Karau & another v Mungania & Mugania (Suing as legal representatives of the Estate of Jennifer Nyoroka Mungania (Deceased) & another (Civil Appeal 49 of 2018) [2023] KEHC 1830 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 49 OF 2018

FROO OLEL, J

MARCH 2, 2023

BETWEEN

PAUL BUNDI KARAU .... 1ST APPELLANT

DANIEL RUKUNGA .... 2ND APPELLANT

AND

DAVID KALIUNCHI MUNGANIA & BEATRICE NTHETU MUGANIA (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JENNIFER NYOROKA MUNGANIA (DECEASED) .... 1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY .... 2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON D. NYABOKE SURE (R.M.) DELIVERED ON 16TH JULY 2018 IN WANG'URU PMCC NO 34 OF 2026, BEING TEST SUIT FOR PMCC NO 19 OF 2016, 20 OF 2016, 21 OF 2016, 25 OF 2016, 27 OF 2016 & PMCC NO 29 OF 2016)

JUDGMENT

1. The Appellant's were the defendant's was in the primary suit, where they were sued as the driver and registered owner of Motor vehicle KBU 795Y. It was alleged that on 16th April 2015 the deceased was a lawful passenger on motor vehicle registration Number KBL 508V along Embu – Mwea Road at Nyamindi river, the appellants motor vehicle was carelessly, recklessly and/or was negligently driven by the 1st defendant who was employed by the 2nd defendant, that he caused the said motor vehicle to loss control and violently collide with motor vehicle KBL 508V, whereby the deceased sustained fatal injuries.

2. Both the defendants and the third party filed their respective written statement of defense and vide a consent adopted by court on 5th September 2016, both parties agreed that proceedings conducted in WANG'URU PMCC NO 34 OF 2016 would be used as a test suit for liability.

3. After hearing the suit, the learned magistrate in her judgment delivered on 16th July 2018 apportioned Liability at 100% as against the appellant's and proceeded to award damages for pain and suffering , loss of expectation of life and loss of dependency all totaling to Ksh610,000/= special damages were also proved to the tune of ksh 36,910/= only. The other plaintiff's in the different suits (under this series) were also awarded different amounts as quantum plus costs and interest.

4. The Appellant's, being dissatisfied by both quantum awarded and liability as apportioned did file their memorandum of Appeal on 15th August, 2018 and raised several grounds of appeal namely:-

    a. That the learned trial Magistrate erred in law by failing to appreciate that no negligence was established as against the appellants and as such, no liability could attach.

    b. That the learned trial magistrate erred in law and in fact by considering irrelevant matters in arriving at the said decision in favour of the respondents and as against the Appellants.

    c. That the learned trial magistrate erred in law and in fact by failing to consider or even adequately adopt and appreciate the written submissions of the appellants on record and the authorities annexed in support of the appellants case.

    d. That the learned trial magistrate erred in law and in fact by failing to follow rules of precedents in finding the appellants liable.

    e. That the learned trial magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent's as against the Appellant's.

5. The Appellant herein is thus mainly aggrieved with the issue of liability as assesses and quantum of damages as awarded for 1st plaintiff, 5th plaintiff, and 6th plaintiff based on the submissions filed.

Facts of the Case

6. Before this hearing of this matter commenced, the parties' counsels did apply to have several civil suits consolidated as the cause of action arose from one accident and the parties involved were the same. The series of matters were WANG'URU COURT CC 34/2016, 29 /2016, 27/2016, 25/2016, 21/2016, 20/2016, and 19/ 2016. The parties agreed that the lead file would be WANG'URU COURT CC 34/2016 where the issue of liability would be determined. The consolidation order was granted on 5th September 2016.

7. PW1 BEATRICE NDETHU MUNGANIA testified that on 14th April 2015 they were in the s motor vehicle KBL 508V together with her husband, child , mother and other relatives. They were travelling from Meru to Kerugoya. At about 9.30pm while still along Mwea – Embu road they reached river Nyamindi. The road was going downhill and she noticed an oncoming motor vehicle with full lights and being driven in a zig zag manner. It swerved and hit their motor vehicle and as a result she became unconscious. She regained consciousness about one hour later as she was being removed from the accident wreckage.

