REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. E 18 OF 2020

JOSHUA MULINGE ITUMO (suing for and on behalf of the Estate of DAMARIS

NDUKU MUSYIMI (Deceased).....APPELLANT

VERSUS

BASH HAULIERS LIMITED.....1ST RESPONDENT

JERINAH MUNINI MUENDO (Sued in her capacity as the Legal Representative to the

Estate of Fred Kinyamasyo Kivelenge (Deceased).....2ND RESPONDENT

(Being an Appeal from the Judgment of E. N. Keago (SPM) delivered on the 22nd day of October 2020 in Machakos Chief Magistrate's Court Civil Case No. 483 of 2014)

JOSHUA MULINGE ITUMO (suing for and on behalf of the Estate of DAMARIS

NDUKU MUSYIMI (Deceased).....PLAINTIFF

- VERSUS –

BASH HAULIERS LIMITED.....1ST DEFENDANT

JERINAH MUNINI MUENDO (Sued in her capacity as the Legal Representative to the

Estate of Fred Kinyamasyo Kivelenge (Deceased).....2ND DEFENDANT

JUDGEMENT

1. This judgement relates to two appeals, Machakos High Court Civil Appeal No. 18 of 2020 and Civil Appeal No. 23 of 2020. There is also a cross appeal filed in HCCA No. 18 of 2020. All these causes were consolidated under HCCA No. 18 of 2020. The appeal in HCCA No. 18 of 2020 is filed by the Plaintiff (hereinafter referred to as "the Appellant") in the lower court against the two defendants therein (hereinafter referred to as the 1st and 2nd Respondents respectively). The 1st Respondent filed a cross appeal within HCCA No. 18 of 2020 while the 2nd Respondent filed HCCA No. 23 of 2020.

2. The appellant herein, filed a suit vide a plaint dated 25th May, 2015 in which he claimed general damages, special damages, costs and interests arising from a road traffic accident which occurred on 4th June, 2011 in his capacity as the legal representative of the estate of **Damaris Nduku Musyimi** (deceased). The 2nd Respondent was sued in her capacity as was sued in her capacity as the legal representative of the estate of **Fred Kinyamasyo Kivelenge**, also deceased. According to the plaint, on the said date, the deceased, a minor, was lawfully travelling as a passenger in motor vehicle registration number KAN 583X Toyota Corolla owned by the 2nd Respondent along Mombasa road when at Lukenya area, the 1st Respondent's vehicle registration no. KBJ 672A/2D (sic) 3567 DAF Trailer was so negligently driven by its authorized agent that the same was caused to veer onto the path of motor vehicle reg. no. KAN 583X thereby violently colliding with the same. As a result, the deceased sustained fatal injuries resulting into loss and damage for her estate. In the alternative, it was pleaded that the said collision was substantially contributed to by the negligence of the driver of motor vehicle registration no KAN 586X hence the

Respondents were jointly and severally liable. The Appellant proceeded to set out the particulars of negligence for motor vehicle no. KBJ 672A, particulars pursuant to statute and special damages which were Kshs 93,500/-.

3. Save for the correction in the registration number which according to it was motor vehicle registration no. KBJ 672A/ZD 3567 DAF, the 1st appellant in its defence while admitting the occurrence of the said accident denied that the accident was caused by the negligence of its driver as allege din the plaint. It also denied the fact that the deceased was travelling in motor vehicle reg. no. KAN 583X. According to the 1st appellant the said accident was caused by the negligence of the driver of motor vehicle reg. no. KAN 583X whose particulars were set out. It further denied the particulars pursuant to statute and special damages and prayed that the suit against it be dismissed with costs.

4. Apart from the defence, the 1st Defendant gave a notice of claim against a co-defendant directed to the 2nd appellant pursuant to Order 1 Rule 24 of the Civil Procedure Rules. Suffice it to state that the Appellant filed a reply to the defence disputing the allegations made by the 1st Respondent.

5. Oh her part the 2nd Respondent who was sued in her capacity as the legal representative of the estate of **Fred Kinyamasyo Kivelenge** in her defence denied that the said deceased was the registered owner of motor vehicle reg. no. KAN 583X N Appellant and further denied that there was an accident on the date mentioned in the plaint in the manner pleaded involving the deceased. According to her, the said accident was wholly or substantially contributed to by the negligence of the driver of motor vehicle registration no. KBJ 672A/2D 3567 DAF particulars whereof were set out. It likewise sought that the suit be dismissed with costs.

6. In support of his case, the Appellant called two witnesses.

7. PW1, **PC Morris Juma**, the investigating officer, attached to Athi River Police Station on traffic duties, testified that on 4th June, 2011 at 4.00pm a fatal accident occurred at Lukenya area involving 3 motor vehicles KAY 292U Toyota Saloon, KBJ 672A/ZD 3567 Trailer and KAN 583X Toyota Saloon. According to him, motor vehicle KAN 583X Toyota Saloon from Nairobi toward Mombasa direction which was being driven by **Fred Kinyamwasia** carelessly without due care and attention and overtook two motor vehicles and upon reaching an oncoming motor vehicle, KAY 292U, tried to speed up. The driver of motor vehicle KAY 292Y moved off the road but an impact occurred on the right side mirror extending to the rear right rim. The motor vehicle KAN 583X finally hit a trailer KBNJ 672A ZD 3567 that was from Mombasa direction towards Nairobi and the occupants of motor vehicle KAN 583X suffered fatal injuries. In his view, the driver of motor vehicle KAN 583X was to blame for the accident since he overtook carelessly. However, no one was charged for the accident as the matter was still pending under investigations. He produced the police abstract as Pexhibit 1. He confirmed that the driver of motor vehicle KAN 583X died on the spot and that the occupants of the said vehicle were **Fred Kinyamwasia Kwerenge, Ibrahim Kinyamwasia, Damaris Nduku, Geofrey Mulinge** and **Victor Mumo** while the owner of the said motor vehicle was **Fred Kinyamwasia Kwerenge**.

