REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 128 OF 2018

CATHERINE MWENDWA MWIRIGI..APPELLANT

VERSUS

LUCY NKOYAI KARWAMBA (Suing as he legal

administrator of the estate of DERRICK MUGAMBI

MWIMBI- DECEASED)......................RESPONDENT

[Being an appeal from the decision and judgement of Hon. P.M.Wechuri-R.M made and delivered on 6th November 2018 in Tigania PMCC No. 1 of 2018]

JUDGMENT

1. The appellant herein was the defendant in the trial Court whereas the Respondent was the Plaintiff. The Appellant being aggrieved by the decision of the trial Magistrate filed this appeal on 5th December 2018 seeking this honourable to set aside the decision of the trial court and substitute it with an order dismissing the Respondents suit and or in the alternative to make its own assessment under the head of Pain and suffering and loss of dependency.

2. The appeal has enumerated twelve grounds of appeal that can be summarised in the following hypothesis;

> **a. That the accident occurred on the lane of the appellant and therefore the appellant could not have been held liable.**
>
> **b. The learned Magistrate erred disregarded the evidence and findings of Pw3, a police officer who investigated the circumstances under which the accident occurred on the lane of the appellant.**
>
> **c. The learned Magistrate erred in law and in fact in disregarding the findings contained in the investigation report tendered by the defence as an exhibit during trial and which report was admitted in evidence by consent.**
>
> **d. The Learned magistrate erred in law and fact and/or misapplied the law in taking into account extraneous issues or matters and thus arriving at a wrong decision on the issue of liability.**
>
> **e. The Learned magistrate erred in law and fact and/or misapplied the law in taking into account extraneous issues or matters and thus arriving at a wrong decision on the issue of damages payable to the deceased estate.**

3. On 25th April 2019 this Honourable Court directed parties to canvass the appeal through written submissions.

Appellant’s submissions

4. The appellant submitted that the evidence of the Respondent at the trial Court was at variance. That Pw2 who was a witness had in his written statement stated that the appellant was negotiating a corner but in his oral testimony in court he changed the narrative and alleged that the appellant was overtaking.

5. He further submitted that the evidence of Pw 4, the investigating officer was that the motor cycle was hit on the left hand side; meaning the motor cycle was hit on the appellant’s lane. This was the evidence of the appellant who also produced the investigation report which trial court failed to analyse in its judgement. He proposed that in the alternative this honourable Court should hold the Respondent 50% liable for

the fate that befell him.

6. On damages counsel submitted that should this honourable Court find the appellant liable it should cap the following headings i.e. Pain and Suffering, Loss and expectation of life and loss of dependency. He cited the following authorities in support of his submissions; **Albert Odawa vs. Gichimu Gichenji [2007] eKLR, DMM (Suing as the administrator and legal Representative of the estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR, Jannet Njoki Kigo (Suing as personal representative of the late Benson Irungu Wanjohi vs. Daniel Karani Gichuki [2016] eKLR.**

Respondent's submissions

7. The Respondent submitted that the court apportioned liability at 80:20% in accordance with the evidence tendered. That Pw 2, Pw 3, and Pw 4 who are eye witnesses gave a true account of what happened and all blamed the driver of the motor vehicle. That the apportionment of 20 % is only on the ground that he did not have a helmet but not because he was negligent. That the trial Court applied sound legal principles in arriving at quantum of damages. The Respondent relied on the following cited authorities to support his submissions; **Nakuru Hcc No. 357 of 1999 Alice Mboga vs Samuel Kiburi, Meru Appeal No. 221 Of 2014 David Micheni Mutegi Njui (Suing As The Legal Representative of the estate of Laurel Kawira Michieni) vrs Stephen Johana & Anor, Hccc No. 78 of 2000, David Mukii Mereka vs. Richard Kanyago & 2 Others, Civil Suit No. 437 Of 1996, Jackson Mgata Kuritu (Personal representative of the estate of Loise Nyambura Magata) vs. Charles Cheruiyot Keter.**

ANALYSIS AND DETERMINATION

Duty of court

8. This being the first appeal the court should evaluate the evidence and come to own conclusions except it should remember that it neither saw nor heard the witnesses when they testified. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In so doing, the court is not beholden or compelled to adopt any particular style. Except, it must avoid merely rehashing of evidence as was recorded or trying to look for a point or two which support or does not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed. .