8. She stated that she was seated opposite the driver's seat (co driver) and had suffered bruise injuries all over the body. She noticed that the accident caused a snarl up. As regards the position of the accident cars she stated that "our car was still on the lane, while the lorry was lying on its lane." She further

testified that their car was not being driven at high speed. Their speed was at about 80km/hr. she blamed the oncoming lorry which swerved into their lane and rammed into their motor vehicle KBL 508L.

9. The witness further stated that her mother JENNIFER NYOROKA MUNGANIA died as a result of this accident. In cross examination, the witness testified that she was seated as a co-driver and was carrying her child on her lap. The point of impact was the front of their car.

10. PW 1 BEATRICE NTHETU MUNGANIA initially testified as to how the accident occurred and as administrator to her mother's estate. She was further to be recalled to testify (as PW3, PW5 and PW 8)with regard to injuries she sustained, her son Trevor Munene and as regards the claim on behalf of her late husband Antony Mugambi (Estate). It was the late Antony Mugambi who was driving motor vehicle KBL 508L when the accident occurred.

11. PW 2 DAVID KALIONCHI MUNGANIA testified that JENNIFER NYOROKA MUGANIA {deceased} was his mother and she passed on as a result of the injuries she sustained after being involved in a road traffic accident on 16th April 2015. The deceased had 5 children and was a tea farmer earning Ksh 50,000/= per month. This amount would be verified by a slip used by the tea company. The witness further stated that the deceased would help the family pay school fees especially for their last two siblings who were still in school and at the time of death was 60 years old.

12. On cross examination, the witness confirmed that all the deceased children were adults and he was the last born aged 26yrs. Also he did not have any document to show that the deceased used to earn Ksh 50,000/= monthly. He confirmed that he went to the scene of the accident before the police arrived and found that the driver of Motor vehicle KBL 508V had died on the steering wheel of his motor vehicle.

13. PW4 FRANCIS MUGANIA also testified and stated that his wife Josephine Mokoiti too was in motor vehicle KBL 908L and sustained fatal injuries. The deceased left behind 6 children all of whom were above 18years old. At the time of her death the deceased was 56 years old and was in good health. The deceased was a businesswoman selling cereals and would earn approximately Ksh 10,000/= which she used to support her family with. He prayed for compensation for the loss suffered. In cross examination the witness stated he did not have proof in court to show that his late wife earned Ksh10,000/= and that his children live far off and would occasionally support him with small finances.

14. PW6 SYLVESTER WARURU NDERITU testified that his child SAMATHA WANJIRU was also in motor vehicle KBL 908L and sustained fatal injuries. The said child was 2 years old. He prayed to be compensated

15. PW7 was P.C PATRICK NZILE stationed at Wang'uru police station performing traffic duties On16th April 2015 at about 2300hrs an accident was reported to have occurred at Nyamidi area involving motor vehicle KBL 508V Toyota Fielder and KBU 795A Isuzu FKR Canter. The driver of motor vehicle KBL 508V, One Antony Mugambi died on the spot while other passengers were injured. The list of passengers in motor vehicle KBL 508V Toyota Fielder were;

    a. Antony Mugambi – Deceased

    b. Josephine Mokoit – 63yrs Deceased

    c. Jennifer Mugania- 62 years –Deceased

    d. Samamtha Wanjiru – 2 years –Deceased

    e. Beatrice Ndeto- 37 years (critical injuries)

    f. Nehema Kinya – 9 years (fracture of right leg and bruises)

g. Trevour Munene – 3 years – (cut wound on the hand)

16. The driver of the canter was unhurt but his passenger Moses Githinji complained of pains in the waist. The witness clarified that he was not the investigating officer but an inquest file had been opened and was awaiting judgment.

17. The witness in cross examination stated that the O.B report was made by P.C Pauline Kibati on 17/4/2015 at 3.35hrs, this was after she had visited the scene of the accident. As per the O.B entry it was observed that the entry made read as follows;

> " The accident occurred on 16/4/2015 at 2300hrs. Ezra Kathuri was driving towards Embu and when he reached the scene of the accident collided with a vehicle which was overtaking a trailer." KBL 508V was overtaking a trailer.

The witness stated that O.B did not state in which lane the accident took place and he did not testify in the inquest proceedings. He blamed the driver who was overtaking. In cross examination he confirmed that he did not visit the scene of the accident and did not have the accident scene sketch map. He further stated that in a scenario where they (the police) could not determine who was to blame for the accident they would opt for an inquest.