8. In cross-examination by the 1st Respondent, PW1 stated that the trailer motor vehicle KBJ 672A was not to blame for the accident. Cross-examined on behalf of the 2nd Respondent he stated that the accident was reported by an un-named member of public vide the OB was made on 4th June 2011 while the police abstract was dated 22nd June, 2011. He was unable to tell whether further investigations were carried out and that investigations follow an OB entry. He admitted that the scene was visited and the report was booked and that it is normal to have sketch plans of the scene but he did not have the same.

9. Referred to the statement of the driver of motor vehicle KBJ 672A/ZD 3567, the witness stated that it was not correct that the police intended to charge **Faraj** but that it is normal to issue NIP. In his evidence, the person who was to blame is normally given cash bail. He confirmed that there are no independent witness.

10. In re-examination he clarified that his testimony was premised on the OB records and that the investigating officer were **Sergeant Atandi**, **Corporal Mathenge** and **PC Hussein**. According to him, the NIP does not mean that they must be charged.

11. PW2, **Joshua Mulinge Itumo**, the plaintiff herein testified that he was a teacher at Kenyatta University. On 4th June, 2011 his wife, Damaris Nduku Musembi and children were involved in Road Traffic Accident. In his evidence, he obtained letters of grant dated 26th November, 2012. According to him, the accident motor vehicle KAN 583X, which belonged to **Fred Kwerenge Kinyamasia** was carrying 5 people who had escorted him as he proceeded on overseas trip. In support of his evidence, he produced a copy of records which I produce as exhibit 3 (a). The said accident involved a motor vehicle KBJ 672A belonging to Bash Hauliers and he a copy of the search which he exhibited. He also produced the certificates of death for the 3 victims.

12. According to PW2, his wife was working with Teachers Service Commission as a Deputy Principal at St Kitulu High School earing about Kshs.54, 000/- and he exhibited a copy of the certified payslip as well as a copy of her employment letter. It was his evidence that he paid for letters of administration totaling to Kshs.30, 000/- and produced the receipt as exhibit. PW2 testified that the deceased's death was a big loss to him since despite him having registered for his PHD, he had to postpone it for 4 years.

13. On cross-examination by counsel for the 1st Respondent, PW2 admitted that he did not witness the accident. He disclosed that **Joseph Mbithi Musyimi** and **Annastacia Mueni Musyimi** were parents of the deceased though he did not have evidence in support of this fact. He however averred that together with the deceased they used to provide for the family and that the deceased used to depend on her salary. As at the time of her death her Net pay was Kshs.12, 960/=.

14. In re-examination he stated that though he was not at the scene of accident, he did call the police officer who testified on the circumstances of the accident. Referred to the certificate of confirmed letters of grant, he confirmed that it identified the beneficiaries including his parents in laws.

15. At the close of the Appellant's case, the defence called as **DW1, Faraj Said**. According to him, on 4th January, 2014 at about 3.00PM-

4.00Pm at Lukenya area he was driving towards Nairobi at about 50KPH. While following a salon car, the said car swerved to the left and the other motor vehicle registration no. KAN 583X, which overtook came and knocked his lorry. According to him, the scene was not a road marked with a yellow line was continuous. He blamed the driver of the motor vehicle KAN 583X for the accident since he was going uphill at a speed of 50KPH. He had 28 years' experience as a driver. He also disclosed that he was not charged of any traffic offence but a request was filed which was dismissed.

16. In cross-examination on behalf of the 1st Respondent, he stated that he did not do anything to avoid the accident though the oncoming motor vehicle came at high speed. Cross-examined on behalf of the 2nd Respondent, he stated that he was driving a trailer and that there was another motor vehicle KAY 292U which he denied that he was overtaking since he was on his left lane going uphill at Lukenya area. At the scene there was climbing lane and that the trailer was fully loaded about 20-25 tones. In his evidence, motor vehicle KAY 292U swerved to the left to avoid the accident and though he saw the oncoming vehicle, he did not do anything to avoid the accident. After impact on his truck he lost control and veered to the right side of the trailer. He confirmed that he was issued with NIP and cash bail of Kshs.10, 000/-.

17. In re-examination, DW1 stated that the impact was on the front tyres and the steering rod came out. He was however, not charged of any traffic offence.

18. In his judgement, the learned trial magistrate found that there was no dispute that an accident did happen whereby the deceased was involved as she was a passenger in M/V KAN 583X hence she had no control on the manner of driving of the said vehicle. He also found that from the evidence of DW1, he did nothing to avoid the accident. He therefore found that in as much as the driver of M/V KAN 583X drove carelessly, DW1 had a duty of care to other road users including those who were careless like the driver of M/V KAN 583X but he did nothing to avoid the accident. It was on that basis that the 1st Respondent was found 20% liable while the 2nd Respondent was found 80% liable. Based on the authorities cited before him, the learned trial magistrate awarded Kshs 20,000/- as damages for pain and suffering, Kshs 100,000/- for loss of expectation of life, In arriving at the award for loss of dependency, he applied Kshs 12,690/- which in his view was the net salary and taking into consideration that the deceased was also supporting her parents apart from her family, he adopted dependency ratio of 2/3rds and Multiplier of 20 years and arrived at Kshs 2,073,600/- as the appropriate award under this head.

