REPULIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

MILIMANI LAW COURTS

CIVIL APPEAL NO 224 OF 2019

ELVIS KIPROP MUTAI.....APPELLANT

VERSUS

BERNARD KIBERA GACHOKI (suing as the administrator and legal representative of the estate of

ANDREW GACHOKI KIBERA (Deceased).....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon G.A. Mmasi (Mrs) (SPM)

delivered in CMCC No 7062 of 2015 on 16th August 2018)

JUDGMENT

INTRODUCTION

1. In her decision of 16th August 2018, the Learned Magistrate, Hon G.A. Mmasi Senior Principal Magistrate, found the Appellant herein to have been wholly liable for the accident in which Andrew Gachoki Kibera (hereinafter referred to as "the deceased") suffered fatal injuries. She entered judgment in favour of the Respondent herein against the Appellant for Kshs 1,657,235/= made up as follows:-

Damages under the Fatal Accidents Act	**Kshs 1,600,000/=**
2/3 x 10,000 x 20 x 12	
Special damages	**Kshs 57,235/=**
	Kshs 1,657,235/=

Plus cost of the suit and interest at court rates.

2. Being dissatisfied with the said decision, on 17th April 2019, the Appellant filed a Memorandum of Appeal of even date. He relied on four (4) grounds of appeal.

3. His Written Submissions were dated 22nd July 2020 while those of the Respondent were dated 18th September 2020.

LEGAL ANALYSIS

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the

advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

6. It did appear to this court that the issues that had been placed before it for determination were:-

a. Whether or not the Learned Trial Magistrate erred in having found the Appellant to have been wholly to blame for the fatal injuries that were sustained by the deceased herein; and

b. Whether or not the Learned Trial Magistrate erred in awarding damages that were inordinately excessive so as to warrant the interference by this court.

7. The court therefore found it prudent to address the said issues under the following distinct and separate heads.

I. LIABILITY

8. Grounds of Appeal Nos (1) and (2) were dealt with together as they were related.

9. The Appellant submitted that the Learned Magistrate failed to take into account that the deceased was hit near a foot bridge which showed that he crossed the road at a non-designated place at the material time of the accident. He relied on the cases of **Joseph Muturi Koimburi vs Mercy Wahaki Mugo [2006] eKLR** and **Samuel Kimani &Another vs Mary Wanjiku Kamau & Another [2019] eKLR** where the common thread was that pedestrians are responsible for their safety and should not cross roads recklessly.

10. On the other hand, the Respondent submitted that a driver or rider of a motor vehicle and motor cycle respectively had a higher duty of care as a motor vehicle or motor cycle were lethal weapons and hence, the Appellant could not therefore shift the blame to the deceased. He added that the Appellant was driving at a high speed and did not take any evasive action to control his motor cycle despite having been an experienced rider. He thus argued that the Appellant was wholly to blame for the accident.

11. A perusal of the proceedings showed that on 21st December 2013, the Appellant was riding KMDC 723J Yamaha motor cycle (hereinafter referred to as "the subject Motor Cycle") when he hit the deceased near a foot bridge, a fact that was confirmed by PC No 74584 PC Timothy Ndolo (hereinafter referred to as "PW 2") both in his cross-examination and re-examination.

12. He adduced in evidence a Police Abstract Report and an Occurrence Book (OB) Report which he admitted did not blame the Appellant for the material accident. He, however, stated that the Investigating Officer, who did not testify as he was on leave, had blamed the Appellant for having caused the said accident.

13. On his part, the Appellant testified that the accident occurred underneath the Highline fly off **(sic)** at about 7.30pm-7.45pm. He said that it was dark but he had his headlights on and the deceased jumped onto the road unexpectedly. He added that he saw other pedestrians using the flyover. He averred that he was not charged with the offence of causing death by dangerous driving and that the police officer who was investigating the case did not inform him who was to blame for the said accident.

14. On being cross-examined, he stated that with the headlights on, he could see a hundred (100) metres ahead and that he was riding at a speed of fifty (50) kilometres per hour. He pointed out that he did not brake because the deceased came into the road suddenly. He told the Trial Court that he had been riding for about three (3) years.

15. In her decision, the Learned Trial Magistrate blamed the Appellant wholly for having caused the accident for the reasons that he had been blamed in the Police Abstract, for having caused the accident, that he was speeding, that he did not brake and that he did not swerve to avoid hitting the deceased.

16. A scrutiny of the Police Abstract Report dated 3rd January 2014 showed that the Appellant was blamed for the accident. There was no indication that any charges were preferred against him. The matter appeared to have been pending under investigations.

