REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 18 OF 2017

TERESIA SEBASTIAN MASSAWE (Suing as the Legal

Administratix of the estate of the late

SILVIA SEBATIAN MASSAWE.....APPELLANT

VERSUS

SOLIDARITY ISLAMIC (KENYA OFFICE.....1ST RESPONDENT

HEZRON GETUI.....2ND RESPONDENT

(Being an appeal from the Judgement of Hon. M. Chesang delivered on 7th November 2017)

JUDGEMENT

The appellant Teresia S. Massawe is the mother of the late Silvia Sebastian Massawe who was knocked down on or about 28th February 2014 along Ngong-Nairobi road near Ngong Town. The offending motor vehicle registration number KBT-864E which was registered in the name of 1st Respondent and driven at the time by the 2nd Respondent. As a result of the accident the she sustained serious fatal injuries.

This appeal arises from the suit filed in the Chie Magistrate's court seeking damages under the Law Reform and Fatal Accidents Act. In the suit filed in court on 3rd May 2016 the appellant alleged that the accident occurred due to negligence on the part of the respondent's driver in the manner and speed at which he drove the subject motor vehicle registration Number KBT 864E. The respondents in their joint defence denied that the accident alleged to have occurred was due to negligence as pleaded in the plaint. The respondents in the said defence averred that the deceased pedestrian was the author of her own reason being as pleaded in the defence.

From the evidence the Learned Trial Magistrate found that the accident was partially caused by the negligence of the deceased and approximated liability at 60%: to 40% in favour of the appellant. In the same Judgement the Learned Trial Magistrate awarded the appellant damages as follows.

(1.)	**Pain**	**and**	**suffering**		**Ksh.**		**50,000**
(2.)	**Loss**	**of**	**Expectation**	**of**	**life**	**Ksh.**	**30,000**
(3.)	**Under**	**the**	**Fatal**	**Accidents**	**Act**	**Ksh.**	**929,544**
(4.)		**Special**		**damages**		**Kshs.**	**66,800/=**

(5.) Costs and interest at court rates.

Being aggrieved of the decision on both liability and damages the appellant filed 7 grounds of appeal as follows:

1. THAT the Learned Magistrate erred both in law and fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result there reached a wrong decision by holding the deceased 40% and the Respondents 60% liable for the accident.

2. THAT the Learned Trial Magistrate erred in law and fact by failing to find that the accident was wholly or substantially contributed to by the Respondents' negligence, in light of the evidence before the Trial Magistrate's Court.

3. THAT the Learned Magistrate erred in law and fact in failing to consider all the relevant circumstances in awarding

damages under the Law Reform Act and the Fatal Accident Act.

4. THAT the Learned Magistrate erred in law and fact in adopting a multiplier of eleven (11) years bearing in mind that the deceased was of middle age (34 years), which finding is contrary and out of keeping with the evidence and other findings in similar circumstances.

5. THAT the Learned Magistrate erred in law and fact by failing to apply or applying wrong principles in assessment of damages to wit; general damages for loss of dependency at Kshs. 929,544/=, pain and suffering at Kshs. 50,000/= and loss of expectation of life at Kshs. 30,000/= which assessment when viewed against the evidence adduced, is manifestly low as to amount to a miscarriage of justice.

6. THAT the Learned Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant thereby arriving at a wrong conclusion.

7. THAT the Learned Magistrate failed to exercise her discretion judiciously in apportioning liability and awarding damages.

The court is called upon to decide whether the trial Magistrate Judgement met the threshold on both issues heard and determined before her.

The Claim and evidence before the trial court

The appellant called two witnesses in support of her case to recover the damages for negligence against the Respondents. In her testimony as **PW1 Teresia Sabastian** stated that she brought the claim as a sister to the deceased who was at the time aged 34 years knocked down by motor vehicle registration number KBT 464E. According to Teresa Massawe they had alighted from another motor vehicle along Ngong road together with her sister the deceased. She further testified that the deceased was knocked down by the offending motor vehicle owned by the 1st Respondent.

As a result, the deceased suffered fatal injuries which she succumbed later at Ngong District hospital while undergoing treatment. The appellant attributed to the cause of accident to the negligent act of high speeding and failure to notice the deceased who was crossing the road.

PW2 Dorcas Wanja Wainaina testified as being in company of PW1 and the deceased when the accident occurred. In her testimony the accident occurred where there is no zebra crossing but the moving vehicle hit the deceased before she could fully cross over to the other side of the road.