19. Aggrieved by the said decision, the Appellant appeals to this Court citing the following grounds:

> 1. **That the Learned Trial Magistrate erred in law and in fact by misdirecting himself on what constitutes net salary for purposes of dependency, and in so doing, applied a multiplicand that was way below the deceased's correct net salary.**
>
> 2. **That the Learned Trial Magistrate erred in law and in fact by failing to consider adequately or at all the submissions by the Appellant's advocate on the issue of multiplicand.**
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> 3. **That the Learned Trial Magistrate erred in law and in fact by making an award for loss of dependency which was inordinately low considering the deceased's profession and earnings.**

20. It was therefore sought that the appeal be allowed, the trial magistrate's judgement on quantum be set aside, varied or reviewed and the appellant be awarded the costs of the appeal.

21. It was submitted in support of the said grounds that Appellant's appeal herein is against the Court's finding on the multiplicand. The Appellant submits that it was erroneous for the Court to adopt as net salary a figure which took into account expenses not legally deductible from the gross salary for purposes of computing loss of dependency.

22. It was noted that the 1st Respondent filed a cross-appeal in which it challenged the court's apportionment of liability, arguing that the 2nd Respondent should have been held 100% liable for the accident. The 2nd Respondent also filed an appeal in which she challenged the 2/3 dependency ratio arguing that since the Plaintiff (and deceased's husband) was also working, the court should have adopted a dependency ratio of 1/3. This Appeal by the 2nd Respondent was filed as Machakos High Court Civil Appeal Number E23 of 2020, and was consolidated with the Appellant's appeal herein for purposes of hearing.

23. As regards multiplicand, it was submitted that the Appellant testified that the deceased was a teacher employed by the Teacher's Service Commission and he produced a letter of confirmation from the employer. He also produced a copy of the deceased's payslip for the month of June 2011 which showed that she was earning a gross salary of Kshs. 54,394/- but her take-home salary for that month was Kshs. 12,960.20 which the court adopted as the net salary, and hence as the multiplicand in the case. It was submitted that since legally a person's net salary for purposes of computing loss of dependency comprises gross salary less statutory deductions only, the court erred in adopting the paltry sum of Kshs. 12,960/- as the multiplicand, and that the court ought to have applied the sum of Kshs. 43,824/-, being the deceased's gross salary less statutory deductions. In this regard the Appellant relied on **Nyeri Civil Appeal Number 22 of 2014 - Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015),** where the Court of Appeal held that the net income determines the multiplicand and it is only net of statutory deductions. He also relied on **Kisumu Civil Appeal Number 48 of 2016 - Mary Osano (Personal Representative of the estate Charles Otwori Ogechi - Deceased) v Simon Kimutai [2020] eKLR** and **Machakos HCCC NO. 332 of 2012, Janet Chonge Walumbe & 2 others v Julius Mwaniki & another [2019] eKLR**.

24. According to the Appellant, from the payslip, it is clear that some of the amounts deducted comprise savings. This applies to the monthly contribution of Kshs. 1,200 to Madison Insurance which is a voluntary saving, and the Kshs. 4,000/- to Mwalimu Sacco. It would be totally unfair and illegal to consider these as deductions from the deceased's gross salary for dependency purposes while they were actually contributions to a saving scheme. Just adding these two figures to the take-home salary for that month makes a total of Kshs. 18,160.20. Even if the court was to apply the double compensation principle, this would still be the minimum sum to be adopted as net salary. It was further submitted that two of the deductions, being Kshs. 562/- and Kshs. 2,546/-, relate to loan interest and submitted that in the instance case, since the loans were insured as stated highlighted above, then interest on the loans would not be chargeable after the deceased's death

in any event. These therefore ought not to have been deducted from the gross salary. Again adding these to the sum of Kshs. 18,160.20 above makes Kshs. 21,268.20 which would be the net salary if the double compensation is to be considered.

25. According to the Appellant, the loans are not a permanent charge on the deceased's salary, and it would be unfair to deny the dependents the benefit of the full net salary for the periods after the loans would have been paid up. The deceased's payslip indicates clearly for each loan what the balance was, and how much was payable monthly. It was submitted that the University Loan balance was Kshs. 12,163.70. At the indicated repayment rate of Kshs. 1,014.20 per month, the deceased would have cleared the loan exactly 12 months, or one year, from the date of her untimely death. Considering the multiplier of 20 years applied by the court, it is simply oppressive to reduce this amount for the full period yet it would have been restored as part of the deceased's net salary for 19 out of the 20 years.

26. Regarding the SACCO loan with a balance of Kshs. 50,000/- at the monthly repayment of Kshs. 6,250 would have been repaid in 8 months. Yet for less than one year the deceased's family loses the dependency amount of Khs. 6,250/- monthly for 20 years in this judgement. The second SACCO loan with a balance of Kshs. 657,325/- at the monthly repayment of Kshs. 11,740/- would have been repaid in 56 months or just under 5 years. The third SACCO loan with a balance of Kshs. 251,650/- at the monthly repayment of Kshs. 3,000/- would have been repaid in 84 months, which is 7 years.

27. In the Appellant's view, it is clear that if the deceased had remained alive and continued to service her loans, by the end of 7 years she would have cleared all her loans. Again, working with the multiplier of 20 years, for the 13 years after that she would have been taking home the full net salary of Kshs. 43,824/-, yet the current judgment applies the sum of Kshs. 12,960/- only for this whole period**.** The Appellant lamented that this is the unfairness that is meted on the deceased's family by the court's decision to treat the loans as lawful deductions for purposes of loss of dependency. Perhaps it is because of these convoluted calculations, maybe balanced with the fact that the deceased would definitely have been entitled to salary raises which have not been factored in, that the Court of Appeal reached the decision to exclude all loans from the deductions to be made in computing dependency.

