REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 582 OF 2017

MILDRED MUMBI KANAKE &

SOLOMON M MWANGI (Suing as the Legal Representatives and Administrators of

the estate of PETER MWANGI WACIURI (Deceased).....APPELLANTS

VERSUS

ROBBERT KARIUKI NYAGA.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Milimani Commercial Court Nairobi by the Hon. D A Ocharo (Mr), Senior Resident Magistrate delivered on 26th September 2015 in CMCC No 686 of 2016)

JUDGMENT

INTRODUCTION

1. By his decision delivered on 25th September 2015, the Learned Trial Magistrate, Hon D A Ocharo, Senior Resident Magistrate (SRM) entered judgment in favour of the Appellants, the legal representatives of Peter Mwangi Waciuri (hereinafter referred to as "the deceased") against the Respondent for Kshs 200,970/= made up as follows:-

a. Pain and suffering	**Kshs 50,000/=**
b. Loss of expectation of life	**Kshs 100,000/=**
c. Loss of dependency	**Kshs 308,880/=**
1/3 × 8,580 × 9 × 12	
d. Special damages	**Kshs 143,060/=**
	Kshs 601,940/=
Less 50% contributory negligence	**Kshs 300,970/=**
	Kshs 200,970/=

Plus costs and interest at court rates from date of judgment.

2. Being aggrieved by the said decision, the Appellants filed their Memorandum of Appeal dated 27th October 2017 on even date. They relied on nine (9) Grounds of Appeal.

3. Their Written Submissions were dated and filed 7th November 2018 while those of the Respondent were dated 21st November 2018 and filed on 22nd November 2018.

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 **Peters vs Sunday Post Limited [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. Having looked at the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination are:-

> **a. Whether or not the Learned Trial Magistrate erred in law and in law in apportioning liability equally against the Respondent and deceased respectively;**
>
> **b. Whether the award of damages was so manifestly or inordinately low so as to have warranted interference by this court.**

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

I. LIABILITY

8. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with under this head as they were all related.

9. According to the Plaint dated and filed on 11th February 2016, on or about 13th February 2013, the deceased was lawfully crossing Mombasa Road when the Respondent negligently drove managed and/or controlled Motor Vehicle Registration No KBS 374Q (hereinafter referred to as "subject Motor Vehicle") that he caused it to hit the deceased occasioning him serious injuries from which he succumbed.

10. On the material date, at about 10.30 pm, Edward Irungu Kibunja (hereinafter referred to as "PW 2") testified that he was seated in his taxi at Oil Libya Petrol Station when he saw the subject Motor Vehicle that was being driven along Mombasa Road towards the Central Business District (CBD) knock down the deceased. The Respondent stopped. He and the Respondent then went and asked Red Cross Ambulance to take the deceased to hospital. He stated that the Respondent left the scene immediately the ambulance got there.

11. During his cross-examination, PW 2 testified that there was not much traffic on the road and that the street lights were on. He also stated that the stretch of the road where the deceased was knocked down was straight and the exact spot had no zebra crossing. His evidence was that the accident occurred in the middle of the road.

12. In his evidence, the Respondent testified that the accident occurred between 9.00 pm – 9.30 pm. He said that he was driving in the middle of the road from the Airport towards the Central Business District (CBD) at 50-60 kph and traffic was not heavy.

13. He testified that his head lights were on and his vehicle could have been seen from a distance. He averred that when he arrived at Bellevue, he saw a person in the middle of the road. He tried to swerve but unfortunately, he hit him. He stated that he had not previously seen the person who was wearing a brown jacket first cross the road but only saw him 2-3 metres ahead. He added that there was no over bridge at the site at that time.

14. When he was cross-examined, he admitted that he was charged in **Traffic case 17284 of 2014** with the offence of careless driving and failing to report an accident within twenty four (24) hours. He confirmed that he was convicted on both counts and was fined Kshs 100,000 and Kshs 1,000/= respectively.

15. In his judgment, the Learned Trial Magistrate observed that the deceased failed to make better judgment about crossing the road because he ought to have seen the subject Motor Vehicle approaching. On the part of the Respondent, he concluded that he must have been driving at a very high speed to have occasioned the deceased fatal injuries. He therefore found both of them to have been negligent and apportioned liability equally against them. He relied on the case of **Karanja vs Malele [1983] KLR 147** where the Court of Appeal rendered itself as follows:-

> **"There are two elements to be considered when accessing the issue of liability namely causation and blame worthiness: there should be no distinction which can be drawn as attribution of negligence after seeing danger and negligence in not seeing before hand, and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine car in her control. Apportionment of liability represents an exercise of discretion."**

16. The issue of the Respondent's guilt was not in question as he was convicted of the offence of careless driving and failing to report an accident. The conviction was conclusive evidence of his guilt as no appeal was preferred against the same.