18. PW9 NEHEMA KINYA MUNGANIA who was a daughter to the late Antony Mugambi also testified and stated that she was 12years old and was a student at standard 7 at Goodreach Group of schools. That on 16/3/2015 they were travelling from Meru to Kerugoya, but they did not reach their destination as somewhere in Embu she saw a motor vehicle from the opposite direction moving in a zig zag manner and flashing its light. The said motor vehicle rammed into their motor vehicle and she lost consciousness only to wake up later at Mater hospital. She obtained a future on the right thigh, bruises and injuries to the head. She confirmed that her injuries had healed, but her right leg would usually get swollen.

19. The appellant called one witness DW1 EZRA KATHURIMA GITOBU. He confirmed that he was the driver of motor vehicle KBU 795Y ISUZU FRR which was being used to deliver parcels to Meru. On 16/4/2015 he was driving along to Meru and at Nyamindi area he saw a small vehicle overtaking a canter. He testified that he was driving at a speed of about 30km/hr because he was on a climbing lane.

20. He flashed his lights and hooted at the small motor vehicle but it did not return to its lane causing the two motor vehicles to collide head-on. According to DW1 when he saw that the oncoming motor vehicle was not responding to his flash lights, he swerved to the left but that side was slanted. He stated that, "I swerved to the left but that side was slanted. We had a head on collision. I fell down after impact. The other motor vehicle fell on the other side. Point of impact was on the lane facing Meru."

21. In cross examination DW1 stated that the canter was loaded with goods and he was driving slowly at about 30km/hr. he reiterated that it is the small car which was on the wrong as it was overtaking when it was not safe to do so. He stated that the impact was on the left side of the road (facing Embu) and the lorry was hit on the right side. He confirmed that there were fatalities in the small motor vehicle. He stated that after the accident motor vehicle KBL 508 lost control and veered to the left. His motor vehicle was damaged on the cabin and left side where it rested.

Submissions

22. The learned Magistrate did consider the evidence tendered and submissions filed and vide her considered judgment dated 16th July 2018 she found that the appellants were 100% liable for the accident. On quantum she did award the various plaintiffs , the following sums as damages

1st PLAINTIFF

i. Pain and suffering Kshs 10,000/=

ii. Loss of Expectation of life Kshs 100,000/=

iii. Loss of Dependency Kshs 500,000/=

iv. Special Damages Kshs 5, 500/=

2nd PLAINTIFF

i. General Damages Kshs 250,000/=

ii. Special Damages Kshs 8,200/=

3rd PLAINTIFF

i. General Damages Kshs 90,000/=

ii. Special Damages Ksh 3,000/=

4th PLAINTIFF

i. General damages Kshs 450,000/=

ii. Special damages Kshs 3,000/=

5th PLAINTIFF

i. Pain and suffering Kshs 10,000/=

ii. Loss of Expectation of life Kshs 70,000/=

iii. Loss of Dependency Kshs 3,212,800/=

iv Special Damages Kshs NIL

6th PLAINTIFF

i. Pain and suffering Kshs 50,000/=

ii. Loss of expectation of life Kshs 100,000/=

iii. Loss of dependency Ksh 350,000/=

iv. Special Damages Nil

7th PLAINTIFF

i. Pain and suffering Kshs 10,000/=

ii. Loss of Expectation of life Kshs 100,000/=

iii. Loss of Dependency Kshs 500,000/=

23. The plaintiffs were also awarded costs and interest of the suit. It is as against this judgment that the appellant filed this appeal majorly as against judgment on liability but also challenged quantum awarded to the 1st plaintiff, 5th plaintiff and 6th plaintiff.

Parties Submissions

24. The first issue raised by the appellant was that the trial magistrate erred in law to find that the appellant's driver was negligent and thus they were 100% liable for the accident yet the respondent did not adduce

evidence to prove that fact with certainty. They stated that by virtue of sec 107(1) and 108 of the *Evidence Act* it was incumbent upon the respondent's to prove existence of the facts which they asserted at trial. The respondents were therefor expected to present before court facts which unerringly supported their claim of negligence before the court could make a positive determination in their favor.

25. Relying on the case of Tread setters Tyres Limited Vs John Wekesa Wepukhulu(2010) eKLR , the appellants submitted that the evidence called on behalf of the respondent must consist of such either proved or admitted facts and after the case is concluded, two questions would arise(1) whether on that evidence, negligence maybe reasonably inferred and (2) whether, assuming it may be reasonable inferred, negligence is in fact inferred."

