs of the appeal.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025 IN THE PRESENCE OF;

Njoroge for the Appellants

Kaburu for the Respondents

Siele /Mark (Court Assistants)

…………………………………………………

J. NG'ARNG'AR

JUDGE