



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mariera v Nzuki & another (Civil Appeal 137 of 2017)
[2021] KEHC 203 (KLR) (9 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 137 OF 2017
MW MUIGAI, J
NOVEMBER 9, 2021**

BETWEEN

IGNATIUS MARIERA APPELLANT

AND

ANTONY MWENDA NZUKI 1ST RESPONDENT

**VERONICA NDUGWA MBITHI (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF EMMANUEL WAMBUA NZUKI (DECEASED) ... 2ND RESPONDENT**

*(Being an Appeal from the Judgment and Decree of
Hon. Lorot (SPM) delivered on 8th September, 2017)*

JUDGMENT

1. By a Plaint dated and filed on 2nd April, 2015, the Respondents suing as the administrators of the estate of Emmanuel Wambua Nzuki (Deceased) sought general damages under the Fatal Accident Act and the *Law Reform Act*, special damages as well as the costs of the Lower Court suit and interest thereof.
2. The Respondents pleaded that on 11th October, 2013, the deceased was lawfully on board motor vehicle registration number KBS 158S which was negligently driven and/or controlled by the Appellant, his driver, servant and/or agent causing a collision with motor vehicle registration number KBG 706V along Mombasa/Nairobi Highway. Consequently the deceased succumbed to his injuries. The Respondents pleaded the doctrine of res ipsa loquitur.
3. In opposition, the Appellant filed his appearance and statement of defence on 28th May 2015. The Appellant denied he was the registered owner of motor vehicle registration number KBS 158S. He denied the occurrence of the accident on 11th October, 2013 along the said road between the said motor vehicles. He denied in toto the particulars of negligence against him as pleaded by the Respondents and the applicability of the doctrine of res ipsa loquitur to the Respondents case.



4. According to the Appellant, he was not vicariously liable for the accident. He denied the particulars pursuant to the statute, special damages and loss suffered by the dependants. According to the Appellant no demand or intention to sue was served upon him.

HEARING

5. On 17th May 2017, PW1, PC No.81325 Nicholas Koskey from Voi Police Station, Traffic Department stated that he was present in court to produce a Police Abstract in relation to an accident that occurred on 11th October, 2013 at about 5.30 pm at Kasarani area along Mombasa-Nairobi Highway involving motor vehicle registration number KBS 158S make Toyota Fielder and KBG 706V make Toyota Saloon. According to PW1, motor vehicle KBS 158S was being driven by one Ignatius Mariera from Mombasa towards Nairobi direction and on reaching the scene of the accident, he tried to overtake a fleet of vehicles heading in the same direction without due care causing the motor vehicle to collide head on with motor vehicle KBG 706V which was heading towards Mombasa and driven by one Kelvin Chacha. Both drivers sustained injuries and admitted at Voi Referral Hospital.
6. PW1 stated that Emmanuel Mwanzia Nzuki (Deceased) was a passenger in KBS 158S. According to PW1, the deceased sustained a fracture on the leg and succumbed to the injuries on 12th October 2013 at around 5.00 am. He stated that investigation revealed driver of motor vehicle KBS 158S Ignatius Mariera was to blame for the accident. He was not charged. He also sustained injuries and went to the police station to pick the motor vehicle while still unwell. According to PW1, Ignatius Mariera has never reported back.
7. According to PW1, Ignatius was to be charged with causing death by dangerous driving. He stated that the file was complete and it was indicated as 'PAKA' meaning 'pending arrest of known accused'. He stated that the file was under lock and key. PW1 stated that he was not the Investigating Officer but one Corporal Ndiga who in 2014 had been transferred to Sagana Police Station. PW1 produced the police abstract as PExh 1 and the police file which he stated had been given to him a week ago as PExh 2. According to PW1, he was also paid Kshs.20, 000/- to attend court and referred to a voucher.
8. In cross-examination by Mr. Abutika, Appellant's counsel, PW1 stated that Number 7 of the Police Abstract shows the result of the investigations as at the time of filling the abstract. According to PW1, the Defendant came to the station while unwell and picked the motor vehicle.
9. In re-examination, PW1 stated that the status of the report is 'PAKA'. According to PW1, the conducted investigations. He stated that the driver of the Fielder could not record a statement due to the state he was in at the time.
10. According to PW2, Veronica Ndugwa Mbithi on 11th October, 2013 she was at home when her husband who had left for Mombasa to work called her at 5.00 pm and informed her that he was on the way having found a vehicle. According to PW2 she knew it was an overnight journey. PW2 stated that at 5.00am she received a call and was informed that his husband had been involved in an accident and was hospitalized at Voi. According to PW2, the call was from his brother in law. PW2 stated that she was told to go to Voi, she boarded a vehicle but was told that his husband had been moved to Nairobi hence she turned back to Nairobi and while at Nairobi nobody was giving her information. According to PW2, her husband was brought to Nairobi but passed on and his body was taken to the mortuary.
11. According to PW2, she was married to deceased herein. PW2 produced a letter from the Chief of Mbilini dated 22nd February, 2014 as PExh 3. She produced letters of administration as PExh 4, burial permit as PExh 5, Death certificate as PExh 6 and postmortem report as PExh 7. According to PW2, the deceased was 34 years old as per the death certificate. PW2 stated that they inquired about ownership of