28. This Court was therefore invited to find that the subordinate court erred in failing to apply this principle laid down by the Court of Appeal, that in so doing it proceeded on a totally erroneous principle and as a result arrived at an award for loss of dependency that was way below what the deceased's estate was entitled to. He urged the Court to adopt the sum of Kshs. 43,824/- as the multiplicand, and replace the subordinate court's award for loss of dependency with one for the sum of Kshs. 7,011,840/-, made up as follows:

Kshs. 43,824/- x 12 x 20 x 2/3 = Kshs. 7,011,840/-

29. It was however submitted that if the Court is not inclined to allow 'double compensation' to the deceased's estate, there is an accurate way of ensuring that the family does not benefit twice, but also that it is not denied compensation legally due to the estate. This would be to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances which are the only component that would in the Court's view result in double compensation. These are the 3 SACCO loans with balances of Kshs. 50,000, Kshs. 657,325/- and Kshs. 251,650/-), a total of Kshs. 958,975/-. This would then work out as follows:

Total loss of dependency sum as above	-	Kshs. 7,011,840/-
Less total of the loan balances	-	Kshs. 958,975/-
Total	-	**Kshs. 6,052,865/-**

30. The Court was invited to consider this as a possible alternative to guard against double compensation, but also guard against the injustice of denying the deceased's estate more than half of the compensation due to them simply because the deceased was repaying loans at the time of her demise.

31. On dependency ratio it was submitted that the subordinate court applied the conventional 2/3 dependency ratio for a married person which the deceased in this case was. Though it was contended by the 2nd Respondent that the court should have applied a ratio of 1/3 because both the Plaintiff and the deceased were employed and therefore shared responsibilities, the Appellant submitted that at the hearing before the Court the Appellant stated that both of them used to provide for the family and that at the time of his wife's demise he had registered for a PhD program but had to suspend it for 4 years.

32. It was submitted that it is clear from the deceased's payslip that the reason she was taking home a paltry Kshs. 12,960.20 out of her net salary of Kshs. 43,824/- is that she was investing the money in savings, or paying loans she had taken. This would mean that the deceased was putting not just 2/3, but almost ¾ of her salary towards the family. Since the deceased was a married woman, it can only be taken that the savings were made and the loans taken in the context of marriage, and therefore were for the benefit of the family. This is therefore one case where anything less than a 2/3 dependency ratio would be totally against both the law and the evidence on record.

33. It was also noted that the Plaintiff was not the deceased's only dependent. The certificate of confirmation of grant produced by the Plaintiff indicates clearly that the deceased's father is entitled to 40% of the deceased's estate. This is a finding, by a court of equal status to this Court, that the deceased's father was dependent on her almost to the same extent as her husband the Plaintiff. It is therefore not material that the Plaintiff was also employed, in view of this fact. In support of this submission, the Appellant relied on N**airobi HCCC No. 392 of 2014 - James Mutuma Kirimi vs. P.C.E.A Kikuyu Hospital & another [2017] eKLR** wherein the court, quoted the unreported case of **Beatrice Waingui Thairu vs. Honourable Ezekiel Barngetuny & another Nairobi HCC 1638 of 1988** and contended that the facts of the present case dictate a dependency ratio of at least 2/3, and that the subordinate court was right in so holding.

34. On liability, it was submitted on behalf of the Appellant that at the hearing before the lower court the 1st Respondent called a witness who was the driver of the motor vehicle registration number KBJ672A/ZD 3567 DAF at the time of the accident while the 2nd Respondent did not call any witness. The court apportioned liability between the 1st and the 2nd Defendants in the ratio of 20:80. The basis of this

finding, in the Appellant's opinion was first, the 1st Respondent's driver was issued with a Notice of Intended Prosecution by the police. This, while not proof of negligence, is an indication that the police officers who first visited the scene formed the view that the driver could not be absolved of, and in fact may have been to, blame for the accident. The police officer who testified as PW 1 stated that it is normal to issue a Notice of Intended Prosecution, but that the person who was to blame is normally given a cash bail. Then DW 1, the driver himself, stated that he was given both a Notice of Intended Prosecution and a cash bail of Kshs. 10,000/-. If the assertion by PW 1 on cash bail is to be believed, it would follow that DW 1 was actually to blame for the accident, and that the only reason he was not prosecuted was that there were no independent witnesses as stated by PW 1.

35. Secondly, it was submitted that the driver told the court that the driver of the motor vehicle ahead of him swerved to the left and thus avoided the collision, but that he did not do anything to try and avoid the accident. In the Appellant's view, this amounts to negligence on his part. Besides the motor vehicle ahead of him, was a small car, a saloon. This meant that while driving a high trailer behind a saloon car, DW 1 had far better visibility of the road ahead and, if indeed KAN 583X had been overtaking, would have seen it in good time for him to go off the road and avoid the collision. Yet he did nothing. DW 1 was also not able to explain why he lost control of his motor vehicle, a huge trailer, on impact from a small car, if he had not been driving at a speed that was too high in the circumstances. Neither could he explain why, on impact, he veered to the right side of the trailer, rather than to the left which was his correct lane.

36. Since all the occupants of the 2nd Respondent's vehicle suffered fatal injuries, it was submitted that the only version of the accident that has ever been told is that of DW 1, the court was invited to take judicial notice of the self-preservative nature of human beings and treat as biased.

