REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 164 OF 2017

NM

MNN (Suing as rep. of the Estate of LN (deceased).....APPELLANTS

-VERSUS-

NDUNGU ISAAC.....RESPONDENT

(Being an appeal from the judgement delivered by the Honourable G.O. Shikwe,

Resident Magistrate in Yatta SRMCC 317 of 2015 on 22nd November, 2017)

BETWEEN

NM

MNN (Suing as rep. of the Estate of LN (deceased).....PLAINTIFFS

-VERSUS-

NDUNGU ISAAC.....DEFENDANT

JUDGEMENT

1. This appeal arises from the decision of the Yatta SRM's Court in SRMCC 317 of 2015 on 22nd November, 2017 by which judgement the learned trial magistrate (**Hon. G.O. Shikwe, RM)** dismissed the appellants' suit against the Respondent on the ground that the appellants failed to prove negligence against the Respondent.

2. In the said case, the Appellants had contended that on or about 1st May, 2015, the deceased, **LN**, a minor, was lawfully walking along a footpath at Scheme Trading Centre, Kithimani when the Respondent or his duly authorised driver so negligently drove motor vehicle reg. no. KVK 552 along the said footpath that it veered off the road and collided with the deceased causing the deceased fatal injuries. The plaintiffs particularised the facts constituting negligence as well as special damages in the total sum of Kshs 77,375/=. They also particularised the beneficiaries of the deceased's estate and claimed both general and special damages

3. According to PW2, **MNN**, the deceased's mother, on 1st May, 2015 she was in her shop in Markiti at 4pm and the children were playing across the road 5 metres away. It was her evidence that the vehicle then appeared and hooted for them to remove a wheelbarrow which was on the road. The said wheelbarrow was being used by one **Mungai** who was pruning leaves. After the wheelbarrow had been removed by one Jane, the vehicle then passed and PW2 heard the children shouting that there was a child who had been run over. The vehicle then stopped after crushing the deceased. According to PW2, the deceased was on the side of the road while the leaves being pruned ere on the side of the fence where the children were playing. It was her evidence that the driver of the said vehicle drove near the fence on the leaves and ran over the deceased.

4. It was her evidence that prior to the accident, the children tried to warn him that there was a child on the side of the road. It was her evidence that the leaves were not on the road and that if the driver had not driven through the leaves, he would not have caused the accident. PW2 however stated that she first saw the vehicle after it had ran over the deceased. It was her evidence that the deceased was in the shrubs of leaves but was off the road.

5. In support of the Plaintiffs' case PW2 produced letters of administration, death certificate, copy of records, receipts for funeral expenses and demand letter.

6. PW2 testified that she was married to one **PN**.

7. In cross-examination, PW2 stated that she was in her shop next to the road while the children were playing on the other side of the road. Though she could see the other children, she did not see the deceased who was playing with her brother aged 5 years old just like the other children. She stated that she saw the vehicle when the wheelbarrow was being removed from the road when the vehicle hooted. Jane then went from the shop to go and remove the wheelbarrow during which time the vehicle had stopped. Once the wheelbarrow was removed the vehicle proceeded and after 5 metres they heard the children shouting. It was her evidence that **Mungai** was trimming Jane's fence off the road and the children were playing with the leaves. It was her evidence that the vehicle stooped immediately the driver was alerted by the shouts from the children. According to her the deceased had not started going to school. In her evidence the owner of the vehicle was **Waweru**, her neighbour, and she did not know **Ndungu Isaac**. **Mungai** who was trimming the fence was **Waweru's** brother. In re-examination she stated that though the name **Ndungu Isaac** came from the records, the car was **Waweru's**.

8. PW1, **IP Ahmed Mohammed Serat**, the deputy Base Commander, Matuu Traffic Base testified that on 1st May, 2015, he received a report of a road traffic accident involving motor vehicle KVK 552 Chevrolet and a child along Matuu-Marikiti Murram Road. The child was called **LN** aged 2 years. He produced the police abstract and testified that at the time the same was issued, the matter was pending under investigations. According to him, the matter was investigated by **Sgt. Lekurosai** who recommended that the case be heard as an inquest.