PW3 PC Paul Onyango a Police detective attached to Ngong Police Station testified on the role he played as the Investigating Officer who was the 1st Responder to visit the scene of the accident. PW3 further stated that the investigations conducted revealed that the driver of the motor vehicle in question was in the wrong. In that regard he was charged with the traffic offence of causing death by dangerous driving, but the case is still pending before a Kibera court.

The Respondents Account

The respondents on their part adduced evidence of the driver Hezron Getui. According to Hezron Getui he was the driver of the offending motor vehicle on the material day the accident occurred. Hezron Getui further testified that he was driving along Ngong-Nairobi road following another vehicle from behind. In the course of his driving he decided to overtake the front vehicle. According to Hezron Getui the deceased crossed the road from the rear side of the front motor vehicle and as he was overtaking a collision occurred between him and the deceased. Hezron Getui denied any acts of negligence on his part which could have contributed to the accident.

Submissions on appeal by the Appellant

Mr Nyarangu Learned counsel for the Appellant submitted that the trial magistrate erred in law and fact while appraising evidence on liability. The bone of contention as argued by Counsel that there is no evidence for contributory negligence to be apportioned between the deceased and the 2nd respondent. Further Counsel contended that the fact PW1 and PW2 did not cross the road at the same time with the deceased did not depict poor judgement on her part. Learned Counsel further submitted that the respondent witness did not controvert the appellant case on the occurrence of the accident. That in the defence the witness PW1 attributed the cause to inventible accident and exonerated himself from blame. This according to Learned Counsel was not a rebuttal to the case by the appellant. Learned Counsel relied and cited the principles in the case of **Jona Venzi Nguko & Anor Versus John Mwaka Amisi & 2 others HCCA 589 of 2010 [2015] eKLR at page 11-12** to support his argument on liability in favour of the appellant. Learned counsel in support of his submissions prayed for this court to set aside the findings of liability on grounds that it was erroneous.

On the issue of quantum Learned Counsel submitted that the trial magistrate erred in adopting a multiplier of 11 years for a deceased person aged 34 years. Learned Counsel argued and submitted by outlining the undisputed facts before the trial court i.e. the deceased employment as a bar attendant, secondly, that the deceased was in good health prior to the day of the accident. Thirdly, that she was pressed and survived with two children who depended wholly on her upkeep. The appellant Counsel in support of this ground relied on the following cases to buttress the legal principles on multiplier and multiplicand under the law reform act and fatal accident act; **Grace W. Kinyugo (As the legal representative of Francis Ruengo) Versus Keroche Breweries Limited HCCA NO. 46 of 2014 [2016] EKLR, Mohammed Iqbal & 2 others Versus Agnes Mbayaki shikami [2016] EKLR,Mwita Nyamohanga & another Versus Mary Robi (Suing on behalf of the Estate of Joseph Tagare Mwita (deceased) & another (2015) eKLR, Rachel Ivasha Igunza Vesrus Nyenjeri Kamau, Mary Owino Adunga Versus John Wambua & another, Board of Members of Kangubiri Girls High School Versus Jane Wanjiku Muriithi &**

another (2014) eKLR, David Kahuruka gitau & another Versus Nancy Ann Wathithi Gitau & another [2016] eKLR

Learned Counsel submitted and proposed a multiplier of 26 years as the appropriate figure from the facts of the appellant's case. Learned Counsel also took issue with the award of damages on pain and suffering and loss of expectation of life. While applying the decision in the case of **Stella Kanini Jackson & another Versus Kenya Power & Lighting Company Ltd 2012 EKLR, Elizabeth Ngina Murola Versus Martin Masila Kambo and another HCC 124 of 2004 and Berly Betha Malowa Were Versus Kenya Ports Authority** , **Alexander Okinda anagwe (Suing as the Administrator of the Estate of Patricia Kezia anagwe Deceased) Versus Reuben Muriuki Kahuha, City Hopper Limited, Michael A. Craig & Reuben Kamande Mburu [2015] eKLR** Learned Counsel urged this court to award of Ksh 100,000/= as appropriate.

On loss of expectation of life Learned Counsel advanced the arguments that the deceased could have lived up to the age of 70 years. She died at the age of 34 years. On the basis of the dicta in the case of **Patrick Kanai Waweru Versus George Ogwella & 21 others 2016 EKLR** Learned Counsel urged this court to consider an award of Ksh. 250,000/=.