17. Section 47A of the Evidence Act Cap 80 (Laws of Kenya) stipulates as follows:-

> **"A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment, or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

18. In view of the fact that this conviction that had not been set aside, vacated and/or overturned on appeal, the Appellants seemed to suggest that the Respondent ought to have been held wholly liable for the accident herein.

19. On his part, the Respondent submitted that the apportionment of liability was justified as the accident occurred at night, along a straight stretch of the road and that the accident occurred in a place where there was no zebra crossing.

20. He argued that the proceedings of the lower court were not submitted in evidence during the trial but that in any event, his conviction did not mean that he was wholly liable for the accident. In this regard he placed reliance on the case of **Charles Ocharo Momanyi vs United Millers Ltd [2017] eKLR** which cited the case of **Robinson vs Oluoch [1971] EA 376** where the common thread was that a conviction of a traffic offence was conclusive proof of guilt of a defendant but it did not mean that he was wholly liable for the accident as contributory negligence would come into play.

21. This court fully associated itself with the Respondent's submissions in this regard. The fact that a defendant had been convicted of traffic offence did not absolve a plaintiff from having contributed to the causation of an accident. It only implies that a defendant cannot argue that he was not guilty of the traffic offence he was charged with unless he can provide proof that such conviction has been set aside, vacated and/or overturned on appeal.

22. It, however, disagreed with the Respondent that the fact that the Appellant did not adduce in evidence the proceedings in the traffic matter he was exonerated from liability in this case. The Respondent himself duly admitted during Cross-examination that he had been convicted of the offences of careless driving and failing to report an accident and fined Kshs 100,000/= and Kshs 1,000/= respectively. Insisting on the lower court file being adduced in evidence during trial was therefore not necessary and would have added no value whatsoever.

23. Notably, an express admission of facts by a party discharges the party who had said what is admitted from adducing further evidence to prove those particular facts. In that regard, the Respondent's submissions that **"he who asserts must prove"** and that **"the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given by either side"** as stipulated in Section 107 (1) and Section 108 of the Evidence Act Cap 80 Laws of Kenya were thus immaterial and misplaced as the Appellants could not be called upon to prove what the Respondent had clearly admitted during trial.

24. On analysing the evidence that was adduced in the Trial Court, this court came to the firm conclusion that both the deceased and the Respondent were to blame for the accident as the Learned Trial Magistrate had correctly determined. Taking PW 2's and the Respondent's evidence of the lighting conditions at the time into consideration, it was clear that visibility was only possible by lighting from the street lights and head lights of the Respondent's subject Motor Vehicle.

25. As the accident occurred on a straight stretch of the road, the deceased must have seen the Respondent's motor vehicle from a distance. The chances of any road user underestimating the speed of a motor vehicle at night is very high and such road user is expected to exercise greater caution while using a road especially where there are other road users at the material time. The deceased was therefore to blame for having crossed when the road was not clear of the motor vehicles.

26. He was also to blame because he was not wearing any reflective clothing. In his Examination-in-chief, the Respondent was emphatic that the deceased was wearing a brown jacket. This colour could only have made the deceased less visible to other road users and appear as a dark object and not necessarily as human being.

27. On his part, the Respondent was negligent for having driven the subject Motor Vehicle at an excessive speed. It is not possible that an impact with the deceased at a speed of 50-60 kph could have occasioned the deceased fatal injuries. The Respondent must have been driving at a higher speed.

28. At the material time, the deceased was crossing the road from South C towards South B. The Respondent acknowledged that there was no overbridge at the time. It was therefore expected that pedestrians could be expected to cross the road hence the importance of the Respondent, who was a driver, to have exercised more caution.

29. The accident occurred on a straight stretch of the road. If the Respondent had exercised proper look out, he ought to have seen a dark object, whatever it was, on the road and slowed down to avoid hitting it. Nonetheless, the fact that he saw a person in the middle of the road 2-3 metres from him was proof that he was not keen on the goings on by other road users as the deceased was already in the middle of the road by the time he got to him.

30. It must be understood that any person, no matter how careless, is owed a duty of care by other road users. If that there were not so, then drivers of vehicles would be hitting persons with infirmities, both physical and mental, with impunity and without a care in the world.