26. The appellants also submitted that this court had jurisdiction to review the evidence tendered in order to determine whether the conclusion reached at trial could stand. They relied on the case of Kirugu Vrs Kiruga & Another (1988) KLRat pg 348 as cited in Timsales Vs Simon Kinyanjui Nakauru Civil Appeal No 103 of 2003 and also Mbogo & Another V shah {1968} E.A

27. On this issue of negligence the appellants also relied on the case of Bawani Stores Limited & Another Vs Margaret Magiiri Gitau {2015}eKLR where it was held that the burden of proof of any fact or allegation is on the plaintiff to prove and the plaintiffs must show a causal link between someone's negligence and his injuries' sustained .

28. The 2nd issue raised by the appellant was that quantum as assessed and awarded to the 1st plaintiff, 5th plaintiff, and 6th plaintiff. They stated that the trial court adopted the wrong principles in awarding damages and thus prayed that they be reduced considering normal legal parameters and awards of similar injuries or fatal accidents. The appellants thus prayed that this appeal be allowed.

29. The 1st respondent did file their submissions opposing this appeal. They submitted that the evidence of PW1 Beatrice Mugania, who was an eye witness was cogent and it was supported by the evidence of PW9 Nehema Kinya her daughter. Both testified to the effect that motor vehicle KBL 508V was recklessly driven in a zig zag manner with its head lights on and it rammed into Motor vehicle KBU 795Y which was on its lane. They asserted that the evidence of the police officer PW 7 P.C Patrick Nzile that motor vehicle KBL 508V was overtaking was not solid because there was no sketch plan or OB Extract produced as exhibit to ascertain the point of impact or who was to blame in this accident. They thus finalized by stating that the evidence of PW7 P.C Patrick Nzile was purely speculative and inconclusive.

30. Further while still on the said evidence of the police officer the respondent stated that his evidence was hearsay as he was not the investigating officer and could not attribute negligence when the investigations were incomplete or pending. The inquest too had not been concluded. They relied on the case of Nairobi Hccc No 191 of 2013 John Karanja Waina (Deceased) Vs Elijah Oketch Adellah, which relied on the case of Commercial Transporters Ltd Vs Registered Trustees of catholic Diocese of Mombasa(supra) , where it was held that liability cannot be derived from a policer abstract produced in evidence.

31. The respondent also faulted the evidence of DW1 Ezra Gitobu as being inconsistent and his evidence was not corroborated by his co-driver or any documentary proof such as photographs. They also questioned why he did not stop or give way yet he was driving at a speed of 30km/hr.

32. The respondent also submitted that the appellant enjoined the 3rd party but lead no evidence to show how they were liable so at to share liability. The appellants failed to lead such evidence resulting in the suit as against the third party to be dismissed.

33. On quantum, the respondents stated that, the issue of quantum was never raised in the memorandum of appeal filed by the appellants and they would not make submissions on the same.

34. The 2nd respondent did not file submissions and did not participate in this appeal as the trial court dismissed the claim as against them.

Determination

35. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

36. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed aif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270

37. In Coghlan V Cumberland (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

38. Also it has been held by the court of appeal in Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 that;

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

39. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

40. The appellant's submitted that the respondent did not adequately prove that indeed it was the appellants who were negligent and therefor liable for the accident.

41. Section 107(1) of the *Evidence Act* provides that;

> " whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist."
>
> Section 108 of the *Evidence Act* further provides that ;
>
> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

42. In the supreme court case of Raila Amolo Odinga & others Vs IEBC & 2 others {2017} eKLR it was stated inter-alia that;

> " Though he legal and evidentiary burden of establishing he facts and contentions which support a parties case is static and remains constant through a trial with the plaintiff, however depending on the effectiveness with which he or she has discharged this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would loss if no further evidence were to be introduced."

43. The court of appeal in Mbuthia Macharia V Annah Mutua & Ano {2017}Eklr also discussed this issue and stated that;

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefor while both the legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incident of both the legal and evidential burden was with the appellant."

44. I also refer to The halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This

constitutions evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

45. It is clear in this appeal that the main issue in contention is liability and in particular the trial court finding that the appellants were 100% liable. From the submissions filed, the parties blame the opposite party and/ or their drivers for being negligent, reckless and/or careless thereby causing the accident. The point of divergence is who between the two driver's was negligent.