37. In support of his position that the Respondents ought to have been held equally liable, the Appellant relied on **Nairobi Civil Appeal No. 34 of 2005 - Hussein Omar Farah v Lento Agencies [2006] eKLR** where the court cited **Barclay – Steward Limited & Another Vs. Waiyaki [1982-88] 1 KAR 1118** and **Baker vs. Market Harborough Industrial Co-Operative Society Ltd [1953] 1 WLR 1472 at 1476.**

38. The Court was invited to find that in the circumstances of this case, liability ought to have been apportioned equally between the Respondents according to the principles established in the precedents above. In the alternative, it was contended that the trial magistrate, having observed the demeanor of the witnesses, may have been better placed to make a decision on the level of contribution of each driver, and this court should let its decision stand.

39. This Court was therefore urged to allow the Appellant's Appeal, and disallow the Appeals by both Respondents in this matter and with costs to the Appellant.

40. The 1st Respondent also filed a cross-appeal based on the following grounds:

> **1. That the Learned Trial Magistrate erred in law and in fact in finding the Appellant 20% liable for the subject accident against the weight of evidence on record which clearly showed that the 2nd Respondent was wholly to blame.**
>
> **2. That the Learned Trial Magistrate erred in law and in fact in apportioning liability at 20%-80% as against the Appellant and the 2nd Respondent respectively, when the latter did not adduce any evidence to rebut the evidence of PW1 and DW1.**

41. It was therefore sought that the judgement on assessment of liability be set aside and substituted therefor with an order finding the 2nd Respondent 100% liable.

42. On multiplicand, the 1st Respondent associated itself with the position adopted in **Janet Chonge Walumbe & 2 Others vs. Julius Mwaniki & Another [2019] eKLR - Machakos HCCC No. 332 of 2012** that not including the loans with other deductions would amount to double compensation to the Plaintiffs since the loan money had already been used. It was argued that it is clear from the Payslip that most of the deductions were SACCO interests and loan recoveries. This would mean that the deceased had taken those loans which were now being liquidated through deductions from her salary. For the Appellant to now say that the deductions should be included in his claim would clearly lead to double compensation, having already made use of the loan proceeds. In the 1st Respondent's view, what is relevant for consideration when considering a multiplicand is what was available for use by the deceased and her dependants as at the time of death and that the net sum of Kshs. 12,960/= as per the payslip. It was contended that the calculations made by the Appellant's Advocates in their submissions as to the amounts which would have been available at different times in the deceased's life-time are ill-advised since it is not possible to tell what would have happened within the 13 years which is said to have been the period it would have taken the deceased to clear her loans. For this reason, it was submitted that the adoption of the net pay of Kshs. 12,960/= by the Trial Magistrate was in order and should be upheld.

43. With regard to the multiplier, the 1st Respondent disclosed that it had submitted for one of 15 years in the lower court based on the case of **Gichuhi Mwaura Githinji –vs- Greensteds School & Others** which is reasonable.

44. Regarding dependency ratio, it was contended that the 1st Respondent agreed with the 2nd Respondent's contention that this was a high ratio based on the case of **D.K.M (Suing as Legal Representative to the Estate of J-M.M.- Deceased –vs- Mhari K. Towolde – HCCC No.139 of 2009 –[2018]eKLR.** The Court was urged to find that 1/3 dependency ratio is reasonable as submitted on behalf of both the Respondents, the Defendants in the lower court.

45. On liability, it was submitted on behalf of the 1st Respondent that it is strange that although PW 1, the Police Officer based at Athi River Police Station testified on behalf of the Plaintiff, the Plaintiff's Advocates did not base their submissions, both in the lower court and in this Appeal on that testimony. They concentrated on analysing the evidence of DW1 and the fact that the 2nd Defendant did not adduce any evidence in the lower court as if the burden of proof lay on the Defendants. That witness, it was noted confirmed that from the Police records motor vehicle registration number KAN 583X was to blame for the accident while the Appellant admitted that he could not tell how the

accident occurred as he neither witnessed the accident nor visited the accident scene. Yet, the burden of proof lay on him to establish the various Particulars of negligence pleaded in the Plaint. In support of this submission, the 1st Respondent relied on the case of **Morris Njagi & Another –vs- Beatrice Wanjiku Kiura HCCA No. 17 of 2017** in which the Court relied on **Treadsetter Tyres Ltd. –vs- John Wekesa Wepukhulu (2010) eKLR** where **Ibrahim J.** allowed an Appeal and quoted ***Charles Worth & Percy On Negligence***, 9th Edition at P.387 on the question of proof, and burden thereof and the case of **Stephen M. Mwangi & 2 Others –vs- Albert Wesonga (Suing as the Administrator, a dependant and on behalf of the dependants of Rhoba M. Shikuku DCD) & Another- Eldoret HCCA No. 66 of 2016**.

46. In the Appellant's view, the Appellant herein did not discharge that burden of proof and wondered the basis upon which the Respondents could be held equally liable in light of PW1's testimony that the driver of car registration number KAN 583X was the one blamed for the accident.

47. According to the 1st Respondent, the evidence of DW1 showed that it would have been impossible for DW1 to have taken any action to avoid the accident. on the evidence on record it was argued that the deceased driver of motor vehicle registration number KAN 583X was wholly to blame for the said accident and that the 2nd Respondent having adduced no evidence in the lower court, the evidence of both PW1 and DW1 was uncontroverted. The Trial Magistrate thus erred in law and in fact in holding the 1st Respondent 20% liable for the subject accident.

48. The Court was therefore urged to dismiss the Appellant's Appeal and allow the 1st Respondent's Cross-appeal and the 2nd Respondent's Appeal with costs.