31. Accordingly, bearing the circumstances of this case, this court came to the firm conclusion that liability ought to be apportioned at 70%-30% in favour of the deceased herein against the Respondent as the Respondent was at the material time in charge of what could be said to be a "lethal machine" as it was capable of causing serious, if not fatal injuries, to pedestrians. It was the considered opinion of this court that the Learned Trial Magistrate applied the wrong principles in apportioning liability at 50%-50% against both the deceased and the Respondent. This court could therefore found merit in the Appellants submissions disturb the said apportionment.

32. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3) and (4) were merited and the same are hereby upheld.

II. QUANTUM

33. Ground of Appeal No (5) was dealt with under this head.

34. The Appellants argued that the Learned Trial Magistrate calculated quantum on the wrong principles and further misapprehended the evidence and hence arrived at an inordinately low figure.

35. They argued that the deceased was in the informal business of selling sand, stones and materials and his income of Kshs 50,000/= was evidenced by the bank statements from Equity Bank. It was their contention that the Learned Trial Magistrate erred by adopting the minimum wage for unskilled workers and expecting the deceased who was a businessman to have had a constant source of income.

36. They referred to the case of **David Kimathi Kaburu vs Gerald Mwobobia Murungi (suing as a legal representative of the Estate of James Mwenda Mwobobia (deceased) [2014] eKLR** where Makau J held that earnings can be proven by modern technology by way of phones and such gadgets and not necessarily by bank statements, vouchers or pay slips.

37. The Respondent pointed out that the occupation of the deceased in the Death Certificate was indicated as **"Nil"** and that the deceased's wife, Mildred Mumbi Kanake (hereinafter referred to as "PW 1") had stated in her Witness Statement which she adopted in court, that the deceased earned a sum of Kshs 50,000/= per month. He stated that she further confirmed that his income was not fixed.

38. In his analysis, the credit amounts in the deceased's bank statements for eighteen (18) months from September 2011 to February 2013 showed a deposit of Kshs 62,530/= giving an average of Kshs 3,473/= per month and thus the deceased could not have given PW 1 between Kshs 2,000/= - Kshs 10,000/= as he had contended.

39. The first thing that this court noted was that it was not correct that PW 1 had stated in her Witness Statement that the deceased used to earn Kshs 5,000/= per month. Her Witness Statement clearly showed that she said although the deceased's income was not constant, he would make around Kshs 50,000/=.

40. The second thing that it observed was that the credits in the deceased's bank statement from 12th November 2005 – 12th February 2013 showed a total deposit to his Equity Bank Account in the sum of Kshs 319,203/=. Bearing in mind the twenty six (26) deposits that he made to his account, it was an average deposit of Kshs 12,277/= over an eight (8) year period.

41. As deposits were not made every month, it was difficult to say for a fact how much the deceased earned monthly, a fact that the Learned Trial Magistrate also correctly observed. What was apparent was that between November 2005 and August 2011, the deceased appeared to have been making an average income of Kshs 20,000/=. From September 2011 to February 2013, save for 27th September 2011 and 4th June 2012, where the deposit was shown to have been Kshs 9,000/= and Kshs 33,000/= respectively, all the other deposits were lower than Kshs 5,000/=.

42. Indeed, during that latter period, there were no deposits in December 2011, February 2012, March 2012, April 2012, May 2012, July 2012, September 2012, October 2012, November 2012, December 2012 and January 2013.

43. This court therefore found that the multiplicand of Kshs 8,580/= being the minimum wage for unskilled workers that was adopted by the Learned Trial Magistrate was extremely generous considering that there was no sufficient proof of the deceased's income and in his Certificate of Death, his occupation was indicated as **"Nil."** The Learned Trial Magistrate did not apply the wrong principles in this regard. As the Respondent had no problem with this figure, this court opted not to interfere with the said award.

44. In the premises foregoing, this court found and held that Grounds of Appeal No (5) was not merited and the same is hereby dismissed.

III. MULTIPLIER

45. Ground of Appeal No (6) was dealt with under this head.

46. The deceased was aged fifty one (51) years. The Appellants argued that since he was self-employed, he could have continued working till seventy five (75) years of age. They therefore proposed a multiplier of nineteen (19) years as the multiplier of nine (9) years that was adopted by the Learned Trial Magistrate was for civil servants who retire at sixty (60) years.