46. The respondent's key eye witness was PW1 Beatrice Nthetu Mugania and her daughter Nehema Kinya Mugambi, both testified that on 16th April 2015 they were enroute from Meru to Kerugoya when at about 9.30pm at Nyamindi along Mwea – Embu road they were involved in a road traffic accident which claimed the lives of other family members. It was their testimony that they saw an oncoming motor vehicle which had full light on. It swerved onto their lane and hit their motor vehicle. PW1 Beatrice Nthetu initially lost her consciousness but regained the same as she was being removed from the accident motor vehicle. PW9 Nehema too lost her consciousness and regained the same at Mater Hospital a few days later.

47. Both PW1 and PW 9 blamed the respondents for negligence and failing to control the canter, which according to them was being driven at high speed and swerved into their lane and crushed them headon.

48. The respondent did call DW 1 Ezra Kathurima Gitobu. He gave a completely opposite version of events. According too him he was lawfully driving motor vehicle registration KBU 795 ISUZU FRR enroute form Nairobi to Meru to deliver goods. At about 9.30pm he had reached Nyamindi area and was driving at about 30km/hr while on the climbing lane, when he saw a small motor vehicle over speeding and overtaking a canter which was heading toward Nairobi direction. He flashed his lights to warn the said motor vehicle but it did not return to its lane. He swerved on the left but the side was slanted. They had a head on collusion and his motor vehicle fell down on impact. The small motor vehicle KBL 508V also fell on the other side. According to DW1 the point of impact was on the lane facing Meru.{His rightful lane.}

49. The evidence of DWI found corroboration in the evidence of PW7 PC Patrick Nzile, who was stationed at Wang'uru police station and was performing traffic duties. He confirmed that this accident was reported at their police station and produced the police Abstract as Exhibit 6. He confirmed that he was not he investigating officer as case this was investigated by one P.C Pauline Kibati, who also visited the scene of accident.

50. In cross examination the witness stated that there were no remarks in the O.B but the accident report was made by one P.C Pauline Kbati. The entry was made on 17/7/2015 at 3.35am. he testified that "It was made after visiting the scene of accident (witness reads the O.B}It shows that accident occurred at 16/4/2015 at 23.00hrs. Ezra Kathuri was driving towards Embu and when they reached the scene of the accident collided with a vehicle which was overtaking a trailer. KBL was overtaking a trailer."

51. PW7 P.C Patrick Nzile also confirmed that he did not have the accident scene sketch Map nor did he visit the scene and that there was an inquest pending judgment.

52. PW5 DAVID KALIONCHI MUGANIA also in cross examination stated that the lorry was off the road on the left side as one faces Embu, while point of impact was on the right lane as one faces Embu. This evidence was contradicted by PW 7 who stated that the O.B does not state which lane the accident took place. While DW1 while referring to the accident scene stated that the point of impact was on

the left side facing Embu, his lorry was hit on the right front side and that the point of impact was on the left lane. After the accident Motor vehicle KBL 508 lost control and veered to the left.(meaning Back to its lane)

53. The trial magistrate at her judgment analyzed the issue of liability at pages 11 to 19 of her judgment (pages135 to 143 of the record of appeal) and a finding that " I tend to find that Neema corroborated Beatrice Evidence of the lorry swerving into their lane and causing the head on collision and will hold the defendant 100% liable jointly and severally"

54. This court is faced with two sets of circumstances and is duty bound to make a determination thereon however difficult the circumstances are. . This was appreciated by Madan , J (as he was then) in Welch Vs Standard Bank Limited (1970) EA 115 where he expressed himself as hereunder;

> " When there is no material to generate actual persuasion in the courts mind, still the court cannot un-concernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability.
>
> Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.......There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does so in this case.

55. Similarly , in Lakhamshi Vs Attorney General(1971) EA 118 it was held that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and inmost traffic accidents , it is possible on a balance of probability to conclude that one or other party was guilty, or both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the Centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.

56. The issue of apportionment of liability was also discussed in Khambi and another Vs Mahithi and another (1968) E.A 70 where it was held that;

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge." Similar decisions have been reached in Mahendra M Malde Vs George M Angira Civil Appeal No 12 of 1981

57. I have relooked at the evidence presented, the submissions, the judgment of the trial court and find as a fact that the trial magistrate erred in principal in the away she made a determination on liability that would warrant interference by this court.