- motor vehicle KBS 158S and a copy of results produced as PExh 7 established the owner was Ignatius Mariera. According to PW2, the deceased was on board the Fielder-KBS 158 S.
12. PW2 stated that the deceased worked at Mercury Supplied Ltd as a Sales Representative. According to PW2, the deceased had a private company. PW2 produced the confirmation letter from the previous employer as PExh 9(a) together with a salary voucher as PExh 9(b) which show the deceased earned Kshs.24,577/- monthly. Further, PW2 stated that the deceased ran a company called Parma Ventures and produced a certificate of Registration and Tax Compliance Certificate as PExh 10(a) and 10(b) respectively. According to PW2, the deceased made roughly Kshs.16,000/- monthly. She produced receipts and invoices for the business as PExh 11 as well as bank statement as PExh 14. PW2 stated that they did notify the Defendant of the case vide the demand letter and Statutory Notice which she produced as PExh 12(a) and PExh 12(b) respectively. According to PW2, they incurred expenses. She produced a receipt as PExh 13. PW2 stated that they had a son together. She sought for compensation and costs.
 13. In cross-examination by Mr. Abutika, PW2 stated that the deceased earned about Kshs.40, 000/- monthly. According to PW2, Parma Ventures was the deceased business. She produced some invoices. According to PW2, the deceased had workers. PW2 stated that the net income was Kshs.16, 000/-. She stated that she was not working but also stated that she is a secretary at a school.
 14. In re-examination, PW2 stated that she went to work after her husband died since she cannot maintain their child all by herself.
 15. PW3 Anthony Mwendwa Nzuki, stated that Emmanuel Nzuki was his brother. He adopted his witness statement dated and filed on 2nd April, 2015. According to PW2, his brother was aged 34 years old earning a salary of Kshs. 40,000/- monthly.
 16. In cross-examination by Mr. Abutika, PW2 stated that the deceased earned a salary of Kshs. 24,000/-. According to PW3, the deceased ran a company known as Parma Ventures.

DEFENSE

17. In the defence case, the Appellant herein, DW1, Ignatius Mariera King'oina stated that he is a Bio-Medical Engineer working with Science Scope Ltd. According to DW1, on 11th October, 2013 he had gone for an official trip to Mombasa. He stated that he gave a lift to some friends one them being Emmanuel Nzuki, the deceased herein. He stated that he knew Emmanuel Nzuki to deal with non-pharmaceuticals but according to DW1, the deceased was in Jua Kali.
18. DW.1 stated that on reaching Kasarani towards Voi from Mombasa, the road was not smooth but bumpy tarmac. He stated that it was raining and the road had potholes. He stated that they could not stop on the said road. It was a round 5.10pm. According to DW1, he was driving at 50 Kph while the speed limit was about 80-100Kph on the road. According to DW1, he lost control on sharp bend after hitting a pothole, then moved the motor vehicle to the other lane. He stated that his motor vehicle collided head on with an oncoming motor vehicle from Nairobi direction. According to DW1, the oncoming motor vehicle was on a high speed. DW1 stated that his motor vehicle was hit and the impact caused his motor vehicle to turn and face Mombasa direction.
19. DW1, stated that he had 4 passengers in his motor vehicle but no one complained how he drove the motor vehicle. He stated that he was not stopped for speeding. He was on speed limit. He had a driving license. According to DW1, there were no motor vehicles ahead of his. He was not charged with a traffic case. According to DW1, there was no much traffic on the road at the time.