47. It placed reliance on the case of **Roger Dainty vs Mwinyi Omar Haji & Another [2004] eKLR** where the court held that:-

> **"We do not agree… as a matter of practice the appropriate multiplier to be appropriate multiplier to be applied to different age groups of victims. What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case."**

48. On the other hand, the Respondent urged this court not to disturb the said multiplier.

49. This court was persuaded by the Respondent not to disturb this award for the reason that closer to his death, the deceased did not seem to

have been engaged economically. This court did not see any justification by the Appellants that the deceased would have worked until seventy five (75) years. Bearing the vagaries of life, this court found a multiplier of nine (9) years to have been fair in the circumstances.

50. In arriving at this conclusion, this court associated itself with the holding of Nyamweya J in **EMK & Another vs EOO [2018] eKLR** where she adopted a multiplier of eight (8) years in the case of a deceased who was aged fifty one (51) years of age at the time of his death.

51. In the case of **John Wamae & 2 Others vs Jane Kituku Nziva & Another [2017] eKLR** the deceased was aged sixty one (61) years at the time of his death. Kariuki J adopted a multiplier of nine (9) years at the time of his death.

52. In **Joseph Katuga Gathii & Another vs World Vision Kenya & Others [2010] eKLR**, the deceased therein was 57 years. The court therein adopted a multiplier of 8 at the time of his death.

53. In the premises foregoing, this court found and held that Ground of Appeal No (6) was not merited and the same is hereby dismissed.

III. DEPENDENCY RATIO

54. Ground of Appeal No (7) was dealt with under this head.

55. The Appellants submitted that a dependency ration of 2/3 ought to be adopted because the deceased had a wife and a sickly child to take care of. They argued that the mere fact that he supported his wife, warranted a dependency ratio of 2/3.

56. On his part, the Respondent pointed out that the Chief's letter dated 10th October 2017 showed that the deceased children were aged thirty two (32), twenty six (26) and twenty four (24) years and that two (2) children were employed at the material time of the accident.

57. PW 1 did not adduce any evidence to demonstrate that her last born was unwell and that it was the deceased who used to take care of him. The other two (2) children were gainfully employed and could not have been the deceased dependants.

58. The above notwithstanding, this court took the view that the mere fact that PW 1 relied on the deceased for her upkeep was sufficient proof that a dependency ratio of 2/3 could be adopted.

59. As the Respondent did not adduce any evidence to the contrary, this court found the Appellant's submissions that dependency ratio of 2/3 was reasonable to have been fair.

60. In the case of **Chania Shuttle vs Mary Mumbi & Another [2017] eKLR** this very court adopted a dependency ration of 1/3 where the deceased husband was living in a different town and was expected to have used a big chunk of his income to cater for his rent in the town he was living in. In the instant case, evidence seemed to suggest that the deceased was living with his wife in the same house.

61. Notably, the Learned Trial Magistrate did not lay basis for adopting a dependency ratio of 1/3. Failure to justify the same led him to arriving at an erroneous conclusion which this court was persuaded it could interfere with.

62. In the premises foregoing, this court found and held that Ground of Appeal No (7) was merited and the same is hereby allowed.

CONCLUSION

63. Accordingly, having considered the evidence that was adduced in the lower court, the written submissions and the case law each of the parties relied upon, this court was persuaded that there was sufficient reason for it to disturb the discretion of the Learned Trial Magistrate as she had applied the wrong principles in respect of the dependency ratio.

64. The awards of special damages, pain and suffering and loss of expectation of life were not disputed so this court did not disturb the same.

DISPOSITION.

65. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 27th October 2017 was partially successful. The effect of this was that the judgment that was entered in favour of the Appellants against the Respondent in the sum of Kshs 200,970/= is hereby set aside and/or vacated.

66. In its place, it is hereby directed that judgment be and is hereby entered in favour of the Appellants against the Respondent for Kshs 637,574/= made up as follows:-

a. Pain and suffering **Kshs 50,000/=**

b. Loss of expectation of life **Kshs 100,000/=**

c. Loss of dependency

2/3 × 8.580 × 9 × 12 **Kshs 617,760/=**

d. Special damages **Kshs143,060/=**

Kshs 910,820/=

e. Less 30% contribution **Kshs 273,246/=**

Kshs 637,574/=

Plus costs and interest at court rates. For the avoidance of doubt, interest on the award under Law Reform Act and Fatal Accidents will run from the date of judgment while interest on the Special damages will run from the date of filing suit.

67. The Appellant will have costs of this Appeal.

68. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **9th** day of **April** 2019

J. KAMAU

JUDGE