58. As stated earlier noted the trial magistrate did go at length to analyze who was on the wrong as between the two drivers. She had two conflicting and diametrically opposite set of evidence and in the end believed the plaintiffs witnesses. This maybe so but her judgment does not provide for concise reasoning as to why PW1 AND PW9 evidence was more cogent and believable when considered against the evidence of PW7 the traffic police officer and DW1 Ezra Gitobu , the driver of motor vehicle KBU 795Y. This goes against provisions of Order 21 rule4 which provides that the court must provide reasons for the decisions reached.

59. Specifically the magistrate's finding that the suit lorry swerved into the lane of the other motor vehicle and caused the head on collision, cannot be justified by the evidence on record. The witness who ought to have shed light on the point of impact was PW7 P.C Patrick Nzile, whose evidence the court discounted as he was not the investigating officer and there was a pending inquest yet to be determined. As stated earlier, "the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case both the legal and evidential burden remained with the Respondent and obviously their case was weaken by the lack of further Evidence."

60. The 1st respondent had the evidential burden to convince court as to how the accident happened, once PW7 and DW1 had presented evidence to allege otherwise they needed to have brought in further evidence to support their case. Purely from the evidential point of view the respondent failed to do so. Further even if the evidence on record was to analyzed , PW1 testified in her evidence in chief that ;

> " The accident took place at 9.30pm. We were along Mwea- Embu road. It was a clear night when were reached river Nyamindi, at downhill, I saw an oncoming vehicle with full lights. It was swerving and it hit us. Later I learnt it was a lorry KBU 759Y."

61. DW1 also while testifying in chief stated that ;

> " The journey was eventful because at Nyamindi area, I saw a small vehicle overtaking a canter. I was driving at 30km/hr because I was climbing lane. The small vehicle was over speeding and overtaking a canter, which was heading towards Nairobi direction."
>
> "The accident occurred at night, I noted and flashed lights. When he did not respond, I swerved to the left but the side was slanted. We had a head on collision. I fell down after impact. The other vehicle fell on the other side. Point of impact was on the lane facing Meru".

At cross Examination DW1 stated that;

"I had driven form Nairobi with 10 tonne of goods. The lorry was heavy and had to drive it slowly."

62. From the evidence PW1 admits they were going downhill, while DW 1 evidence was that the motor vehicle was loaded with 10 tonnes of goods and he was on the climbing lane going at 30km/hr. Given this scenario it is not possible as alleged by the PW1 and PW9 that the KBU 795Y was on coming at high speed , swerved off its lane and rammed into motor vehicle KBL 508V. That explanation would not be logical given that the canter was going uphill fully loaded with goods.

63. DW1 also stated that he swerved to the left while trying to avoid the head on Collison but the side of the road was slanted, but it was too late and the accident occurred and the lorry fell on its side due to the impact. The action by DW1 to so swerve probable lessen the impact of the collision and would explain why PW1 and her son who she was carrying on the front passenger seat did not sustain fatal injury.

64. PW5 evidence also corroborates DW1 evidence that motor vehicle KBU 795Y CANTER was on its lane. PW5 confirmed that the canter was on the left lane facing Embu . He stated that ; " The lorry was off the road on the left side as one faces Embu" . This evidence is inconsistent with that of the PW1 and PW 9 who alleged that the lorry veered into their lane.

65. The sum total of the above I that I do find that the trial magistrate committed a fundamental error in her assessment of the evidence on liability and wrongly apportioned liability at 100% as against the appellants. The same is set aside. Further as there was no conclusive evidence present in court as to the precise point of impact it will not be repugnant to hold that both drivers were to blame and it is proper to divide the blame equally.

