



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 172 OF 2014**

**PETER KAGO KARIUKI.....1<sup>ST</sup> APPELLANT**

**CATHERINE NJERU KARIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GEORGE KIMULI MWIKYA *sued as the legal***

***Representative of the estate of***

**MUTUKU KIMULI (*Deceased*).....RESPONDENT**

***[Being an appeal from the judgment of M.K Mwangi, Ag. Senior Principal Magistrate, in Machakos CMCC No. 1111 of 2009 delivered on 18<sup>th</sup> July, 2014]***

**JUDGEMENT**

1. The appellant is aggrieved by the judgment of the Ag. Senior Principal Magistrate (as he then was) delivered on 18/7/2014.
2. Mutuku Kimuli (hereafter *the deceased*) died in a road traffic accident on 10<sup>th</sup> January 2009. He was run over by a UD Nissan Trailer, *prime mover* registration number KBD 334W. It was owned by the 2<sup>nd</sup> appellant; and, driven by a one Maina, who was the turn boy.
3. The respondent, George Kimuli Mwikya, is the brother to the deceased. He brought a claim for damages against the appellant under the Law Reform Act and the Fatal Accidents Act.
4. At paragraph 5 of the plaint he pleaded as follows: That on 10<sup>th</sup> January, 2009, at Emali Township along Nairobi-Mombasa Road the deceased was lawfully crossing when the 2<sup>nd</sup> appellant's driver negligently drove the vehicle causing it to knock down the deceased and cause him fatal injuries. The particulars of negligence were as follows: driving at an excessive speed; failing to give any warning to the deceased; and, failing to stop or avoid the accident.
5. By a statement of defence dated 11<sup>th</sup> February, 2010, the appellant denied the claim *in toto* and put the Respondent to strict proof.
6. The learned trial magistrate found that the appellants were partially to blame for the accident, and apportioned liability at 70% to the appellants and 30% to the respondent. He awarded the estate Kshs 40,000 for pain suffering; Kshs 100,000 for loss of expectation of life and, Kshs 1,120,000 for loss of dependency. The respondent was also granted costs of the suit.
7. The appellants have challenged those findings through a memorandum of appeal dated 8<sup>th</sup> August, 2014. There are 12 grounds of appeal. They can be condensed into *four*. First, that the learned trial magistrate erred by holding the appellant liable in the absence of direct evidence; secondly, that the respondent failed to prove his case on a balance of probabilities; thirdly, that the learned trial magistrate erred by misapprehending the doctrine of proximate cause; and, fourthly, that the trial court applied wrong principles in assessment of damages leading to an *exorbitant* award.
8. The appeal is contested by the respondent. The respondent relied on written submissions dated 27<sup>th</sup> July 2018. The respondent contends that the lower court applied the correct formula to assess damages; and, that there are no grounds for interference with the discretion of the learned trial magistrate. He urged this court to dismiss the appeal.

9. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

10. PW1 was the brother of the deceased. He was informed of the accident by an unknown person who called him. By the time he got to the scene, the deceased had died. He testified that he and his father were largely relying on the deceased for their upkeep. He used to give their father (PW 2) Kshs 3,000 per month. He said he spent Kshs 18,400 for the funeral. He presented payment receipts. Upon cross examination, he said as follows-

*“I am not an eye-witness to the accident. I am not sure of the driver..”*

11. PW2 was George Kimuli Ngumbi. He did not witness the accident. He was dependent on the deceased and was receiving Kshs 3,000 per month from the deceased who was earning 7,000 per month as a watchman.

12. PW3 was PC Alfred Ogoti. He relied on the records on the file and the OB to testify that the deceased was among the injured in the road accident. The driver permitted his conductor to drive the truck and he was charged and convicted of permitting a person to drive without a driving license. On cross-examination, he said that if the driver had not permitted the conductor to drive the lorry, the accident would not have occurred.

13. That marked the close of the Respondent’s case in the lower court.

14. The appellants called no witnesses. They said they were unable to get their witnesses thus closed the defence case.

15. From that evidence it is beyond dispute that the accident occurred on 20<sup>th</sup> January, 2009; and, that the deceased died from the injuries. The main issues for determination are firstly, ***which of the parties ought to be held liable for the accident that claimed the life of the deceased, and secondly what is the reasonable award of damages?***

16. The learned trial magistrate found as follows-

*“The conductor of the vehicle drove without authority... the turnboy drove thereby knocking down the deceased... had the turnboy not driven the vehicle, then the road traffic accident would not have occurred. The driver by giving keys to the turnboy and the turnboy by driving, were negligent and exposed the deceased...the deceased on his part was under a duty to ensure his own safety and ought to have avoided the collision when he saw the vehicle moving towards him. Considering the above analysis, I, therefore apportion liability as follows;*

*Plaintiff 30% and Defendants 70% jointly and severally. ”*

17. I have perused the trial magistrate’s judgment. I must state that the Learned Magistrate did analyse the evidence on record on the issue of the causation of the accident or negligence and came to the correct finding.