17. Having said so, while driving in built up areas such as where pedestrians are likely to be passing through, drivers and riders are expected to drive at a reasonable speed. It is for that reason that the Appellant may have insisted that he was riding at a speed of 50kph.

18. However, this court disagreed with him that he was driving at 50 kph and instead agreed with the Learned Trial Magistrate and the Respondent that he was speeding at the material time of the accident. The fact that the deceased sustained fatal injuries was evidence that the Appellant was riding at an excessive speed in the circumstances. In the event he had been riding at a reasonable speed at the material time, the deceased would most probably not have sustained the fatal injuries.

19. Going further, the standard of proof in civil cases is on a balance of probability and not beyond reasonable doubt like in criminal and traffic cases. Indeed, in civil proceedings, the deceased would not have escaped liability completely as he was also expected to have exercised due care and attention while crossing the road. It was not lost to this court that the deceased attempted to cross the road instead of using a nearby foot bridge and therefore acted recklessly. It was at night when visibility for drivers and riders is poor. He was therefore expected to be more keen and not approximate how far the Appellant was by relying on the headlights of the subject Motor Cycle.

20. The onus was on the Respondent to have called an eye witness who would have demonstrated that the Appellant acted so recklessly that there was no way that the deceased would have avoided the accident. The Learned Trial Magistrate therefore erred in having found the Appellant to have been wholly liable for the material accident as no witness adduced evidence to the effect that the Appellant failed to take

any action to avoid the accident. Her assumption was not backed by any evidence and in this regard, she proceeded on the wrong principles that called for interference by this court.

21. However, as the Respondent correctly argued, the Appellant was in control of a more lethal weapon and was expected to have exercised a higher duty of care. In fact, he was expected to have exercised more due care and attention because it was at night time when visibility was poor.

22. Doing the best that it could, this court therefore apportioned liability at 65%-35% in favour of the Respondent herein.

23. In the premises foregoing, Grounds of Appeal Nos (1) and (2) were successful and are hereby allowed.

II. QUANTUM

24. Grounds of Appeal Nos (3) and (4) were dealt with together as they were related.

25. The Appellant submitted that the Respondent did not adduce any evidence to show that the deceased was self-employed and was earning a sum between Kshs 10,000/=and Kshs 15,000/=. However, he did not appear to have any problem with the adoption of an income of Kshs 10,000/= and a multiplier of twenty (20).

26. He, however, took issue with the Learned Trial Magistrate for having adopted a multiplicand of 2/3 when there was no evidence that the deceased used 2/3 of his income on his parents. He urged this court to adopt a multiplicand of 1/3.

27. It was his further submission that the Respondent submitted a receipt in the sum of Kshs 40,150/= in the name of one Jane Wanjohi whose relationship to the deceased, the Respondent did not establish. He pointed out that the Respondent had indicated that she was his daughter and that the receipt was marked for identification but was never adduced in evidence. It was his argument that the Respondent was therefore only entitled to the sum of Kshs 17,585/= for special damages.

28. He therefore proposed that the Respondent be awarded a sum of Kshs 817,585/= made up as follows:-

Damages under the Fatal Accidents Act	**Kshs 800,000/=**
1/3 x 10,000 x 20 x 12	
Special damages	**Kshs 17,585/=**
	Kshs 817,585/=

29. The Appellant placed reliance on the cases of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR** and **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR** in support of his case.

30. On his part, the Respondent submitted that the Learned Trial Magistrate used the minimum wage to calculate the general damages for lost years and in this regard, he placed reliance on the case of **Wangari vs Nkaru [2004] eKLR**. He added that he pleaded for a sum of Kshs 57,235/= and produced receipts to prove the same.

31. He also relied on the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another** (Supra) in arguing that the Learned Trial Magistrate ought to have awarded him a sum of Kshs 100,000/= for loss of expectation of life. He therefore urged this court to amend the judgment to include a sum of Kshs 200,000/= for loss of expectation of life and pain and suffering.

32. Right at the outset, this court noted that the Respondent did not file a Cross-Appeal having been aggrieved by the decision of the Learned Trial Magistrate of not having awarded him damages under the Law Reform Act for loss of expectation of life and pain and suffering. It could not therefore amend the judgment as the Respondent had proposed. This submission therefore fell by the way side.

33. As could be seen from the Appellant's Written Submissions, he was aggrieved by the multiplicand that was adopted by the Learned Trial Magistrate and the amount of special damages that were awarded.

