REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 108 OF 2017

NZIOKA LEAH.....1ST APPELLANT

JEREMIAH MUTAVI SIMBA.....2ND APPELLANT

-VERSUS-

PATRICK MUINDI KISAI

JENNIFER MBITHE KAVOI (Suing as administrators to the estate of

FREDRICK KYALO MUINDI-(DECEASED**).....RESPONDENTS**

(An appeal from the Judgement of Hon. A.G. Kibiru (Chief Magistrate)

delivered on 4.07.2017 in Civil Case No. 1092 of 2013

before the Chief Magistrate's Court at Machakos**)**

BETWEEN

PATRICK MUINDI KISAI &

JENNIFER MBITHE KAVOI (Suing as administrators to the estate of

FREDRICK KYALO MUINDI- (DECEASED**.....PLAINTIFFS**

-VERSUS-

NZIOKA LEAH.....1ST DEFENDANT

JEREMIAH MUTAVI SIMBA.....2ND DEFENDANT

JUDGEMENT

1. According to the pleadings in the trial court, the deceased was 23 years old when he died as a result of a road accident and an action was brought in the Chief Magistrates Court at Machakos through his father and mother, as legal representatives against the appellant for damages under the Fatal Accidents Act and the Law Reform Act and special damages due to negligence.

2. It was pleaded that the deceased died from a road traffic accident that occurred on the 24.2.2013 where the deceased had been a pillion passenger aboard a motor cycle KMCX 297A that was being ridden along Nairobi-Machakos Road when he was hit by motor vehicle registration number KBF 250B that was registered in the names of the 1st appellant and being driven by the 2nd appellant. The respondent pleaded negligence and that the deceased's estate suffered special damages of Kshs 81,600/-It was pleaded that at the time of the death of the deceased, he was a 23-year-old student at Machakos University College whose dependents were his father, mother, 3 brothers and 2 sisters and who lost their means of livelihood and support. The respondent pleaded negligence and *res ipsa loquitor*.

3. The appellants denied negligence and its particulars, denied the accident and averred in the alternative that the accident was contributed to by the rider of the motor cycle KMCX 297A. The appellants averred that none of the listed dependents of the deceased qualified to be dependents and that the deceased was a student therefore was not earning any money or salary at all; they prayed that the suit be dismissed with costs.

4. The suit proceeded for hearing on **21.3.2017** where a police officer and the 1st respondent testified. The 2nd appellant testified and closed their case.

5. Parties filed submissions and the court delivered judgement on **4.7.2017** in which Hon. A.G. Kibiru found that because the 2nd appellant who was the driver of the suit vehicle was convicted of causing death by dangerous driving, he was 100% to blame for the accident. The magistrate awarded special damages of Kshs 81,000/-; pain and suffering at Kshs 30,000/-; loss of expectation of life at Kshs 150,000/- and damages for loss of dependency under the Fatal Accidents Act of Kshs 4,480,000/- after using a dependency ratio of 1/3, a multiplicand of 40,000/- and a multiplier of 28 years.

6. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal dated 28.7.2017 and filed on 2.7.2017. The appeal challenges the finding on liability and quantum. Counsel prayed that the appeal be allowed and that the judgement of the trial court be set aside and substituted with fair findings on liability and quantum.

7. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 12.3.2021 and the respondent on 28.1.2021. Learned counsel for the appellant took issue with the failure of the magistrate to take into account the contribution of the deceased to the accident; to counsel, the failure of the deceased to wear a helmet and reflective jacket meant that he contributed to the accident. Reliance was placed on the case of **Elizabeth Bosibori & Another v Damaris Moraa Nyamiache (2017) eKLR.** It was submitted that the court ought to have apportioned liability at 50:50 and that the magistrate erred by finding the appellants 100% liable for the accident**.** According to counsel, a traffic charge is not a pointer to liability for causing an accident.

8. On quantum, counsel submitted that the court made an award that was excessive and inordinately high. Counsel had no issue with the award of general damages for pain and suffering, loss of expectation of life and special damages. In respect of the amount for lost years, counsel while appreciating the case of **Isaac Muriungi Mbataru v Silas Kalumani (2017) eKLR,** counsel proposed that the deceased be classified as an unskilled employee under the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2015 where the salary was Kshs 5,436.00/- per month. It was proposed that a multiplier of 32 years would be appropriate as the deceased was aged 23 years at the time of death. Therefore, counsel proposed Kshs 695,808/- for loss of dependency after using a multiplier of 32, dependency ratio of 1/3 and a multiplicand of Kshs 5,436.00.