20. In cross-examination by Mr. Munyao, Respondents advocate, DW1, stated that Emmanuel was not in the mainstream of bio-medical field. According to DW1, he swerved and joined the oncoming lane. He stated that had he not swerved, he could not be on the oncoming lane's way. He admitted that he was served with a Notice of Intended Prosecution. He stated that he heard that there is a pending warrant of arrest but the investigating officer would clarify. DW1 admitted that Emmanuel was his passenger.
21. In re-examination, DW1 insisted that he hit a pot hole hence the reason why he swerved.

TRIAL COURT'S JUDGMENT

22. In his judgement, the Trial Magistrate observed that the Appellant stated that he was the one who joined the oncoming lane and caused the accident. He also noted that Appellant was blamed by the police. According to the Trial Magistrate, PW1, the police was not asked about the status of the road and even if it was raining, it was the view of the Trial Magistrate that it is the duty of the driver especially on the busy road to ensure that he managed the motor vehicle in such a manner that does not endanger other road users. On liability, the trial magistrate held the Appellant 100% liable.
23. As regards loss of dependency, the Trial Magistrate observed that the Appellant in his written submissions dated 2nd June, 2017 found at Pages 92 to 102 of the Record of Appeal applied the deceased earning of Kshs.40, 577/- but proposed a multiplier of 10 years. According to the Trial Magistrate the deceased would have been active until 60 years hence a multiplier of 26 years was appropriate and not 10 years. He noted that the Appellant agreed on a dependency ratio of 2/3. The Trial Magistrate computed the total award under this head as follows; $Kshs.40,577/- \times 12 \times 2/3 = Kshs.8,440,016/-$.

MEMORANDUM OF APPEAL

24. Aggrieved by the Trial Magistrate's decision, the Appellant lodged this appeal citing the following grounds: -
- (1) THAT the learned Trial Magistrate erred in law and in fact in awarding Kshs.8,440,016 which is manifestly excessive and not as strictly proved.
 - (2) THAT the learned Trial Magistrate erred in law and in fact in awarding 100% liability against the Defendant.
 - (3) THAT the Trial Court misused the discretion on the multiplier without taking into consideration the uncertainties of life.
25. The Appellant has urged this court to set aside the award on loss of dependency or substitute it with an appropriate award.

APPELLANT'S SUBMISSIONS

26. On behalf of the Appellant, it is submitted that PW3 stated that the deceased earned Kshs.40,000/- whereas the facts in his witness statement dated 2nd April, 2015 establish that the deceased earned Kshs.24,577/- hence a contradiction. It is also submitted that PW2 stated that the deceased earned Kshs.40, 500/- deviating from the amount stated in his witness statement.
27. Reliance is placed on the case of *Nelson Mghadi vs. Razick Obuba [2021] eKLR* on the effect of contradicting evidence to a case. According to Appellant, this is a material fundamental departure from the evidence in their witness statement and such discrepancies have not been explained and/or supplementary witness statements filed. It is submitted that it is trite that parties are bound by pleadings. Appellant has urged court to set aside Kshs.40, 000/- and substitute the amount with Kshs.24, 577/-.