The Respondents case on appeal

Mr. Muchemi Learned Counsel for the Respondents argued and submitted on the issue of liability that the appellant has not shown any errors on fact or law to enable this court to interfere with the decision of the trial court. Learned Counsel invited the court to peruse the record more specifically the evidence by appellant and her witnesses ***visa viz*** the respondents' version on the accident.

According to the Learned Counsel submission the issue of liability was anchored on the tort of negligence. The evidence adduced at the trial court indicated that there was no zebra crossing and the impugned motor vehicle was on its rightful lane. In Learned Counsel submissions that the deceased substantially contributed to the occurrence of the accident is in complete simply because the issue of tortious liability was properly decided by the trial magistrate. On quantum learned counsel submitted that the award of general damages is discretionally and an appellate court cannot interfere unless on well-founded principles. Learned Counsel further submitted that in the circumstances of this appeal, the applicant has not shown that such legal principles exist for invocation of appellant jurisdiction to set aside the award. Learned Counsel placed reliance on the following cited cases**. KEMFRO Africa Ltd Versus Lubia & Another (NO. 2) 1987 LR 30, Court of appeal at Nairobi in Civil Appeal No. 79 of 2012 [Peter M. Kariuki Versus Attorney General].**

Learned Counsel urged this court to dismiss the appeal also on quantum.

Analysis and Decision

I have considered the entire record of appeal and the submissions by both counsels.

The duty of an appellate court has been restated in many decisions by the superior courts; as illustrated in the case of **Selle Versus Associated Motor Boat Company 1968 EA 123 at 126. Sir Clement De Lestang VP** held as follows:

> ***"Appeal to this court from a trial by the High court is by way of a retrial and the principles upon which this court acts in such appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions. Though it should always bear in mind that it is neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial Judge's findings or fact if it appears either that he has clearly failed on some point to take account of a particular circumstances all probabilities materially to estimate the evidence, or if the impression based in the demeanor of a witness is inconsistent with the evidence in the case generally."***

Therefore, based on these principles I examine the trial court evidence to reach my own conclusion whether she misappropriated the law or facts of the case.

The Undisputed facts from the record.

> **(1) On or above 28 February 2014 near Kamu House Ngong Town an accident occurred involving the deceased Silvia Sebastian Massawe and the 1st respondent's motor vehicle registration No. KBT 864E.**
>
> **(2) The motor vehicle was being driven at the time by Hezron Getui the 2nd respondent.**
>
> **(3) The accident occurred along Ngong-Nairobi Road while the 2nd Respondent was in the process of overtaking another motor vehicle when the accident occurred.**
>
> **(4) The deceased pedestrian was crossing the road from left side of the road from to the right side of the road.**
>
> **(5) There was no zebra crossing where the accident occurred. The issues to be decided in resolving this appeal in my view can be broadly categorized as two;**

Given this background the issues to be decided in resolving this appeal in my view broadly categorized as two:

> **(a) Who was to blame for this accident; was there contributory negligence and if so was the apportionment by the trial**

magistrate reasonable?

(b) Did the trial magistrate error in law and fact in the award of quantum of damages?

The first issue in this appeal is whether the appellant proved there was negligence on the part of the respondents. For this court to arrive at that conclusion it is necessary to consider the applicable law.

In **Scholarly text book by Charles Worth and Percy on Negligence 9th Edition paragraph 101 the Learned Authors** stated as follows: In Current forensic speech negligence has three meanings associated with it. They are:

(1) State of mind in which it is opposed to intention

(2) Careless conduct and

(3) The breach of a duty to take care that is imposed by either common law or statute law.

Section 47 (1) of the Traffic Act provides that if any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably expected to be on the road is guilty of an offence. Further section 49 (1) of Traffic Act provides:

"that if any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence."

The Kenyan Highway Code has the following relevant provisions

(6) Before you cross the road, stop at the kerb, look right, look left, and right again. Do not cross until the road is clear then cross at right angles keeping a careful lookout all the time. If there is a refugee stop and look towards on coming traffic before you cross.

(7) Do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstructions and whenever your view is limited

These provisions of the law place a specific duty of care on the part of the drivers and pedestrians to avoid occurrence of an accident or endangering other road users.

Case Commentaries

In the English case of **Hay or Bourhill Versus James Young 1943 AC 92.** The House of Lords held as follows on the duty of care imposed on the drivers of motor vehicles.

"No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway but, it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be the injured by the omission to take such care".