9. In response, learned counsel for the respondent agreed with the findings of the trial court and urged this court to uphold the finding of the trial court. On liability, it was submitted that the appellant did not prove that the deceased was the author of his own misfortune and instead as per the evidence on record, the appellant caused the accident by moving onto a feeder road when it was not safe to do so. The court was reminded that the 2nd appellant was charged and convicted with causing death by dangerous driving and the conviction has not been appealed against. On quantum it was submitted that the deceased was a 23-year-old 2nd year student pursuing a diploma in ICT at Machakos University with prospects of pursuing a career in ICT. It was submitted that the multiplier of 28 years and the multiplicand of Kshs 40,000/- was reasonable. Reliance was placed on the case of **Dominic Kiongerah (Suing as the Legal Administrator of the Estate of the Late Magdalene Njeri Kiongerah-Deceased) v Zacharia Wachira Gatiga & Another (2018) eKLR** where a 23-year-old holder of a Diploma in Journalism was awarded Kshs 3m/- after adopting a multiplicand of Kshs 30,000/-

10. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**. In addition, the responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. This was observed in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212) CA.**

11. The evidence in the trial court was as follows. Pw1 was Pc Robert Onyoi attached to Machakos Police Station Traffic Department. He testified that he had the abstract in respect of the deceased who was a pillion passenger aboard Motor Cycle KMCX 297B and a fatal accident occurred where the deceased died. He told the court that the accident occurred on 24.2.2013 when the suit vehicle KBF 250B which was heading towards Nairobi from Machakos moved to the side of a feeder road and collided with the suit motorcycle where the deceased was a pillion passenger. He told the court that the 2nd appellant was convicted of causing death by dangerous driving in traffic case No.194 of 2013. On cross examination, he testified that he was not the investigating officer and that he did not know how the accident happened. He testified that he deduced what happened as was recorded on the OB.

12. Pw2, was **Patrick Muindi Kisai** who testified that the deceased was his son and that he obtained letters of administration, treatment notes from Machakos Hospital, death certificate of the deceased and receipts of treatment of burial totaling to Kshs 81,600/-. He told the court that the deceased would have supported him as a parent. The respondents closed their case.

13. The 2nd appellant testified as the only defence witness. He told the court that he was the driver of the suit vehicle that collided with the suit motorcycle. On cross examination, he told the court that the point of impact was the right front of the motor vehicle; that it was dark and it was not possible to see the motor vehicle.

14. From the evidence on record, the accident that happened on the material day was confirmed vide the evidence of Pw1 and Dw1 and the cause may be inferred from the evidence of Dw1 as corroborated by the documentary evidence that was neither challenged nor controverted.

15. Having considered the pleadings and the evidence on record, the following issues are to be determined.

a. Whether the accident was as a result of the negligence by the appellants.

b. Whether the appellant is liable for damage and loss to the deceased and his estate and at what percentage.

c. Whether it has been demonstrated that the deceased contributed to the accident.

d. Whether the court may interfere with the finding of quantum by the trial court.

16. The answer to any of the above issue will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers*, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remain this:

(a) There is a duty of care owed by an appellant -

(i) the appellant would foresee the reasonable possibility of his conduct injuring another and causing him loss**; Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404** and;

(ii) the appellant would take reasonable steps to guard against such occurrence; and

(b) the appellant failed to take such steps.

In assessing whether the appellant took reasonable steps, the court will consider:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materializes;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm. See **Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617.**

17. It is undisputed that the appellant and the rider of the suit motor vehicle owed a duty of care. All road users are expected to exercise a duty of care on the road. See **Teresia Sebastian Massawe (Suing as the Legal Administratix of the estate of the late Silvia Sebatian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR**.

18. There is no evidence of the point of impact on the road and this court is not able to envisage who exactly was on the wrong. As can be deduced from the abstract, the accident was reported to the police and recorded on OB 16/24/02/2013. The post mortem indicated that the deceased sustained a fracture on the left side of the skull and this is about all the evidence regarding the condition of the deceased's body. There is no other evidence of the circumstances surrounding the accident and this court is only certain that there was an accident and that the deceased died and that is all.