28. As regards liability of 100% apportioned by the Trial Magistrate, it is submitted that the Trial Magistrate disregarded the evidence from the Defendant that the road was bumpy and on the material day it was raining hence making it hard for the Appellant to see the pothole that made the motor vehicle lose control after hitting it. Reliance is also placed on the Police Abstract that established that the matter was pending investigation.
29. The Appellant faults the Trial Magistrate for finding that as a result of hitting the pothole and swerving onto an oncoming lane, it was an admission by the Appellant that he was unable to manage the motor vehicle. According to the Appellant it was raining and the road was flooded hence he was unable to see the pothole hence a contributing factor to the accident.
30. Reliance is placed on the case of *Solomon Okoth Oduma vs. Munyarugere German & Another [2020]eKLR* where the authority of *Susan Kanini Mwangangi & Another vs. Patrick Mbithi Kavita [2019]eKLR* with reference to *Embu Public Road Services Ltd vs. Riimi [1968]EA* on the applicability of the doctrine of res ipsa loquitur to their case. According to the Appellant the situation on the road was beyond the driver's control hence he should shoulder lesser liability.
31. As regards the multiplier of 26 years adopted by the Trial Magistrate, it is submitted that the deceased was 35 years old at the time of his demise hence the years exceeded the retirement age of 60 years with one year hence a higher multiplier considering the uncertainties of life that a person can live to the maximum years. Reliance is placed on the case of *Jane Karimi & Lois Wawira Kinyua (Suing as Administrator of the Estate of Boniface Kinyua Mugane-Deceased) vs. David Waigwa & 2 Others [2019] eKLR* where the deceased was aged 34 years and a multiplier of 16 years was applied.
32. According to the Appellant the Trial Magistrate departed from the laid down principles applied in awarding of multiplier and ignored and/or neglected the Appellant's submissions.

RESPONDENT'S SUBMISSIONS

33. On behalf of the Respondents, on whether the award of Kshs.8, 440,016/- was manifestly excessive and not strictly proved, it is submitted that PW1, Police Officer confirmed the occurrence of the accident. According to the Respondents, PW2 did not adopt his witness statement but adduced oral evidence that was different from the statement, hence it does not form part of the evidence. It is submitted that the Appellant cross-examined the Respondents on the discrepancies. According to the Respondents, PW2 evidence was supported by PW3 evidence that the deceased was aged 34 years old earning a monthly income of kshs.40, 000/- hence earning was proved.
34. As regards liability, it is submitted that the deceased was a passenger not in control of the motor vehicle. According to the Respondents, DW1 confirmed that the deceased was a passenger in motor vehicle KBS 158S. It submitted that PW1 stated in court that investigations had been completed and the Appellant was to blame for the accident. According to PW1 the Appellant was to be charged for causing death by dangerous driving and arrest was pending. The Respondents urged the court to take note of PW1 evidence at Page 138 of the Record of Appeal.
35. Reliance is placed on the case of *Peris Wambui Kinuthia & Another vs. S.S Mehta & Sons Ltd [2015] eKLR*. The Respondents urged this court to uphold the 100% liability apportioned to the Appellant.
36. On the issue of multiplier, it is submitted that the deceased PW2 and PW3 stated that the deceased was 34 years old and noting the retirement age to be 60 years, the multiplier of 26 years was within the Trial Court's discretion. It is submitted that he was youthful and in good health before his demise. Reliance is placed on the case of *Abson Motors & 2 Others vs. Sinema Kitsao & Another (Administrators of the*



Estate of the late Kitsao Kajefwa Kitunga [2016] eKLR where the deceased was aged 80 years, the court adopted a multiplier of 5 years.

37. As regards the deceased income, it is submitted that he was working with Mercury Medical Suppliers Limited earning a salary of Kshs.24,577/- and also ran his company namely Parma Ventures making a monthly income of Kshs.16,000/-. Therefore, making a total monthly sum of Kshs.40,000/. According to the Respondents, the pay slips, bank statements and cash sales receipt and invoices for Parma Ventures proved deceased earnings.
38. The Respondents urged the court to dismiss the appeal with costs.

DETERMINATION

39. I have considered the pleadings and evidence on record as well as the written submissions filed on behalf of respective parties.
40. In this appeal the Appellant is challenging both liability and quantum awarded by the Trial Magistrate. It is not disputed that the deceased herein was a passenger in motor vehicle registration KBS 158S which was registered in the name of the Appellant herein. The accident involving two motor vehicle is not disputed.
41. This being a negligence claim against Appellant, the standard of proof required is on balance of probabilities hence the two issue for determination are namely; whether the Appellant proved his case on a balance of probabilities and whether the doctrine of res ipsa loquitor is applicable in the circumstances.
42. 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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.”