My attention was also drawn to the case of ***Lochgelly Iron Court Co. Ltd Versus Mcmillan 1934 AC where Lord Right held:***

"In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission. It properly involves the complex concept of guilty, breach and damage thereby suffered by the person to whom the duty was owing".

Further Lord Denning in his decision in the case of **M. Jones Versus Livior Quarries Ltd 1992 2QB 608** took this view on the doctrine of contributory negligence.

"a person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudence man or woman he or she might be hurt himself or herself and in his or her reckonings he or she must take into account the possibility of others being careless".

In paragraph 186 of Charles Worth on Negligence Third Edition road users more so pedestrians also owe a duty of care. **The Learned author emphasized as follows: "A pedestrian owes a duty to other highway users to move with due care"**

Applying the above legal principles, the real question therefore in this appeal liability being a question of fact, whose negligence was the real or substantial cause of the accident? This court has reviewed the trial court records and the submissions by counsel on this ground.

From the evidence of PW1-PW3 the events leading to the occurrence of the accident are clearly stated. It appears to me more likely that the said accident occurred in the manner articulated in the Respondents defence at the trial. This is an area we are told there was no zebra crossing on the day of the accident. The deceased alighted from a public service vehicle with PW1 and PW3. They were apparently travelling to the same direction. The physical layout of the road is not in dispute in that it is clear straight where visibility is not in any way obstructed. where the collision took place, we are not told by the appellant and her witnesses that there was any obstruction which would have prevented the deceased from seeing the on-coming traffic. Outlining the evidence of PW1, PW2 and PW3 they cannot recall if the deceased observed whether there was another vehicle which might have been on the same road before she decided to cross over. What is clear from the evidence is a collision between the deceased and the offending motor vehicle on a road where each of the parties to the suit assert that there was no zebra crossing. It is not also emphatically disputed that the respondent motor vehicle was overtaking another vehicle in front of him. As a driver driving a lethal vessel he was under duty of care to ensure that the road was clear from any other users who would be expected on the same road before crossing.

The trial court Confronted with two opposing versions on the occurrence of the accident, including lack of clarity from the evidence of the appellant and her witnesses one cannot fault her findings on apportionment and contributory negligence. I take the cognizance that the trial court had the advantage of evaluating and hearing witnesses testify on oath as to the circumstances of the accident. I have no such advantage as to the demeanor and velocity of the witnesses as the trial court. I think the appellant has not discharged the burden of proof that the learned trial magistrate erred in law and fact in apportioning liability at 60-40%. I am therefore of the considered view that this ground on liability fails.

The second ground of appeal is on the assessment of damages. The dispute by Mr. Nyarango Learned counsel for the appellant is that Learned Trial Magistrate misapprehended the evidence on the crucial aspects of multiplier and multiplicand to arrive at a wrong award. The respondent seems not to contest or cross-appeal on this ground. The approach taken by our courts in assessment of damages flows from the decision of the court of Appeal in **Tayab Versus Kinamu 1982-88 IKAR 90** adopting the decision by **Lord Denning Limpho Choo Versus Camden and Islington Andrea Health Authority 1979/A11 ER 332** held as follows:

> ***"In considering damages in presence injury claims, it is often said: the defendant are wrong doers so make them pay up in full. They do not deserve any consideration. That is a tedious way of putting the case. The accident like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often repeated that the plaintiff is enabled to be fully compensated for all the loss and detriment such as suffered. That is not the law. She is only entitled to what is in the circumstances a fair compensation, fair both to her and to the defendant. The defendants are not wrong doers. They are simply the people who foot the bill. They are as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay where their hard-earned money sustains such institutions".***

Further in the case of **West H & Sons Ltd Versus Shepherd 1964 AC 326**, the court held interalia

> ***"But money cannot restore a physical fame that has been battered and shattered. All the Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach".***

The salient aspects of these principles will mirror in the determination of this ground on award of damages. The question that is uppermost in the mind of this court is whether the trial court erred or misapprehended the law in making her findings on the various items on the award of quantum. The legal position in cases of this nature is that

> ***"a court on appeal will not normally interfere with a finding or fact by the trial court unless it is bed on no evidence or on a misapprehension of the evidence or the Judge is shown the demonstrably to have acted on the wrong principles in reaching on the findings he did. (case of Shah Versus Mbogo)".***

As far as the evidence adduced in the court below is concerned, the deceased died at the age of 34 years. It was stated in evidence that she was working as a bar attendant. The trial magistrate applied an income of Kshs. 10,563 and a multiplier of 11 years under the fatal accident act for loss of dependency. There is no cogent evidence from PW1 on how much she earned and her personal expenditure. Though no birth certificate was admitted the deceased was survived by her two children Jackson Massawe and Eveta Massawe. These were the facts placed before the trial court which influenced her decision on award of damages. The question is whether the trial magistrate misdirected herself in assessment of damages.