49. In her appeal, the 2nd Respondent relied on the following grounds:

> **1. That the Learned Trial Magistrate erred in law and in fact in finding a dependency ratio of 2/3 and thereby awarding damages to the 1st Respondent amounting to Kshs 2,233,600/=**
>
> **2. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the 1st Respondent considering the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.**
>
> **3. That the Learned Trial Magistrate erred in law and in fact by disregarding established principles in awarding damages in the case before him.**

50. It was submitted on behalf of the 2nd Respondent that that the trial court had the advantage of getting the oral testimony of the witness first hand including but not limited to the witnesses' demeanor. Accordingly, the appellate court should only be called to interfere with the lower courts' judgement where there is clear misinterpretation or variation of facts and the law leading to gross error thereby denying justice. In this case it was submitted that there was no such error to warrant the interference of the lower court's judgement and reliance was placed on **Mbogo & Another vs Shah, [1968] EA, p.15**; as was quoted in the case of **Kenya Human Rights Commission & Another vs. Attorney General & 6 others [2019] eKLR.**

51. On loss of dependency, it was submitted that according to the Appellant's pleadings the deceased was aged 36 years old as at the time of her death and was working as a Secondary School Teacher as at the time of her demise. The Plaintiff/appellant in their amended Plaint listed the deceased's husband and parents as dependants. However, since the appellant did not prove any damages suffered by the persons listed, it was submitted that the deceased's husband/widower was the man/head of the house/provider who was on employment as a University lecturer. The widower/appellant did not prove his loss of dependency on the deceased and neither was there any proof of dependency or loss of it by the deceased's parents. It was therefore proposed that dependency ratio of one-third (1/3) was reasonable based on **D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR** and **Machakos Civil No. 124 of 2014 - *Elizabeth Muthoka vs. Martin Musila Muthoka.***

52. On multiplicand, it was submitted that though not expressly pleaded in their amended Plaint, the Appellant testified that the deceased was earning a salary of Kshs. 54,394/=. The Plaintiff produced the deceased's payslip for the month of June, 2011 showing that the deceased was in permanent employment and was earning a gross salary of Kshs. 54,394/= per month where after the total deductions, the net income is Kshs. 12,960/=. According to the 2nd Respondent, the amount that was available for dependency at the end of the month as at the time of death was Kshs. 12,960/= which was the net salary as the deductions do not necessarily go to the benefit of the dependants and reliance was placed on **D K M (Suing as Legal Representative to the Estate of J M M – Deceased) v Mehari K. Towolde [2018] eKLR**.

53. In the foregoing, this Court was urged to find dependency ration of one third (1/3); multiplicand of Kshs. 12,960/= and to proceed to compute the final award as follows:

> **Kshs. 12,960/= x 20 years x 12 months x *1/3* = Kshs. 1,036,800/=** *(subject to liability)*

Determination

54. I have considered the issues raised in these consolidated appeals and the cross-appeal. Three issues fall for determination in the same. Fist is the issue of liability and whether the 1st Respondent ought to have been found 20% liable in the circumstances of the case. Secondly, is the issue of the appropriate multiplier and multiplicand. Thirdly, is the issue of dependency ratio.

55. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

56. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

57. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

58. It was therefore 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 circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

59. The 1st Respondent in this appeal challenges the trial court's finding on apportionment of liability. As to whether the apportionment of liability was proper, in **Khambi and Another vs. Mahithi and Another [1968] EA 70**, 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.

60. That seems to have been the position in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** and **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981**, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

61. In this case the learned trial magistrate apportioned liability between the 1st and 2nd Respondent in the ration of 20:80. The 1st Respondent takes issue with this finding on the ground that PW1, a police officer, who testified as the Appellant's witness placed the blame for the accident on the 2nd Respondent wholly and that there was no eye witness to the accident.

62. That the burden of proof was on the appellant to prove his case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"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."

63. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 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."

64. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

65. In **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR**, **Ibrahim, J** (as he then was) cited ***Charlesworth & Percy on Negligence***, 9th Edition at pg 387 inn which it is stated that:

"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

66. Similarly, in **Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J** quoted ***Halsbury's Laws of England***, 4th Edition at paragraph 662 at page 476 where it is stated that:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

67. In the case of **Henderson vs. Henry E Jenkins and Sons [1970] AC 232 at 301** it was held that:

"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgement at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants."

68. In **Simpson vs. Peat (1952) 1 All ER 447** it was held that errors of judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. That was the same position in **Rambhai Shivabhai Patel & Another vs. Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36** where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

69. Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent. As stated hereinabove in ordinary cases a case such as the present one would fail for failure by the Appellants to prove that the accident was caused by the negligence of the Respondent. In that case there would be no evidence as to whether it was the deceased who was liable or the driver.

70. It is true that in his evidence, PW1 testified that from the records held by the police, it was the driver of the 2nd Respondent's vehicle that was to blame. In his evidence, PW1 denied that it was intended to charge the driver of motor vehicle KBJ 672A/ZD 3567, **Faraj** who testified as DW1 and that it is normal to issue Notice of Intention to Prosecute (NIP). In his evidence, the person who is to blame is normally given cash bail. However, in his evidence DW1 confirmed that he was issued with NIP and cash bail of Kshs.10, 000/-. So that going by the evidence of PW1 and DW1, there is evidence tending to show that the police intended to charge DW1.

71. However, caution must always be taken not to take the decision by the police to charge a particular person as conclusive evidence that that person and not the other was the one responsible for the accident. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken o be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

72. In this case by the time of the hearing no one had been charged. However, even where a person is charged and either convicted or acquitted, it does not follow that the person is by that mere fact the only one responsible or not responsible for the accident.

73. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"**

74. In **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998**, it was held by the Court of Appeal that:

> **"Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous…It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."**

75. Platt, JA in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** opined that:

> **"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."**

76. According to **Apaloo, JA** (as he then was) in the same case:

> **"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."**

77. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

> **"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."**

78. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

> **"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it… Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or**

to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."