43. According to 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.”



44. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:-

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

45. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

Section 112

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

46. The Respondents placed reliance on the doctrine of *res ipsa loquitur* which means according to the *Black's Law Dictionary* (8th Ed.) page 1336, "the thing speaks for itself".

47. In *Nandwa vs. Kenya Kazi Limited [1988] eKLR*, Court of Appeal (Gachuhi JA) cited, with approval, a portion *Barkway vs. South Wales Transport Company Limited [1956] 1 ALLER 392, 393 B* on the nature and application of the doctrine of *res ipsa loquitur* as follows:

"The application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

48. Before the court delves into the merits of the appeal, the court notes that a copy of the judgement has not been listed in the index of the record of appeal. However a copy of the decree 'for purposes of appeal' has been filed vide the Supplementary record of appeal dated 12th March, 2021.

49. Pursuant to order 42(13)(4)(f) of the [Civil Procedure Rules, 2010](#) a copy of (f) the judgment, order or decree appealed from has to be attached in the record of appeal. Under sub rule 4(ii) the Judge cannot dispense with the production of the documents under (f).

50. Pursuant to Section 2 of the [Civil Procedure Act](#), decree is an extract of the Judgment appealed from. Under Section it is provided that, for purposes of appeal "decree" includes judgement.'.



51. In *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR, when addressing the issue of failure by an appellant to file a decree, the court stated thus-

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in *Silver Bullet Bus* case on the point, that it would be too draconian to strike out the appeal in these circumstances”

52. The court is in possession of the Trial Court file which contains the judgement appealed against by the Appellant. The failure to attach a copy of the judgement is not an issue in the appeal hence the court guided by Article 159(2) (d) of the Constitution will proceed to determine the appeal on merit. The Appellant has a right to fair hearing as enshrined under Article 50.

LIABILITY

53. The Court in discharging its mandate, this being a 1st appeal, it is trite law, that the court evaluates and reconsiders the evidence on record and draws its own conclusion while bearing in mind that the Court has neither seen or heard the witnesses and should make allowances in this respect. See *Peters vs Sunday Post Ltd [1958] E.A.424; Butt vs Khan [1981] KLR 349 & Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini vs A. M. Lubia & Olive Lubia (1982-1988) 1 KAR 727.*
54. This being the first appeal court, its duty is well expressed in *Selle vs. Associated Motor Boat Co [1986] EA 123* where court held as follows: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court 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 through 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.”

55. The Court in *Khambi & Another vs. Mabithi and Another [1968] EA 70*, 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”

56. The Appellant contends that in apportioning liability at 100% against him, the Trial Magistrate disregarded his evidence on record. The Appellant is challenging liability apportioned to him. The Appellant contends that liability ought to be less based on the evidence on record since the occurrence of the accident is not disputed.



