



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO.760 OF 2016**

**DAVID KAMAU.....APPELLANT**

**VERSUS**

**NANCY WAIRIMU KIMINDIRI (Suing as the**

**Representative of the estate of**

**E M Deceased).....RESPONDENT**

*(Being an appeal against the Judgment/decree dated 14<sup>th</sup> November, 2016*

*of Hon. Rachel Ngetich, Senior Principal Magistrate in Nairobi in Milimani*

*Commercial Courts, Chief Magistrate's Court Civil Suit No.390 of 2015)*

**JUDGEMENT**

1) Nancy Wairimu Kimindiri, the respondent herein, filed a compensatory suit in her capacity as the administrator of the estate of E M K, deceased, against David Kamau, the appellant herein.

2) It is alleged vide the plaint dated 3<sup>rd</sup> February, 2015, that the deceased, a son to the appellant aged 12 years at that time, was cycling with his friend M N, the PW2, on the 30<sup>th</sup> of August 2014, along Fort Smith Road in Gitaru, near Ndumbuini. When he was hit by motor vehicle registration No. KBT 973F, a Mitsubishi canter, which was being driven by the appellant, causing the deceased fatal injuries.

3) The appellant filed his defence dated 31<sup>st</sup> March, 2015, in which he denied the respondent's allegations. The case was heard on various dates and in the end, Hon. Rachel Ngetch, the learned Chief Magistrate entered judgment for the respondent in the following terms. Liability was apportioned at 20:80 in favour of the Respondent.

<i>i. Pain and suffering</i>	<i>Ksh. 30,000/=</i>
<i>ii. Loss of expectation</i>	<i>Ksh. 100,000/=</i>
<i>iii. Loss of dependency</i>	<i>Ksh.2,000,00/=</i>
<i>Special damages</i>	<i>Ksh. 66,400/=</i>

Total	Ksh. 2,196,400/=
Less 20% contribution	Ksh. 1395,352/=
<b>Grand Total</b>	<b>Ksh.1,801,048/=</b>

4. Being aggrieved by the award, the appellant preferred this appeal and put forward the following grounds of appeal:

**1. That the learned magistrate erred in law and in fact by ignoring the witness statement of PW1 M N G, the witness with the closest proximity to the accident, which was recorded at the police station in which he clearly stated that they were cycling inside the road and further stated that when the defendant was overtaking from the right side, that is when the deceased also decided to move to the right side of the road thereby being knocked down by the canter.**

**2. That the learned magistrate erred in law and in fact in finding the appellant to be 80% to blame for the accident in spite of the plaintiff's witness (M N) own admission in his witness statement recorded at the police station stating that indeed the deceased turned right when the defendant overtook them.**

**3. That the learned magistrate erred in law and misdirected herself in assessment of both general damages and awarded a figure which was inordinately high.**

**4. That the learned magistrate erred in law and misdirected herself in assessment of the judgment sum in that the grand total less 20% liability should not have amounted to Ksh.1,801,040/= but Ksh. 1,757,120/=.**

**5. That the learned magistrate erred in arriving at conclusion that were not sufficiently supported by evidence given by the Respondent.**

5. The aforesaid grounds may be summarized into three main grounds namely;

**i. Whether or not the trial magistrate erred in law and fact on apportionment of liability.**

**ii. Whether or not the trial magistrate erred in law and fact on her award on general damages.**

**iii. Whether or not the trial magistrate erred in her computation of the final award less the respondent's 20% contribution.**

6. When the appeal came up for hearing, learned counsels recorded a consent to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

7. The first ground of appeal touches on the issue of liability. The appellant submits that there were inconsistencies in the testimony of PW2 who was the person who witnessed the accident with proximity, by virtue of having been cycling with the deceased. The appellant states that it is impossible that two people cycling together and only the one in front was hit. It was agreed that there is a high possibility that the deceased encroached into the road as a result of which, he was hit. It is the appellant's submission that this court ought to re-evaluate the evidence again to arrive at its own, fresh apportionment of liability to substitute that of the trial court. The appellant cited the case of **Livingstone Otundo –vs- Naima Mohamoud (1990) eKLR** where it was held inter alia that;

**“the appellants duty of care should have been judged by what we ought to have reasonably anticipated and to consider what cause of action would have been taken to ensure no accident occurred .....**”

8. The Respondent submits that the magistrate exercised her judicial discretion based on the evidence placed before her. It is trite law that the exercise of judicial discretion is not to be interfered with unless it is shown that it was exercised on the wrong principles. The Respondent cited that case of **Samken Limited and Another –vs- Mercedes Sanchez (1999) EA** which held *inter alia* that;

**“The burden of proving that a single judge has exercised his discretion improperly lies on the person challenging the same .....**”

Thus, the Respondent states that the appellant has failed to discharge that duty.