34. In Paragraph 7 of the Plaint dated and filed 23rd November 2015, the Respondent indicated that the suit was brought on his behalf and on behalf of the deceased's mother and brother, namely, Janet Wairimu Kibera and Peter Mwai Kibera respectively. The deceased appeared to have been unmarried. This court agreed with the Appellant that in the absence of proof that the Respondent and the deceased's mother depended on him wholly, there was no justification to have adopted a dependency ratio of 2/3.

35. As was stated in the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another** (Supra) while citing with approval the case of **Fr Leonard O. Ekisa & Another vs Major Birgen [2005] eKLR**: -

> **" …there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of**

dependency is a question of fact to be established in each case."

36. In this particular case, the Respondent could only claim for damages under the Fatal Accidents Act for himself and on behalf of the deceased's mother but not on behalf of the deceased's brother. Indeed, Section 4(1) of the Fatal Accidents Act Cap 32 (Laws of Kenya), an action under Fatal Accident Act can only be brought for the benefit of the wife, husband, parent and child of the person whose death was so caused.

37. The said Section 4(1) of the Fatal Accidents Act stipulates as follows: -

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused** (emphasis court)**, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:"**

38. It was therefore the considered opinion of this court that the proper and/or correct dependency ratio applicable in the circumstances of the case herein was 1/3 and not 2/3 as had been adopted by the Learned Trial Magistrate as the Respondent did not demonstrate that the deceased supported them to the extent of 2/3 and only used 1/3 on himself.

39. Turning to the special damages, the court noted that there were several receipts in names of persons other than the Respondent herein. Whereas the Appellant had argued that the receipts in the sum of Kshs 40,150/= were in the name of someone else other than the Respondent herein, this court noted from the proceedings that only Receipts of 23rd December 2013 for Kshs 20,000/= were marked for identification. The Respondent closed his case before the same were tendered in evidence.

40. During funerals, it is not uncommon for persons to make payments on behalf of the bereaved. In Kenyan setting, not awarding a deceased's family anything for burial expenses would be tantamount to assuming that a deceased was buried without any ceremony, which is very un-African. Indeed, even where there are no receipts, the deceased's family is normally expected to have incurred some expenses despite being assisted by the community. It is for that reason that a sum of Kshs 40,150/= would not have been unreasonable for funeral expenses in Kenya, with or without receipts.

41. Having said so, it is trite law that special damages must not only be specifically pleaded but that they must also be specifically proven. Any receipts that were not tendered in evidence cannot therefore be admitted. The receipts that were marked Exhibit P MFI (a), (b) and (c) for Kshs 20,000/= were therefore inadmissible as was held in the case of **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others** (Supra) in which the Court of Appeal rendered itself as follows:-

> **"In Des Raj Sharma vs Regiman (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa vs The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence."**

42. Although the proceedings showed that the receipts that had been marked for identification were in the sum of Kshs 20,000/=, this court noted that the receipts were for a sum of Kshs 28,700/= and were in the names of Jane Nyawira and Jane Wanjohi. Notably, there was nothing on record to show that she was the Respondent's daughter as he had contended.

43. Accordingly, as the Respondent had claimed a sum of Kshs 57,235/= in his Plaint which was inclusive of the sum of Kshs 28,700/= that had not been specifically proven, the Learned Trial Magistrate proceeded on the wrong principle and/or erred by awarding the entire amount for having considered documents that had only been marked for identification. The court therefore found and held that it could interfere with her determination.

44. In the premises foregoing, this court found and held that Grounds of Appeal Nos (3) and (4) were partially successful.

DISPOSITION

45. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17th April 2019 was partly merited and the same be and is hereby allowed. The effect of this judgment is that the Judgment of the Learned Trial Magistrate that was delivered on 16th August 2019 be and is hereby set aside and/or vacated and replaced with the following:-

> **Judgment be and is hereby entered in favour of the Respondent against the Appellant for the sum of Kshs 538,547.75 made up as shown hereunder:-**
>
> **Damages under the Fatal Accidents Act** **Kshs 800,000.00**
>
> **1/3 x 10,000 x 20 x 12**
>
> **Special damages** **Kshs 28,535.00**

Kshs 828,535.00

Less 35% contributory negligence **Kshs 289,987.25**

Kshs 538,547.75

Plus costs and interest on damages under the Fatal Accident Act from the date of judgment and interest on special damages from the date of filing suit until payment in full.

46. As the Appellant succeeded on his Appeal partly as shown hereinabove, each party will bear its own costs of the Appeal herein.

47. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **November 2020**

J. KAMAU

JUDGE