57. In his submission, the Appellant submitted that on the material day it was raining hence making it hard for the Appellant to see the pothole. In addition, Appellant submitted that the Police Abstract establish that the case was pending investigation. According to the Appellant, how then could the Trial Magistrate conclude that the Appellant was 100% liable? The Appellant disputed that he admitted the accident when he testified that he swerved on an oncoming lane. According to the Appellant he hit a pothole and lost control of his motor vehicle. According to the Appellant, it was beyond his control.
58. In his evidence, at Pg 143 of the Record of Appeal, the Appellant stated as follows;
- “It was raining. There were water pots on the road. We could not stop there. It was around 5.10 pm. I was driving 50Kph. The speed limit is about 80-100 Kph. I lost control on a sharp bend when hit a pothole. I moved to other lane. There was an oncoming vehicle from Nairobi direction. We collided head on. The car was at a high speed. My vehicle was hit and on impact my vehicle was turned to face Mombasa direction....No one complained about my driving. I was not stopped for speeding anywhere. I was on the speed limit. There were no vehicle ahead of mine. I was not charged with traffic case. There was no much traffic road on the road at that time.”
59. At Pg 138 of Record of Appeal, PW1 PC Nicholas Kosgey testified as follows;
- “Motor Vehicle Reg No KBS 158 S, the Fielder was driven by Ignatius Mariera from Mombasa towards Nairobi. On reaching the location of the accident, he tried overtake a fleet of vehicles in the same direction, without due care, he collided head on with the salon Reg KBG 706 V which was heading towards Mombasa driven by one Kelvin Chacha. Both drivers suffered injuries and passengers in Fielder (KBS) also suffered injuries. They were rushed to Voi Referral Hospital in serious conditions and were admitted on arrival. Emmanuel Mwanza Nzuki was a passenger in KBS 158S.He had sustained a fracture on the leg and succumbed to injuries on 12th October 2013 at around 5 am.”
60. According to the Trial Magistrate, at Pg 2 of the judgment delivered on 8th September 2017 found;
- “He confirmed that he is the one who joined the oncoming lane and caused the accident. He confirmed further, that he was served with a notice of intended prosecution. He had 4 passengers, the deceased being one of them. The Defendant was blamed by the Police. He confirms he was driving that day. When PC Kosgey testified he was not asked about the status of the road. Even if it was raining, it is the duty of every driver, especially on a busy road such as Mombasa-Nairobi highway to ensure that they manage the vehicle in a manner that does not endanger other road users. The Police say he was overtaking a fleet of motor vehicles. The Defendant’s version that he hit a pothole and swerved into the oncoming lane is itself an admission that he was unable to manage the motor vehicle. He was outright negligent. I hold the Defendant 100% to blame.”
61. The Appellant contends that he ought not to have been found liable for negligent driving on the fateful day 11th October 2013 that led to the untimely demise of Emmanuel Wambua Nzuki. The collision was between 2 motor vehicles KBS 158 S & KBG 706 V. The deceased was not driving or in any way involved in the manner of driving or collision instead he was one of the passengers in the Appellant’s motor vehicle KBS 158S. So how would liability be apportioned between the Appellant and the deceased? What action or omission did the deceased commit to disclose any iota of negligence that contributed to the unfortunate accident? If there was/is contributory negligence it would be by either or both of



the 2 drivers, namely the Appellant herein, Mr. Ignatius Mareira driver of Reg KBS 158 S & and/or Mr. Kelvin Chacha driver of Reg KBG 706 V. The Appellant failed to join the said party/driver as a 3rd Party to the Trial Court proceedings so as to enable the Trial Court determine liability between them.

62. In the absence of any overt act/conduct by the deceased that contributed to the tragic accident liability cannot be visited or apportioned against him. It is insinuated that the Appellant's version of the circumstances of the accident were not controverted, certainly the deceased cannot be held responsible and /or condemned unheard due to his death. Yet this Court is curious why the 3 other passengers in Motor Vehicle Reg KBS 158 S were not called to testify nor the driver of Motor vehicle Reg KBG 706V.

63. Suffice is to state that from the evidence on record more specifically; the Police Abstract dated 14th February 2014 which at No 3 shows that it is intended to prefer charges against driver Ignatius Mariera Kingoina of Motor Vehicle KBS158S with the charge of causing death by dangerous driving. The result of the investigation is indicated as PUI- pending under investigation.

During cross examination PW1 stated that the status of the Report is PAKA- 'pending arrest of known accused'.

64. According to the Police Abstract and evidence of PW1 which was not controverted by tangible and cogent evidence to prove that that the Appellant was not liable for the accident that resulted in death of the deceased who was a passenger in his vehicle, PW1 stated that the Appellant was blamed for the accident but was not charged because he too suffered severe injuries. He came and collected the vehicle while still unwell and he never came back. The insinuation is that the Appellant was to be charged with the offence as indicated in Police Abstract and Notice of Intended Prosecution (NIP) but was unwell and when he recovered he never reported back.

65. The totality of the evidence on record considered and as outlined above discloses that the Appellant was negligent in driving Motor Vehicle Reg KBS 158 S on 11th October 2013 because, he did not exercise proper care and control of driving the vehicle, he was driving at excessive speed so as to overtake a fleet of motor vehicles that he came on the oncoming lane and collided head on with motor vehicle Reg. KBG706V.