79. In this case DW1 in his own words testified on cross-examination that the car in front of him motor vehicle KAY 292U swerved to the left to avoid the accident and the other motor vehicle registration no. KAN 583X, which overtook came and knocked his lorry. Though he saw the oncoming vehicle, he did not do anything to avoid the accident though he stated that the oncoming motor vehicle came at high speed. He however did not expound why he did not take any action to either avoid the collision or reduce the impact thereof. In **Zarina Akbarali Shariff and Another vs. Noshir Pirosesha Sethna and Others [1963] EA 239**, it was held that:

"A driver on the main road...is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his *prima facie* right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have certiorated him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road. There is no doubt that anyone driving on the main road is entitled to keep his proper place on the road, and to do so in reliance on the side traffic heaving itself as the rules of the road desires, until it may be the very last moment observation of a gross infringement by others calls for a special attempt to deal with it…If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions…A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do…It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take…He cannot be expected to cope with every form of recklessness or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident…This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."

80. Similarly, in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434** it was held that:

"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it…There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct…Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently."

81. According to **Aganyanya, J** (as he then was) in **Merali & 2 Others vs. Pattani [1986] KLR 735:**

"That one is driving on major road does not mean that she is entitled to ignore traffic approaching the junction from the minor road and assume, which the plaintiff here did, that such traffic would always conform to the "yield" sign…The plaintiff was thus negligent in failing to slow down. The possibility of danger emerging at that junction on either side of the minor road was reasonably apparent in view of the fact that visibility was obstructed by high hedges and it was incumbent upon the plaintiff to take extra precautions. This was not a case where the plaintiff should have taken that it was a mere possibility that danger would emerge, which would never occur to the mind of a reasonable man…Anyone driving on a major road is entitled to go on that road in a proper position and is entitled to keep his proper place on that road and to do so in reliance on side road traffic behaving himself as the rules of the road desires until it may be at the very last moment some observations of a gross – infringement by other calls for special attempt to deal with it. The driver on a major road as the plaintiff was is not expected, say, to slow down to a pace of 15 miles an hour in broad daylight, when approaching a side road or otherwise share the blame for any collision, which may occur. But here the plaintiff omitted to take due care for the safety of the defendant and as a prudent driver, she ought to have guarded against possible negligence of drivers on the minor road, defendant included, as experience shows negligence to be common…Though therefore the defendant was mainly

to blame for the accident and ought to compensate the plaintiff therefor; the plaintiff contributed in some measure to it and her contributory negligence put at 30%."

82. According to the decision in **Mwanza vs. Matheka [1982] KLR 258:**

"Speed Itself is not necessarily negligence. But it is probable that the driver of the bus took no action at all, according to the evidence, to avoid this violent meeting. He did not ease further to his near side or slow down. He was not, of course, required to steer his bus with its passengers over to his near side straight into the culvert. He must have seen the tanker approaching long enough to rule out any decision having to be made in the agony of the moment…On the evidence, the plaintiffs have proved the defendants were negligent, but it is not possible to apportion the blame and so the defendants are equally to blame."

83. What comes out from the said decisions is that there is no hard and fast rule when it comes to apportionment of liability where one driver is *prima facie* on the right. In other words, a driver on the road must always keep at the back of his mind that some road users are likely to be negligent give allowance for that and ought not to adopt an attitude that as long as he is driving properly on the road, he ought not to take action which a reasonable driver is expected to take when there appears to a possibility of danger posed by other roadusers. If he fails to do so, he could be liable in negligence if not wholly to a certain extent.

84. In light of the evidence on record that not only was DW1 served with the NIP but was also bonded coupled with his own evidence that he took no action to avoid the collision however little, there is no basis upon which I can find that that apportionment of liability was clearly wrong, or based on no evidence or on the application of a wrong principle or that it was manifestly erroneous. Though there was no eye witness, as was held by **Madan, J** (as he then was) in **Welch vs. Standard Bank Limited [1970] EA 115**:

"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly 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. Everyday, 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 had nothing by which to draw any 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 fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising 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 hold so in this case."

85. 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 in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that 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 have been negligent in failing to take evasive action. It is usually possible, although often 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."

86. That brings me to the issue of dependency. In **Nyeri Civil Appeal Number 22 of 2014 - Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015) eKLR,** the Court of Appeal expressed itself as hereunder:

"In this case, there was no complicated record of evidence to evaluate. Only Hellen testified and produced documentary evidence. On the issue of the salary, the deceased's last pay-slip was produced and it showed clearly his gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error. In the case of *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the Fatal Accidents Act which we cite in part as follows:

> ***"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. (Emphasis added)***

As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. In this case, Hellen testified, and it is apparent from the pay-slip, that the net salary after statutory deductions was Sh. 19,373, and indeed counsel for KSSL accepted that figure in his submissions. There is no reason why the High Court should have interfered with

that figure."

87. Similarly, in **Kisumu Civil Appeal Number 48 of 2016 - Mary Osano (Personal Representative of the estate Charles Otwori Ogechi - Deceased) vs. Simon Kimutai [2020] eKLR**, the same court stated as follows:

> **"Counsel for the appellant submitted that the deceased's net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions as contained in the payslip are; PA.Y.E at Kshs 23,947; NHIF at Kshs 320 and NSSF at Kshs 3748 which totals to Kshs 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand."**

88. In the Appellant's view, the decision in **Machakos HCCC NO. 332 of 2012, Janet Chonge Walumbe & 2 Others vs. Julius Mwaniki & another [2019] eKLR** where the court held that not including the loans with the other deductions would lead to a double compensation to the plaintiffs since the loan money had already been used was contrary to the above holdings.