18. Despite the fact that there was no eye witness to the accident and no direct evidence was tendered, the police officer who attended court did have the police file with him and relied on the records to give evidence. Therefore his evidence was of evidential and probative value to the case.

19. In a commentary and dicta by the Court of Appeal in the case of *Embu Public Road Services Ltd v Riimi CA No. 23 of 1967* the court held:

***“The doctrine of res ipsa loquitor is one which a plaintiff by proving that an accident occurred in the circumstances in which an accident should not have occurred; thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff in those circumstances does not have to show any specific negligence, he merely shows that an accident of that nature should not have occurred in these circumstances which lead to the inference, the only reasonable inference that the only reason for the accident must therefore be negligence of the defendant.”***

20. From the analysis of this evidence, we can safely conclude that the respondent had shown that there was a probable cause of the accident which does connote negligence on the part of the appellants. I accept that the accident happened along Nairobi-Mombasa Road. The evidence from PW1 and PW2, including the documents was not contested. That is supported by the fact that the death certificate indicates the cause of death as internal injury. However there is no post-mortem report to indicate the investigation thereof. The police abstract form (exhibit 9) stated that the matter was pending arrest. However it blamed no one for the accident; and, no one was charged for a traffic offence.

21. However, the police officer (PW3) did answer the elementary question on what the initial report indicated as the cause of the accident. He said *“The 1<sup>st</sup> defendant admitted to giving keys to the conductor... the 1<sup>st</sup> Defendant was charged, I have the charge sheet...”* If the defendant had adduced evidence to the effect that the conductor had a valid driving license to explain the fact that the said conductor had the skills to drive a lorry, it would have given an explanation to excuse him of inference of negligence. I thus find that the plaintiffs gave evidence to establish the prima facie case on the presumption of negligence, and this has not been displaced or controverted or challenged by the defendant’s. The learned trial magistrate clearly made no error on finding the appellants liable in negligence. The judgment on liability

therefore cannot be interfered with but must be upheld, suffice to add that the Appellants opted not to tender evidence and hence Respondent's evidence remained uncontroverted.

22. I will now turn to assessment of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

23. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expectancy, vicissitudes of life and the acceleration of the lump sum payment. See *Kemfro v Lubia* [1982-88] KAR 727, *Rev. Fr. Leonard O. Ekisa & another v Major Birge* [2005] eKLR.

24. The deceased was aged 34 years at the time of the accident. He was a security guard. There was documentary evidence of his earnings and this was not challenged by the defendant. The Appellants had urged the lower court to accept a monthly figure of Kshs 3,309/=. The trial court should have adopted this sum under the Regulation of Wages that is near the basic wage for an unskilled employee. There is precedent for that. See *Philip Musyoka Mutua v Veronica Mbula Mutiso (Suing as the legal representative of Lazarus Mutiso(deceased))*, [2013] eKLR. I also think the multiplier of 20 years was reasonable. The arithmetic works out as follows Kshs 3,309 x ? x 12 x 20 = Kshs 264,720/=. The learned trial magistrate failed to consider that the letter indicating a salary of Kshs. 7,000/= per month was not sufficient enough as it was not a payslip and which sum should attract statutory deductions. The deceased was unmarried and thus the suitable dependency ratio ought to be ?.

25. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The deceased died on the way to hospital. The lower court awarded general damages for pain and suffering at Kshs 40,000. That award is not inordinately *high* and keeps with latest trends on the subject. See generally, *Radhakrishnan Khamaney v Murlidhar* [1958] E.A 268. The award is found to be reasonable in the circumstances.

26. The lower court awarded the respondent a further sum of Kshs 100,000 for loss of expectation of life. The amount would have had to be *discounted* against the award under the Fatal Accidents Act. See *Kemfro v Lubia* [1982-88] KAR 727. The rationale is that all these amounts end up in the *same* estate and thus there should not be a double compensation.

27. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Coast Bus Service limited v Sisco E. Murunga and others*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The respondent had *specifically* pleaded for special damages of Kshs 46,460 made up as follows: funeral expenses Kshs 30,860; police abstract Kshs 200; and, the cost of Obtaining Letters of Administration Kshs 15,000. However, he *failed* to *strictly* prove all of those items, what he strictly proved was Kshs. 18,400/= which sum was duly awarded. I see no need to interfere with it.

28. The upshot is that this appeal succeeds partly. Liability remains undisturbed. The award on loss of general damages for pain and suffering remains as awarded.

29. The summary of the award is as follows-

<i>General damages for pain and suffering.....</i>	<i>Kshs 40,000.</i>
<i>Loss of dependency.....</i>	<i>Kshs 264,720.</i>
<i>Special damages .....</i>	<i>Kshs 18,400</i>
<i>Sub-total.....</i>	<i>Kshs 323,120.</i>
<i>Less 30% contributory negligence.....</i>	<i>Kshs 96,936.</i>
<i>Net award.....</i>	<i>Kshs 226,184.</i>

30. As the appeal has partly succeeded, I order that each party bear their own costs in this appeal. However, the Respondent shall have full costs in the lower court.

It is so ordered.

**Signed, Dated and delivered at Machakos this 7<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**