66. Assuming as Appellant alleged that it was raining and there were water pots on the road and he lost control on a sharp bend when he hit a pothole, he moved to other lane where there was an oncoming vehicle from Nairobi direction, he ought to have braked, slowed down, stopped the motor vehicle as visibility due to the rain was not clear and controlled the vehicle to remain on its lane without swerving to the other lane and collide with the oncoming vehicles. There is no evidence on record to confirm the Appellant tried or took any reasonable step to avoid the accident minimize the impact, loss and injury arising from the accident, the deceased is not liable from the accident.

67. In the case of *Isabella Wanjiru Karanja vs Washington Malele Nbi Civil appeal No 50 of 1981* Hon. Chesoni J observed;

What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine when Washington had none and all things being equal she was under an obligation to keep greater lookout for other road users.

68. On the other hand, the deceased was one of the passengers in the motor vehicle Reg. KBS158S and he had no control of the motor vehicle or the manner of driving of the vehicle. Liability cannot be apportioned to the deceased without according fault and in the absence of any act or omission that contributed to the accident, the deceased is not liable for the accident.



69. In the case of *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 court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object 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...”

70. In my view the Appellant had an opportunity to see an oncoming motor vehicle since there were no vehicles ahead of his motor vehicle but he failed take measures to avoid the accident. The Appellant was aware of the conditions on the road. He was aware that it was raining. The apportionment of 100% liability by Trial Magistrate would be appropriate. This Court finds and upholds the Trial Court’s finding of liability at 100% against the Appellant.

QUANTUM

71. On quantum awarded, the Appellant has only challenged the award under loss of dependency in particular on the deceased income and the multiplier. The Appellant has urged the court to set aside the award.

72. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

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

73. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another vs. P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the [Fatal Accidents Act](#) and held 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)”



74. I note at Page 92 of the Record of Appeal, the Appellant filed written submissions dated 2nd June 2017 on 8th June 2017 before the Trial Court. In the submissions, the Appellant submitted that the Respondents had not proved the deceased income hence the court should apply a minimum wage earned by loggers of Kshs. 8,193/- but the Respondent proceeded to apply the income of Kshs. 40,557 as the final amount which comprised a salary of Kshs.24, 577/- earned at Mercury Supplies Ltd and income of Kshs.16, 000/- from the deceased's Company Parma Ventures. According to the Trial Magistrate, the Appellant agreed on the amount to be adopted as the monthly income.
75. In this appeal, the Appellant has urged the court to substitute the income of Kshs.40, 000/- with Kshs.24, 577/-. According to the Appellant, PW2 and PW3 oral evidence deviated from the amount of Kshs.24, 577/- pleaded in the Complaint and Witness Statements of PW2 & PW3 respectively. However, during the hearing, the Respondents produced List of Documents to prove the deceased's income and PW2 & PW3 were subjected to cross examination.
76. PW2 produced a letter and payment voucher to confirm the deceased employment and salary at Mercury Medical Supplies Ltd as exhibits 9(a) and (b). The Court notes that the payment voucher includes the statutory deductions. On Parma Ventures, PW2 produced a Certificate of Registration which bear the deceased name and a Tax Compliance Certificate as exhibits 10(a) and (b) and stated that the deceased earned an estimate of Kshs.16, 000/- monthly from the business. The income was based on receipts produced as exhibits 11 plus bank statements for the business exhibited as exhibit 14.
77. In cross-examination, PW2 stated the deceased had workers and the net income was Kshs.16, 000/-.According to the bank statement, deposits were made into the company account. In my view this establishes that the company generated income. I find that there is sufficient material placed before court to support the deceased total income of Kshs.40, 577/-. The Appellant adopted Kshs. 40,577/- income before the Trial Court. I find no basis why the Appellant is challenging an amount he earlier adopted during trial.
78. The deceased's employment and business were sufficiently proved hence I do not see the applicability of the minimum wage under the Regulations of Wages Order. The amount will only be applicable when there is absence of income as held by Asike-Makhandia J. in *Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR*.
79. The court find no reason to disturb the income of Kshs.40, 577 adopted by the Trial Court. The same is upheld.
80. On the choice of multiplier, it is submitted that the 26 years adopted by Trial Court that the deceased would have worked in addition to his age, exceeded the retirement age of 60 years with one year. The age pleaded in the Complaint was 35 years but the death certificate established that the deceased was 34 years old. PW2 and PW3 also testified that the deceased was 34 years old. The retirement age of 60 is official for civil servants and government employees and not private company unless stipulated in the company policies and/or contracts as most private employers keep employees in their employment long after 60 years. It is therefore possible that the deceased would have worked for the company past 60 years but death cut short his working life. The reason being that it is not a guarantee that one can work for the rest of his life due to uncertainties of life.
81. Ringera J. in *Leonard Ekisa & Another vs. Major Birgen [2005] eKLR* stated that in determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.