19. I find difficulty in agreeing with the reasoning of the trial court that the criminal conviction is evidence of liability, this is because the standard and elements of proof are different in a criminal case and in a civil matter. In the instant case, what I would consider is that the evidence speaks to the fact that the point of impact was on the right side of the motor vehicle, the post mortem indicates that the deceased sustained a fracture on the left side of the head. It is very difficult to establish who was on the wrong but what is clear is that there was a collision between the suit vehicle and the deceased. A carefully ridden vehicle does not just collide into another unless it was over speeding. If the 2nd appellant was driving carefully, he would not have collided with the deceased; if the rider of the suit motor cycle was riding carefully, he would not have collided with the suit vehicle. In the case of **Hoe v Ministry of Health (1954) AC Pages 66, 87- 88 Morris LJ** stated that "*There are certain things that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer*".

20. Where both parties are found to be on the wrong as indicated in paragraph 22 above, case law is to the effect that liability is to be apportioned equally. See **Teresia Sebastian Massawe (Suing as the Legal Administratix of the estate of the late Silvia Sebatian Massawe v Solidarity Islamic (Kenya Office & another [2018] eKLR.** I will apportion liability at 50:50. Suffice to add that the deceased was at the time not wearing a helmet as well as a reflector jacket. The helmet might have come in handy to obviate the head injuries that were sustained. It is also noted that neither the respondents nor the appellants saw it fit to enjoin the rider or owner of the motor cycle that came into collision with the appellants' vehicle and hence they have been left to sort themselves out.

21. I therefore find merit in the appeal against liability and allow the same. I set aside the finding of liability on the part of the appellants and substitute the same with an apportionment of liability at 50:50.

22. On assessment on quantum, the only challenge is on the award of general damages for lost years. It is necessary to consider what kind of life the deceased would have enjoyed had be not been killed. There is no evidence that the deceased would have had an unhappy life. He was a student pursuing a diploma in ICT. The conclusion which can be reached here is that the deceased could have enjoyed average happiness, subject to the normal risks and uncertainties. The deceased could have also completed his ICT studies and probably tarmacked for a job and

succeeded in securing one to be able to support himself and his parents or siblings.

23. The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In line with the multiplier approach, the damages would be by multiplicand and the result reduced by 1/3 because as at the deceased's death he was unmarried and the same multiplied by the expected number of years that the deceased would have lived had he not been a victim of wrongful death and multiplied by 12 months.

24. The court assumed that the deceased would have earned Kshs 40,000/- per month. The basis for this reasoning is not clear and courts have been cautioned against plucking figures from the air.

25. The deceased was aged 23 when he met his death and the life expectancy as per statistics given by the World Bank is 66.7 years. The multiplicand would be the expected monthly earnings of a skilled worker/graded artisan. Assuming that he finished his diploma at 24 years then he would find work at about the same age, I shall take the retirement age to be 55 years meaning that the working life of the deceased would be 22 years on average. The expected earnings of the deceased, (who I shall deem as an artisan grade 1), the minimum wage in 2013 as per the time of death was Kshs 19,360.50/- in Nairobi (I cannot use **THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2013** because it came into operation in May, 2013 and the deceased died in February, 2013 and therefore, I will use **THE LABOUR INSTITUTIONS ACT (REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2012 that came into force on 27th June, 2012**. The calculation for loss of dependency is thus; 22 x 1/3 x 19,360.50/-x12= Kshs 1,703,724/-.

26. The rest of the amounts proposed by the trial court would remain undisturbed as there is no objection thereto.

27. In the result, I find merit in the appeal. The same is allowed. The judgement by the trial court is hereby set aside and substituted with judgement as follows;

Liability	50%:50%
Loss on dependency	Kshs 1,703,724/-
Pain and suffering	Kshs 30,000/-
Loss of expectation of life	Kshs 150,000/-
Subtotal	Kshs1,883,724/
Less 50% contribution	Kshs 941,862/-
Total	**Kshs 941,862/-**
Add Special damages	**Kshs 81,000/-**
Net total	**Kshs 1,022,862/-**

28. The appellants shall have the costs of this appeal while the respondents will have costs in the lower court.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF JUNE, 2021

D. K. KEMEI

JUDGE