9. After PW2's testimony, the Appellants closed their case.

10. On the part of the Respondent called **Waweru Gitu** who relied on his statement, according to which he stated that on 1st May, 2015 he was driving motor vehicle reg. no. KUK 552 towards Matuu Town at about 12pm on a rough road towards the main road. According to him, he was not on a footpath but was moving very slowly at 10 kph. On the way he met his brother on a ladder cutting a fence. Since the ladder was blocking the road, his brother removed it and he passed. He then found a wheelbarrow on the right side of the road. There were also leaves on the road. He stopped and hooted and the wheelbarrow was removed by **Jane Kathike**. Just before he turned onto the main road, he heard screams and upon looking at the side mirror, he saw PW1 lifting the child. He then stopped and went back and PW1 told him that he had ran over her child. The others told him that the child was inside the leaves which were not on the road per se but the road was not enough to enable him pass so he had to move onto the bush of the leaves for him to pass.

11. According to him, he did not see the child but only saw the leaves. The road was a small road leading to peoples' homesteads around two to three metres wide. It was his evidence that he hooted twice for the removal of the ladder and the wheelbarrow and even stopped on the heap and hooted so that the wheelbarrow could be removed.

12. According to his statement, he then stopped and called the police who arrived at the scene immediately and informed him that he was not at fault as there was no way a driver would have known that there was someone in the leaves. According to him, the child was three years old and it appears the mother knew the child was there but when he hooted, they only removed the wheelbarrow but not the child. It was his evidence that he would not have known that there was a child or anyone in those leaves.

13. In cross-examination, DW1 stated that he bought the vehicle from **Isaac Nduki** and was yet to effect the change of ownership at the registrar of motor vehicles. According to him he only saw the leaves but neither saw the deceased nor the other children nearby. According to him, he was essentially moving at zero speed. According to him, his brother did not witness the accident since he was behind cutting the fence. It was his evidence that the distance between where the ladder where his brother was and where the wheelbarrow was between 30-40 metres.

14. DW2, **Mungai Gitu**, testified that on 5th May, 2015 he was cutting a fence belonging to **Jane Kathike Mutinda** when he heard his brother hooting while he was atop a ladder. He alighted and removed it and the vehicle passed. He heard him hoot again and the wheelbarrow was removed by **Jane Kathike** and the vehicle moved on. He however heard PW1 screaming. According to him, before the accident, children were playing nearby. He then rushed to the scene from where the child was removed. In his evidence there was moderate quantity of leaves that the children were playing with.

15. It was his evidence that it was **Jane Kathike** who removed the child from the leaves on the road. He however did not witness the accident since he went after the fact. He however said that he saw the vehicle hit the child when he went over the shrubs in which the child was hidden while the other children were of the road on the sidelines. In re-examination, he said that he did not see the child but only saw the heap of leaves. In his evidence the child could not be seen.

16. DW3, **Jane Kathike Mutinda**, was in the kiosk next to the road when he saw motor vehicle KUK 552. The said vehicle hooted since there was a wheelbarrow on the road which she went and removed. Once the vehicle passed he heard the deceased's brother scream that their sister was in the heap of leaves. They then removed the heap and found the deceased. By then the vehicle had stopped nearby. She then picked the child. It was her evidence that they could not tell that the child was in the heap since the leaves were quiet many.

17. In his judgement, the learned trial magistrate found that from the evidence, the deceased was not visible to any of the witnesses before she was run over.

Determination

18. I have considered the submissions of the parties in this appeal. 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."**

19. 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.

20. 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."**

21. 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."**

22. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their 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."**

23. 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."**

24. 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."**

25. 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 appellant chose to remain silent. In this case, the evidence was that the DW1 was driving along a *murram* narrow roar when he came upon DW2 trimming a fence belonging to DW3. Because the ladder that DW2 was using was on the road, DW1 stopped the vehicle and hooted after which DW2 removed the said ladder. Upon driving further ahead, DW1 once again came upon a wheelbarrow which was apparently being used to transport the leaves from the trimmed fence. Once again DW1 stopped and hooted and DW3, whose fence was being trimmed removed the said wheelbarrow and DW1 passed. However, just before joining the main road, DW1 seemed to have driven over a heap of cut leaves under which the deceased who was playing with some of his fellow children was hiding. As a result, the deceased sustained fatal injuries. Clearly, there was no evidence on record that the Respondent was aware of the deceased presence under the said heap. From the evidence adduced, it is also clear that DW1 could not have been driving at a high speed. In those circumstances, DW1 would not have been liable in negligence. This must be so since as was held in **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995**:

> **"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed."**

26. 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."**

27. 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."**

28. 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.