82. Before the Trial Court, the Appellant proposed 10 years as the multiplier. In this appeal the Appellant placed reliance on the case of *Jane Karimi & Lois Wawira Kinyua (Suing as Administrator of the Estate of Boniface Kinyua Mugane-Deceased) vs. David Waigwa & 2 Others (supra)* where the deceased was aged 34 years and a multiplier of 16 years was applied while the Respondents relied on *Abson Motors & 2 Others vs. Sinema Kitsao & Another (Administrators of the Estate of the late Kitsao Kajefwa Kitunga [2016] eKLR* where the deceased was aged 80 years, the Court adopted a multiplier of 5 years.
83. As held in *Board of Governors Kangubii Girls High School & Another vs. Jane Wanjala Muriithi & Another 2014 eKLR*, where the court cited with approval, the reasoning in the case of [*Cornelia Elaine Wamba vs. Shreeji Enterprises Ltd. & Others 2012 eKLR*](#) and stated,
- “.....the choice of a multiplier or multiplicand is a matter of the Court’s discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere.”
84. According to the Trial Magistrate, the Appellant did not justify a multiplier of 10 years. The Appellant submitted before the Lower Court that the deceased nature of work was a factor to take into consideration hence a multiplier of 10 years was reasonable. I note that the Trial Magistrate correctly held that the deceased would have been active till the age of 60 years. The court has noted that no evidence was adduced about the health of the deceased. The court notes that no evidence was adduced in court about the age of deceased’s son to enable court establish the possibility of dependency years. PW2 stated that she is now employed as a secretary.
85. Considering the uncertainties of life, the Court is persuaded that a multiplier of 10 years is low but also a multiplier of 26 years applied by the Trial Court is not certain. The Court will substitute the multiplier of 26 years with a multiplier of 20 years.
86. The court notes that no submissions have been made to challenge the award for pain and suffering as well as loss of expectation of life. The dependency ratio adopted has also not been challenged.
87. Accordingly, the court will now compute the award under loss of dependency as hereunder;
 $Kshs.40, 577/- \times 20 \times 12 \times 2/3 = Kshs.6, 492, 320/-$
- DISPOSITION
88. Accordingly, the award that ought to have been made to the Appellant was as hereunder:
- (a) Pain and Suffering Kshs. 25,000/-
 - (b) Loss of expectation of life Kshs. 100,000/-
 - (c) Loss of dependency Kshs. 6,492, 320/-
 - (d) Special damages Kshs. 500/-
- Kshs. 6, 617,820/-
89. The appeal has succeeded partially with regard only to quantum. The court will award half of the costs of the appeal to the Appellant. The Appellant will pay full costs of the Trial Court.



90. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damage will attract interest from the date of filing the suit.
91. Interest and costs shall be applied only to the remainder of the decretal amount after taking into account the amount already paid to the Plaintiff/Respondent.

Judgment accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF NOVEMBER 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. OMANGI - FOR THE APPELLANT

MR. NABWIRE H/B MAINGI MUSYIMI-FOR THE RESPONDENTS

GEOFFREY - COURT ASSISTANT

Mr. Omangi: We need stay of execution for 30 days.

COURT: 30 day is granted.

COURT: A copy of the judgment shall be availed through Deputy Registrar Machakos High Court.

M.W MUIGAI

JUDGE