Of liability

9. The burden of proof in civil cases lies on the person who alleges; ordinarily the plaintiff. However, proof of contributory negligence is upon the defendant. But, it is desirable that if a person is seeking contribution or indemnity from a third party, should enjoin the third party in the proceedings so as to avoid such party from being condemned unheard. Of importance also is that the standard of proof in civil cases is on balance of probabilities. See the case of **KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

10. The cause of action herein arises from a road traffic accident involving a motor vehicle and a motor bicycle. From the police abstract, the matter was put under investigation- an ambiguous term used by the police where they have not made a determination from the investigations where liability lies. Nonetheless, **Pw4 Cprl. Ali Golane who** was the investigation officer told the court that he visited the scene and found that the motor vehicle was going to Maua and motorcycle to Meru. According to him, they collided head on. Nobody has however been charged. His testimony was that the motor vehicle was hit at the centre of the road. He however stated that there were prior reports that the motor vehicle was moving in a zigzag manner. But, it was his opinion that he could not decide on the matter and so he referred the file to the Director of Public Prosecution.

11. Pw4 was none committal as to apportionment of blame. But he stated that the point if impact was at the centre of the road. There were however no certain measure provided by him which would determine the exact point of impact. In the circumstances, what does the other evidence portend?

12. The appellant claimed that that the evidence of Pw3 and Pw2 was inconsistent as one stated that the motor vehicle was overtaking while the other stated that there was a corner. In order to tackle this claim I will state in *ex tenso* the evidence by PW2 & PW3.

13. Pw2 Zakayo Kieru testified that he witnessed the aforesaid accident. That the appellant's motor vehicle was driving at a high speed and overtook another vehicle. As a result it knocked down the motor-cycle and the deceased who was a pillion passenger. In cross-examination he admitted that in his statement he had stated that the motor vehicle was negotiating a corner whereas in court he stated that the motor vehicle was overtaking. He also stated that he saw the victims; the rider wore a helmet whereas the pillion passenger (the deceased herein) was not wearing a helmet.

14. PW3 Patrick Thuranra also witnessed the accident. He told the court that the accident was at a corner. That the motor cycle had finished negotiating a corner when it was knocked. The vehicle was on the motor cycle's lane. He testified that he was from Maua and looking at the back of the motor cycle. While facing Maua the motor cycle was on the right side. That if the rider had moved to the left he would have fallen into a ditch.

15. PW2 stated that there was a corner. He did not deny that fact except he added that the motor vehicle overtook another vehicle and hit the motorcycle. One thing that stood out and was common in the testimonies by PW2 & PW3 was that the appellant was driving on the lane

where the motorcycle was being rode. It is common mistake that a driver in negotiating a corner at high speed invariably enters the other lane in order to maintain steadiness of the vehicle. But, prudent driving requires one to slow down to a speed which you can negotiate the corner comfortably using your lane. This is pure science, yet, now common sense for long term road users. The eye witnesses- apart from the appellant- stated that the motor vehicle entered the motorcycle's lane and hit it. The Appellant relied wholly on the investigation report conducted on behalf of her insurance which came to the conclusion that the Appellant was not to blame for the accident. Such exoneration required proper grounding on evidence. Notably, the said investigations report did not take into account evidence of other or independent eye witnesses. It wholly relied on the averments made by the appellant, scene visit and visits to the police station.

16. I have seen the photographs attached to the investigation report that reveal a bend at a short distance from the scene. This fact renders support to the claim by PW2 and PW3. Of greater concern is that the appellant's written testimony stated that she veered to the left side of the extreme left side of the road. From the evidence of PW4, the point of impact was stated to be at the centre of the road. These two positions are at variance. Reconciliation thereof is found in the evidence of PW 2 and 3.

17. I lament that the Investigations officer was not through in his investigations. The point of impact should be clearly ascertained by the IO through exact or reliable measurements. If that is done, little difficulties will be encountered in knowing the point of impact. In this case, this was an important consideration. Nevertheless, the evidence available suggests most probable position to be that the appellant drove on the motor cycle's path. The appellant should bear the blame. She did not discharge the evidential burden on her shoulders or prove contribution up to 50% from the motorcycle driver. In any case, she did not join the said motorcycle driver as third party. Therefore, the position taken by the trial magistrate in apportioning liability in the ratio of 80:20% in favour of the Respondent was supported by evidence. I uphold the decision by the trial court on liability.