29. **Madan, J** (as he then was) in **Welch vs. Standard Bank Limited [1970] EA 115** while citing **Briginshaw vs. Briginshaw [1938] 60 CLR 336 AT 361,** was however of the view that:

> **"The court's dilemma is there is nothing to enable it to say the accident happened in some particular way. There are no witnesses, no marks on the road, no data to strike a balance of probabilities, no usual conflict of expert evidence, no expert evidence, no evidence at all, nothing, save only speculative inferences to be gleaned from the indecisive mute testimony of the damage to the two cars or from the measurements shown in the sketch plan of the scene…In this dilemma should the court surrender its functional duty of determining the controversy by taking an easy way out and telling the parties the action must fail for lack of probative material; or should it say because a collision does not normally take place without negligence on someone's part, it is incumbent that the court performs its task by reaching a decision notwithstanding that the truth is that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found?... 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."

30. As stated hereinabove in ordinary cases a case such as the present one would fail for failure by the Appellant 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.

31. However, the deceased herein was a child whose age was indicated to have been less than 5 years old. The law in cases involving children of tender years was however reiterated by the Court of Appeal in **Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90** where it was held that:

"The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission…The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

32. In arriving at that the decision the Court cited its decision in **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349** in which **Law, JA** expressed himself as hereunder:

"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness. A young child cannot be guilty of contributory negligence although an older child might be depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child…Clearly each case must depend on its peculiar circumstances. In the instant case the learned Judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road and that at the most the plaintiff had committed an error of judgement for which contributory negligence should not be attributed to him."

33. It was on the same basis that it was held in **Nkudate vs. Touring & Sporting Cars Ltd and Another [1978] KLR 199; [1976-80] 1KLR 1333** that:

"The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these."

34. In my judgement, it is clear that the learned trial magistrate did not take into account, the age of the deceased and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability of the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety.

35. 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."

36. In my view the failure to take into account the age of the deceased in arriving at his decision amounted to a failure on his part to take account of particular circumstances or probabilities material to an estimate of the evidence. That entitles the court to interfere with his findings.

37. In the premises I allow the appeal, set aside the decision dismissing the appellant's case. In this case, it was admitted by DW1 that though the vehicle was still registered in the Respondent's name, he was in fact its owner. That being the position I associate myself with the decision in **Welch vs. Standard Bank Limited** (supra) that:

"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."

38. I therefore, enter judgement in favour of the Appellant against beneficial owner of the suit vehicle, **Waweru Gitu.**

39. As regards the quantum, 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."**

40. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

41. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

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

42. The principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others Civil Appeal No. 123 of 1983 [1986] KLR 457; [1982-1988] 1 KAR 946; [1986-1989] EA 137** as:

> **(1). Parents cannot insure the life of their children;**
>
> **(2). The death of a victim of negligence does not increase or reduce the award for lost years;**
>
> **(3). The sum to be awarded is never a conventional one but compensation for pecuniary loss;**
>
> **(4). It must be assessed justly with moderation;**
>
> **(5). Complaints of insurance companies at the awards should be ignored;**
>
> **(6). Disregard remote inscrutable speculative claims;**
>
> **(7). Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;**
>
> **(8). A young child's present or future earning would be nil;**
>
> **(9). An adolescent's would real, assessable and small;**
>
> **(10). The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;**
>
> **(11). Calculate the annual gross loss;**
>
> **(12). Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case;**
>
> **(13). Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and**
>
> **(14). Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.**

43. **Githinji, J** (as he then was) in **William Juma vs. Kenya Breweries Ltd. Nairobi HCCC NO. 3514 of 1985** however appreciated that:

> **"In this country, the courts have taken into account the nature of our society and have correctly held that parents expect financial help from their children when they grow up. It is recognised that in our society children render useful services in the house or in the shamba, which relieves parents from financial expenditure on, say an employed worker. Those free services can be converted into money. The courts therefore have been awarding a lumpsum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer."**

44. In my view the proposed sum of Kshs 100,000.00 by the learned trial magistrate was on the lower side. I would award the Appellant Kshs 200,000.00 for lost years. The Appellants will also get the pleaded special damages in the sum of Kshs 77,375.00. Witness attendance expenses are not special damages but are disbursements to be claimed when taxation or assessment of costs is being done.

45. The Appellant will have the costs of the trial. However, as the parties herein did not comply with the court's directions to furnish soft copies there will be no order as to the costs of this appeal.

46. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 22nd day of January, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Keya for Mr Uvyu for the Appellants

Miss Muithiamiah for the Respondent

CA Geoffrey