66. In this appeal, the Appellant also challenging the quantum of damages awarded to the 1st Plaintiff, 5th Plaintiff & 6th Plaintiff. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

67. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

68. Further in the case of West(H) and Sons Limited vs Shepherd [1964] AC 326 at 345 it was appreciated that ;-

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

69. The Appellants averred in their submissions that taking into account the injuries sustained and/or nature of quantum awarded in fatal injuries the said should be reduced for the following plaintiffs as follows;

    a. 1st Plaintiff; For loss of expectation of life the award should be reduced from Ksh 100,000/= to 50,000/=, while the award of Ksh 400,000/= for loss of dependency should be reduced to Ksh 200,000/= from Ksh 400,000/= awarded.

    b. 5th Plaintiff; they stated that the award of Ksh 3,212,800/= was high and the multiplier of 10years was inordinate given the vicissitude and uncertainties' of life. They urged the court to adopt a retirement age of 55 years and reduce the multiplier to 8 years.

    c. 6th Plaintiff; the deceased was 2years and 6 months at the time of death. The court awarded Ksh.350,000/= for loss of dependency. This award should not have been awarded as the toddler relied on its parents for upkeep and maintenance.

70. The Respondents in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld as the appellants never raised the issue in the memorandum of appeal filed.

71. The memorandum of appeal filed raised general grounds of appeal. In particular ground 2, 3 and 5 thereof consist of General grounds challenging the whole judgment and therefor it will be necessary to make a determination on the quantum awarded for the specific plaintiffs the appellants submitted against. This is also important especially with regard to Article 50(2) which provided for right to fair hearing.

72. The question which then arises, is if the quantum awarded was adequate or was it manifestly too high to justify interference and or intervention by this court.

73. It is trite law that when it comes to assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are unusually similar in terms of nature and extent of injuries sustained. The court of appeal in Stanley Maroa Vr Geoffrey Mwenda (2004) eKLR stated as follows ;

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable award keeping in mind the correct level of awards in similar cases."

74. Further in the case of Charles oriwo odeyo Vs Apollo Justus Andabwa & Ano (2017) eKLR the court stated that;

> " The court in making an award for damages must always consider prevailing inflation."

75. The 1st Plaintiff was aged 63 years and the court invoked the lump sum principle to award him Ksh100, 000/= for loss of Expectation of life and Ksh.400,000/= for loss of Dependency. Having looked at comparable awards and also the fact that the deceased was a tea farmer and would have definitely used part of her tea bonus to help in various family activities, I find no ground to interfere with the said award.

76. The 5th Plaintiff claim was pursued by the wife PW1Beatice Nthetu Mungania. The deceased was aged 47 years and was survived by the wife and 2 minor children (2nd and 3rd Plaintiff). The deceased was employed by Kenya Power & Lighting Company and was earning Ksh.50,000/=(P Exhibit 5(a),(b) & (c).

77. As per the evidence adduced the deceased net Pay for March 2015 was Ksh.40,160/= and would have retired at 60 years. The court considered and acknowledged the vicissitude and uncertainty of life and adopted a multiplier of 10 years. The trial court cannot in any way be faulted as to how it arrived at a figure of Ksh 3,212,800/= and this court finds no ground to interfere with the said award.

78. The appellant also objected to the quantum awarded to PW6 Sylvester waruru Nderitu, who sued on behalf of the estate of his late daughter Samatha Wanjiru Waruru(aged 2years and6 months). The appellants contended that the sum awarded of Ksh 350,000/= was excessive and should never have been awarded.

79. The trial magistrate correctly consider all the similar awards in her judgment and awarded the plaintiff a sum of Ksh 350,000/= for loss of dependency. This sum is not excessive given similar previous awards and also considering the inflationary trends thus find no ground to interfere with the same

Disposition

80. Having exhaustively analyzed all the issues raised in this appeal I find that it partially succeed on the issue of liability and fails on the issue of quantum where challenged. I do thus make the following orders;

    a. The finding on liability in the judgment dated 16th July 2018 by Hon Daffline Nyaboke Sure (R.M) In WANG'URU PMCC No 34 of 2016 is hereby set aside and substituted with a finding that both the appellants and the 1st Respondent are to share liability at a ratio of 50:50.

    b. That as this appeal arises from the test suit involving a series of matter namely; WANG'URU PMCC NO 19 OF 2016, PMCC NO 20 OF 2016, PMCC NO 21 OF 2016, PMCC NO 25 OF 2016, PMCC NO 27 OF 2017, & PMCC NO 29 OF 2016, this finding on liability will apply to all the above cases.

    c. The appeal as against quantum awarded to the 1st plaintiff , 5th plaintiff and 6th plaintiff is dismissed

    d. Each party to bear their costs of this appeal, while costs of the primary suit will be shared equally based on the apportionment of liability.

81. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

Court Assistant - Susan