89. In my respectful view there is no substance in that submission. What the Court of Appeal has held is that net pay is gross pay less statutory deductions while the High Court holding is that the Court ought to take account of any benefits that the deceased may have received in advance and which if not taken into account is likely to lead to double compensation. That is my understanding of the holding in **D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR** where the court stated that,

> **"……. The plaintiff had urged the court to use a multiplicand of Ksh.56,235 which was the gross pay. The payslip annexed shows there were some deductions and the defendant urged the court to use the net salary of Ksh.28,726. The letter from the Ministry of Medical Services showed total earnings as Ksh.56,235. The net pay for February 2005 indicates Ksh. 29578 as net salary. The court cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants. The court adopts Ksh.29,534 as per the multiplicand.**
>
> **Therefore the multiplicand will be a proportion of the deceased's net income as was also held in the case of Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, quoted in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR where the Court of Appeal stated the law on assessment of damages under the Fatal Accidents Act which we cite in part as follows: "The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."**

90. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency were enumerated by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

> **"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case."**

91. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, held that:

> **"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… I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288…"**

92. In support of this submission, the Appellant relied on N**airobi HCCC No. 392 of 2014 - James Mutuma Kirimi vs. P.C.E.A Kikuyu Hospital & another [2017] eKLR** wherein the court, quoting the unreported case of **Beatrice Waingui Thairu vs. Honourable Ezekiel Barngetuny & Another Nairobi HCC 1638 of 1988** stated as follows:

> "I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288."

93. In my view, where the deceased had taken some temporary advance or loan, the same ought to be taken into account for the period

covered by the facility and not for the entire period which the Court finds as regards the reasonable figure representing so many years purchases, otherwise known as the multiplier. I therefore agree with the Appellant that the learned trial magistrate erred in applying the amount stated in the payslip for the whole period of the multiplier. I agree that the prudent thing to do would have been to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances being the 3 SACCO loans with balances of Kshs. 50,000, Kshs. 657,325/- and Kshs. 251,650/-), a total of Kshs. 958,975/-. If that is done the amount due under the head of loss of dependency would Kshs. 7,011,840/- less total of the loan balances amounting to Kshs. 958,975/- leaving the net balance as Kshs. 6,052,865/-. The appeal therefore succeeds on that ground to that extent.

94. The next issue is that of multiplier. According to **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services** (supra):

> **"When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."**

95. In **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another** (supra), the same Judge held at page 248 that:

> **"The court should…multiply the multiplicand by a reasonable figure representing so many years purchases. 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 dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

96. However, the Learned Judge in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** opined that:

"The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

97. What I understand the Learned Judge to be saying is that each case must be decided on its own facts and circumstances. There are cases where the circumstances warrant an application of a multiplier that is low or high depending on the deceased's needs and the needs of his or those he or she was taking care of. However, dependency being a matter of fact, this Court is only entitled to interfere with its finding where, as was held by the Court of Appeal in **John Ndung'u Ngethe vs. Patrick Murima Gitau & 2 Others Civil Appeal No. 143 of 1998,** it is shown that it was perverse or that there was no evidence at all in support of it. Similarly, in **Ronald Kimatu Ngati vs. Ukulima Sacco Society Ltd Civil Appeal No. 277 of 2007 [2011] eKLR** the same Court held that subject to the caution in ***Selle's Case*** an appellate court will be slow to interfere with the findings of fact made by the trial court unless those findings are based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings.

98. In his judgement, the learned trial magistrate in arriving at the dependency ratio took into account the fact that the deceased was taking care of not only her family but also her parents. As held in the authorities cited, one of the factors that the Court ought to take into account in deciding the said ratio are the personal circumstances of both the deceased and the dependant. In this case the trial court took into account the deceased's burden which was clearly a relevant matter. There was evidence on record that her parents depended on her. The deceased's position must therefore be distinguished from that in **D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR** where it was held that:

> **"……The principle in ascertaining the ratio of dependency is $^{2}/_{3}$ of the net salary as it is presumed that $^{1}/_{3}$ of the salary is owned and the $^{2}/_{3}$ dependent by others. However, in some instances courts have established that in the case where both spouses were working both make a contribution of $^{1}/_{3}$ and in the case one spouse is working and the sole provider of the family a dependency of $^{2}/_{3}$ is applied. The case in *Elizabeth Ngina,* supra, the court adopted a ratio of $^{1}/_{3}$ since both the deceased and wife were working and the court held that the wife was not wholly dependent on the deceased. The plaintiff stated that the deceased used to help in payment of school fees and meeting other needs for the family, however, the court is unable to make an estimation of how much the deceased contributed to the family. The ratio of $^{1}/_{3}$ is reasonable in the circumstances as both spouses were working."**

99. Accordingly, there is no basis upon which I can find that the adoption of the dependency ratio of 2/3rds was perverse or that there was no evidence at all in support of it or that it was based on a misapprehension of the evidence, or that her demonstrably have acted on wrong principles in reaching the findings.

100. In the premises, I find both the appeal by the 2nd Respondent being High Court Civil Appeal No. E23 of 2020 and the 1st Respondent's Cross-Appeal in High Court Civil Appeal No. E18 of 2020 unmerited and the same are dismissed but with no order as to costs. I find merit in the Appellant's appeal in E18 of 2020 which I hereby allow and substitute the award of Kshs 2,073,600/- under the head of loss of dependency with Kshs. 6,052,865/-. The costs of this appeal are awarded to the Appellant to be borne by the Respondents in the ratio of their liability.

101. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF JUNE, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mrs Kalinga for the Appellant

Mrs Njuguna for the 1st Respondent

Mr Kioko for the 2nd Respondent

CA Geoffrey