However, in calculating quantum the trial magistrate appended on amount of Ksh. 10,563 and a multiplier of 11 years. The principles in this respect are determinably framed.

> ***"The question is whether the Learned Trial Magistrate misdirected herself in assessment of damages. The principles in the case of Hassan Versus Nathan Mwangi, Kamau Transporters & 4 others 2008 IKLR are relevant in this case as they were then in 2008. The court adopted the decision in that case. In Bonharm Cater Versus Hyde Park Hotel 1948 64 T-LR 177 the court stated as follows:***
>
> ***"Plaintiffs must understand that if they bring …action for damages it is for them to prove damage. It is not enough to write down particulars and so to speak throw them at the head of the court saying this is what I have lost I ask you to give me these damages."***

Justice Ringera as he then was succinctly stated the applicable principles under the Fatal Accident Act in the case of In **Ezekiel Barng'entuny Versus Beatrice Thairu HCC No. 1638 of 1988 Ringera** where he held as follows:

> ***"the principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents'. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."***

In the instant case the deceased died on the same day as per the death certificate. From the record there is no medical or treatment note indicative of any admission to a medical facility before she succumbed to death. It is also further observed the issue a to her employment as a bar attendant is not in dispute. However, the trial court was not given her monthly or annual income obtained during her working life. With respect to the trial magistrate decision on damages and applying the principles in **Ezekiel Barng'entuny Case** there is an error of law and fact to support her findings. This court has no problem that the deceased would as well make a minimum of Ksh. 10,000/= a month but the only challenge is on the application of the multiplier and multiplicand to the circumstances of this case. In my view I do hold that the learned trial magistrate fell in error at arriving at a wrong award. Guided by the principles in **Shah Versus Mbogo case** I would interfere and set aside the award in the following manner;

Pain and suffering

In this case the deceased died on the same day without even being attended at any medical facility. The approach of an award of Ksh. 50,000 is in my view on the higher side. I would therefore under this head Kshs. 10,000.

Loss of expectation of life

Under this head the trial magistrate awarded Kshs. 30,000 and have reasons that there is no proof of income or any evidence that the deceased was gainfully employed. Given the circumstances of this case the award under this head has nothing to do with employment or income of the deceased. The jurisprudence in our jurisdiction is settled on what relevant factors to take into account in assessing damages for loss of expectation of life. On my part I will go with a convention sum of Ksh. 100,000

Loss of dependency

I have considered the principles in the above cited cases. The deceased was aged 34 years. She had been blessed with two children. As a matter of evidence, the appellant and her children had reasonable expectation of life they will live up to 65 years. The deceased appeared to be the sole provider for her children during her life time. Her life was cut short due to the contributory negligent acts of the respondent. Before considering any special principles, which apply to the present case I will refer to the relevant case law in the case of **Wangari Versus Nkaru (2004) eKLR**. In this case the deceased was aged 34 years as at the time of her death. The court weighing one factor after another applied a multiplier of 20 years.in the case of **Board of Governors of Kangubiri girls High school & another Versus Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR.**

I agree with the reasoning in the above cases regarding the correct multiplier. I will in this appeal interfere with multiplier of 11 years by substituting a multiplier of 20 years and a multiplicand of 1/3.

Accordingly, the appeal on liability is upheld while the award on quantum is hereby set aside and substituted as here in under.

(a)Pain and suffering

Kshs. 10,000/=

(b)Loss of expectation of life

Ksh. 100,000

©Loss of dependency

10,000 x 12 x 20 x 1/3 = Ksh. 800,000

(d)Special Damages

Kshs. 66,300

Less 40% liability

Costs of the appeal

Dated, delivered and signed in open court at Kajiado on 4th day of April 2018.

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R. NYAKUNDI JUDGE

Representation:

Mr. Kamwaro Holding Brief for Muchemi for the Respondent

Mr. Turunga for Nyarango for the Appellant

Mr. Mateli Court Assistant

Appellant present

Mr. Kamwaro: I pray for stay of execution of 30 days.

Stay of execution granted as prayed.