Quantum

18. Now, the outstanding issue is on assessment of damages. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly set out in the case of **Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000** by the Court of Appeal as follows:

> **"…in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."**

General Damages for Pain and Suffering

19. Under this head, the trial Magistrate considered the deceased herein did not die on the spot but in the Hospital. The fact was also made clear in the testimony of Pw1 who rushed to the scene and took her son to the hospital only to learn the following day that his son died later. This is an important consideration in assessment of damages under this head. The conventional sum of Kshs. 10,000/= is usually awarded when the deceased died on the spot. But taking the circumstances of this case a higher sum is appropriate compensation. Therefore, the trial magistrate did not err as he considered the fact that the deceased did not die on the spot but later in hospital and must have experienced great pain and suffering. This is a justification for awarding the sum of Kshs. 100,000/= under this head. I uphold the award.

Loss of expectation of life

20. I agree with the trial Magistrate decision to adopt an award of Ksh.100, 000/= under loss of expectation of life as it is within the range of the conventional figure. It is not inordinately high for this court to disturb it. See the case of **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR, Makano Makonye Monyanche v Hellen Nyangena (2014) e KLR and Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) e KLR.**

Loss of Dependency

21. This head is quite problematic especially where a commentator or judicial officer thinks that a multiplier applies in all cases. On this dilemma see Ringera J (as he then was) in the case of **Kwanzia vs. Ngalali Mutua & another** that:

> **"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."**

22. Accordingly, where dependency is not founded on concrete and ascertainable details, courts have favoured assessment in global terms rather than multiplier. See the persuasive decision of **EPHRAIM MUTAHI MUTUNDE V RAPTURE BUS SERVICES LIMITED MOMBASA HIGH COURT CASE NO. S18 OF 2011 (2016) eKLR** Otieno J that:

> **"Dependency is always a matter of evidence and not a question of any conventional standards. It behooves a party/litigant to give evidence on the extent of its dependency to the deceased. For the matter before me the statements and documents filed do not reveal how much the deceased availed to the father as a dependant. It is therefore difficult to ascertain how much he received from the deceased as evidence of annual or monthly dependency lost as a result the death. It is however a matter to**

be taken judicial Notice of that in African set up, parents expect to depend on their children and indeed Do exercise such dependency. The defendant having proposed, the ratio of ½ then in the absence of proof, I am of the opinion that the would represent a reasonable offer and proposal.

23. For further reading see the case of **Charles Ouma Otieno & another -Vs- Benard Odhiambo Ogecha (*Suing As Brother And Legal Representative and Administrator of the Estate of Oscar Onyango Ogecha* (Deceased) [2014] eKLR where the court held:**

> **"I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.**
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> **The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved."**

24. The Respondent (PW1) presented a report from Angili Primary school that showed that the deceased, a class 7 student performed fairly well. The trial court arrived at a global sum of Kshs. 2,000,000/=. The approach was in order. The only matter I should now determine was the quantum of damages for dependency.

25. The appellant submits that the aforesaid sum is excessive and proposes a sum of Kshs. 400.000/=. They rely on the cited case of **DMM (Suing as the Administrator and legal Representative of the estate of LKM v Stephen Johana Njue & Another [2016]** where I held that the conventional sum for a child aged 16yrs is between Kshs. 1,000,000/= to 1,500,000/= and I made an award in the sum of Kshs. 1,200,000/=.

26. In **David Ngunje Mwangi v Chairman of the Board of Governors of Njiri High School [2001] eKLR** the Court awarded a sum of Ksh.1, 680,000/- for lost years. The deceased was aged 17 yrs. This determination was made in the year 2001.

27. I am alive to the fact that each case ought to be determined on its own merits. The above decisions were made in the year 2001 and 2016 and incidence of inflation still persists. This is an important consideration here. Therefore, I do not think a sum of Kshs. 2,000,000/= for loss of dependency is excessive. It is being fair and reasonable compensation in this case.

Special damages

28. The Respondent produced the list of documents in support of her testimony and listed as **P-Exh 2-13;** Death Certificate, Post mortem Report, Receipt for coffin and hearse, Post mortem receipt, Mortuary receipt, Receipts for food for mourners, receipt for casualty expenses, Deposit receipt for treatment, KRA search, Receipt for KRA search, Limited letters of Administration Adlitem. Special damages pleaded and proved is Kshs. 69,700. I award this sum.

29. The upshot is that the appeal is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 4th day of July, 2019.

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F. GIKONYO

JUDGE

<u>In presence of</u>

Kimaita for appellant

M/s Mwilaria for Anampiu for respondent

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F. GIKONYO

JUDGE