9. The trial magistrate apportioned liability at 20:80 in favour of the Respondent on the ground that DW1, the appellant herein stated that he had seen the deceased at a distance of about 50 to 60 metres. He said he hooted, this meant that the driver ought to have been more careful to avoid hitting the cyclist if at all he was not moving at a high speed.

10. Police constable Charles Ondieki, PW1 confirmed the accident having occurred and the cyclist was riding at the pavement when he was hit and Martin Njogu, PW2 stated that the deceased was his friend and they were cycling together on that fateful day. PW1 stated that the deceased was on the left side of the road and off the road, after being hit, he was pushed far off the road. The vehicle canter stopped and the driver of the asked PW2 to go inform the deceased mother about the accident.

11. David Muchiko Kamau, DW1 stated that he saw two young men cycling while chasing each other in the middle of the road and he hooted. They turned back, saw the canter and moved to the left but still on tarmac, but they were still chasing each other. DW1 passed the last one of the two children that were cycling, and suddenly the one in front turned to the right and the driver braked and swerved to the right to avoid collision. The bicycle being in high speed, it was too late to avoid the accident, the deceased hit the front bumper and the deceased was hit by the body of the lorry.

12. The evidence of PW2 and DW1 were proximate as to how the accident occurred and they were both eye witnesses. DW1, the driver who despite seeing the two young men cycling ahead of him, he still could not avoid the accident. If at all the appellant was mindful of other road users the accident could have been avoided. I am convinced that the award of liability at 80:20 was well founded.

13. The second ground of appeal touches on the issue of quantum.

The appellant submits that the award of Ksh.130,000/= under the law reform Act ought to have been deducted from the award in the fatal Accident's Act. Secondly that the quantum should be reviewed to be based on actual and current trends of court awards in cases of a similar nature. The appellant proposed that the global figure of Ksh.2,000,000/= for loss of dependency should be set aside and replaced with an award between Ksh.700,000/= and 900,000/= which is reasonable.

14. The Respondent submits that the trial court's award on Quantum was reasonable and is not inordinately high to be

disturbed.

15. The trial magistrate awarded a global sum of Ksh.2,000,000/= for loss of dependency, for the deceased who died at the age of 12 years. I find the global award not inordinately high in view of comparable awards. This ground of appeal is found to be without merit.

16. The third ground of appeal is whether or not the trial magistrate erred in her computation of the final award less the respondent's 20% contribution.

17. The appellant submits that the final figure after deduction of 20% contributed by the respondent should be Ksh.1,757,120 and not Ksh.1,801,048 that was awarded.

18. The respondent did not submit under this head. I find merit in this ground of appeal, the total should have been ksh.1,757,120/=.

19. The awards on pain and suffering and loss of expectation of life should remain undisturbed.

20. In the end, the appeal succeeds partially. The awards of the trial court is varied and are substituted with the following awards:

<b>i. Pain and suffering</b>	<b>Ksh. 30,000/=</b>
<b>ii. Loss of expectation of life</b>	<b>Ksh. 100,000/=</b>
<b>iii. Loss of dependency</b>	<b>Ksh.2,000,000/=</b>
<b>iv. Special damages</b>	<b><u>Ksh. 66,400/=</u></b>
<b>Total</b>	<b>Ksh.2,196,400/=</b>
<b>Less 20% contribution</b>	<b><u>Ksh. 439,280/=</u></b>
<b>TOTAL</b>	<b><u>Ksh.1,757,120/=</u></b>

In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party meets its own costs.

**Dated, Signed and Delivered in open court this 6<sup>th</sup> day of April, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent