



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 75B OF 2009

M N (suing on behalf of a minor,

L K, DECEASED).....APPELLANT

VERSUS

PAUL KIPTOO.....RESPONDENT

(Being an appeal from the original judgment and decree of G. A. Mmasi, Senior Resident Magistrate, in Eldoret CMCC No. 166 of 2005 delivered on 14th May 2009)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Senior Resident Magistrates Court dated 14th May 2009. L K died in a road traffic accident. Her mother brought a suit against the respondent claiming general and special damages. The learned trial magistrate found that the appellant failed to prove liability. The suit was dismissed but with no order on costs.
2. The appellant has challenged those findings through a memorandum of appeal dated 15th May 2009. There are four grounds of appeal. First, that the learned trial magistrate erred by finding that there was conflicting evidence on the time of the accident; secondly, that the trial court erred by concluding that the case was not proved on a balance of probabilities; thirdly, that the suit was determined on a technicality; and, fourthly, that the learned trial magistrate failed to consider that the respondent did not deny causing the death of the minor.
3. The appeal is contested by the respondent. The respondent submitted that negligence was not proved. The respondent highlighted contradictions in the evidence. The contradictions related to the time of the accident and the person injured in the accident. For example, the police officer (PW4) stated that the accident occurred at 9:00 am; and, that the person killed in the accident was a cyclist; a fact not supported by the evidence. The respondent contended that the burden of proof was always on the plaintiff. The respondent also submitted that the suit was defective for want of letters of administration of the estate of the deceased. I was implored to dismiss the appeal.
4. On 27th May 2015, the court directed that the appeal be heard by way of written submissions. The appellant has filed submissions dated 26th June 2015. The respondent's submissions were filed on 8th October 2015. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
5. This 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.
6. The appellant filed a plaint in the lower court dated 21st February 2005. She pleaded that on 6th

April 2004 at 9:00 am, the deceased was walking along Kapsabet Road near Kapsaret Centre when she was knocked down by the respondent's motor vehicle registration number KAA 937M. The particulars of negligence were that the respondent drove at an excessive speed; that he failed to pay due care and attention; that he drove on the wrong side of the road; and, that he failed to apply brakes, swerve or avoid the accident.

7. By a defence dated 27th June 2005, the respondent denied the claim *in toto*. At paragraph 5, the respondent countered that the accident was caused by the negligence of the deceased. It was pleaded that she was walking alone and unattended; that she suddenly jumped onto the road; and, that she disregarded traffic regulations. The respondent also contested the capacity of the appellant to bring the suit. The appellant joined issues on all those claims in a reply to the defence dated 21st September 2005.
8. At the hearing, the appellant (PW1) testified that the deceased was her daughter. She said the deceased was born in May 1999 and was aged six. The appellant's brother was paying the deceased's school fees. She said the hospital bills and cemetery charges were as per exhibits 2 (a) and (b) and were paid by her brother. She said the cemetery fees were Kshs 650. The receipt (exhibit 1) was produced by *consent*.
9. On cross-examination, she said she had not applied for a grant to the estate of the deceased. She conceded that she did not witness the accident. She said the hospital bills were paid by her brother. Her answers were as follows-

“In total at the hospital, I do not know how much was paid but my brother P M paid the money. I do not know who paid the cemetery charges PMF15. I do not know about the document. I do not know who wrote to the company and how much he paid. I do not know where the document came from and who wrote the same”.

10. PW2 was the elder sister of the deceased. On the material day, they alighted from a *matatu* at Kapsaret. It had stopped raining. They were crossing from the right side of the road to the left as one faces Kapsabet. She testified that the deceased crossed to the left side. When she was off the tarmac, a vehicle headed to Kapsabet from Eldoret direction hit the deceased. PW2 said she saw the vehicle from about 20 metres away.
11. PW2 said the deceased was hit by “the front left side of the vehicle”. She said the vehicle was speeding. The deceased died on the spot. The respondent took the body to hospital. On cross-examination, she conceded that the *matatu* they were travelling in crossed the road and dropped them off on the right side of the road. The traffic from Eldoret to Kapsabet was on the left side of the road. PW2 was aged 14 at the time of the accident. She denied that she failed to chaperon her younger sister by allowing her to jump onto the road.
12. PW3 was Dr. Imbenzi. He is a pathologist. He produced a receipt from Moi Teaching and Referral Hospital for Kshs 8,000 dated 14th April 2004. It was issued to P M (the brother of the plaintiff); and, a receipt for Kshs 2,400 for mortuary services.
13. PW4 was Police Constable Samukui. He produced a police abstract form (exhibit 7). The abstract indicated the accident occurred on 6th April 2004 at 9:00pm. He was shown another abstract form prepared by PC Roinen showing the accident occurred on 6th April 2004 at 3:15pm. He testified that the person killed was “a pedal cyclist”.
14. The respondent testified that on the material date he was driving the suit vehicle. He was driving from Eldoret towards Kapsaret. He was on the *right* side of the road. He said the deceased suddenly emerged. He tried to brake but hit the child causing fatal injuries. He said the accident occurred at 3:00 to 4:00 pm. It had stopped raining. He testified as follows-

“As you face Kapsabet, the child emerged from the right side towards the left. I was not on the left side. I applied brakes but the vehicle hit the child. I brought the child to Elgon View Hospital. The child was confirmed dead on arrival. I rang the police and reported the accident”.

15. DW2 was a passenger in the back seat of DW1's vehicle. She is the wife to DW1. She denied the vehicle was speeding. She said she saw the deceased run across the road. She said it was “a bit

- foggy*” but the rain had stopped. That marked the close of the evidence.
16. I will deal first with the element of negligence. From the evidence of PW2 and DW1, there is no contest about three important matters. First, that an accident occurred on 6th April 2004 involving the respondent’s vehicle registration number KAA 937M. The vehicle was being *driven* by the *respondent*. It hit the deceased and *killed* her on the spot. Secondly, the accident occurred on the *right side* of the road as one faces Kapsabet from Eldoret. The respondent conceded he was *not* on the *left side* of the road. Thirdly, it had just stopped raining, and although the road was clear, DW2 said it was a “*bit foggy*”.
 17. I have then reached the inescapable conclusion that the respondent was driving on the *wrong side* of the road at the time of the accident. Traffic out of Eldoret to Kapsabet should have been on the *left side* of the road. I am entitled to take *judicial notice* that in Kenya, the rule of the road is to keep left. PW2 testified on cross-examination that the *matatu* they were riding in crossed the road and dropped them off on the *right side* of the road. The respondent conceded as much. He said as follows: “*As you face Kapsabet, the child emerged from the right side towards the left. I was not on the left side. I applied brakes but the vehicle hit the child*”. I stated at the beginning that the appellant pleaded that the respondent was driving on the wrong side of the road. That element of negligence is *proved*.
 18. I have also reached the conclusion that the deceased was hit by the respondent’s vehicle as she tried to cross the road. She appeared to the respondent suddenly. The respondent failed to brake and hit her. The respondent could *not* control his vehicle. The deceased was a child of six years. The lower court raised doubt about her age for want of a birth certificate or an antenatal clinic card. With respect, I think that was misdirection. Age is a fact. Documentary evidence is just but one of the methods of proving a fact. I agree that no birth certificate was produced. But her mother PW1 said she was born in May 1999. She was certainly younger than her sister PW2 who was fourteen at the time of the accident. At the time of the accident, it had just stopped raining. The conditions of the road were not perfect. DW2 said it was “*a bit foggy*”. The respondent was driving on the *wrong side* of the road. Granted those circumstances, I cannot assign any blame to the deceased minor as urged by the respondent.
 19. The lower court dealt at length with the *discrepancies* about the *time* of the accident. PW2 said the accident was on 6th April 2004 at 3:00pm. PW4 occurred on 6th April 2004 at 9:00pm. He was shown another abstract form prepared by PC Roinen showing the accident occurred on 6th April 2004 at 3:15pm. DW1 said the accident was on 6th April 2004 at 3:00 to 4:00 pm. From those multiple accounts the accident was on 6th April 2004 between 3:00pm and 4:00pm.
 20. The version by PW4 was clearly erroneous. He was *not* at the scene. He was unreliable. He said the victim was a *pedal cyclist*. True, those are discrepancies. But in any trial, there are bound to be discrepancies. See *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993. The discrepancies here are *not* material. Fundamentally, a police abstract report is not *proof* of the occurrence or circumstances of an accident.
 21. I thus find that the suit accident was *wholly* occasioned by the *negligence* of the respondent. I accordingly set aside the findings of the lower court on liability.
 22. I will now turn to quantum of damages. The learned trial magistrate did not express any opinion on damages. Notwithstanding her finding that liability was not proved, she was obligated to give an opinion on the level of damages. Having failed to do so, the appeal court has two choices: to assess damages; or, to remit the matter back to the lower court for assessment of damages. The impugned judgment dates back to the year 2009. The learned trial magistrate is no longer at the station. The accident occurred in the year 2004; over 11 years ago. In the interests of justice and costs, I will assess the damages.
 23. The appellant had *specifically* pleaded for special damages of Kshs 17,750. The following amounts were proved by documentary evidence: Police abstract form Kshs 100; Mortuary fees (from the evidence of PW3 Dr. Imbenzi) Kshs 10,400; burial permit Kshs 400; and, cemetery fees of Kshs 650. The cost of the coffin and death certificate was *not* proved. I thus award the appellant special damages of Kshs 11,550 to be paid by the respondent.
 24. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The mother of the deceased did not obtain letters of administration. The claim by the estate under the Law Reform Act for pain and suffering; and, for loss of expectation of life *cannot*, unfortunately, be maintained.

25. The deceased died on the spot. Had that aspect of claim succeeded, I would have awarded general damages for pain and suffering at Kshs 20,000 and for loss of expectation of life at Kshs 100,000. See generally, Radhakrishnan Khamaney v Murlidhar [1958] E.A 268, Coast Bus service Ltd v Samuel Mbuvi Lai, Nairobi, Court of Appeal, Civil Appeal 8 of 1996 [1997] eKLR, Benedeta Kimani v Cheboi, Nakuru, High Court Civil case 373 of 2008 [2013] eKLR, Rev. Fr. Leonard O. Ekisa & another v Major Birge [2005] eKLR.
26. The claim under the Fatal Accidents Act for *lost years* can be maintained by the plaintiff. Article 159 of the Constitution frowns upon technical justice. It would be unjust to defeat the claim of the minor merely because her mother had not taken out a grant. In any event, section 4 (1) of the Fatal Accidents Act *expressly* provides that the action can be maintained by the *mother* of the deceased. See David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR. The absence of a grant of letters of administration is *not* fatal as urged by the respondent. The primary reason is that the claim is by a *parent* who has a *reasonable expectation of support* by the deceased.
27. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expected, 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.
28. The deceased was six. There was insufficient evidence on how she was doing in school. She had just started that journey. Paragraph 5 of the plaint pleaded she was in class one. It would thus be a matter of conjecture to say what she would have turned out to be. But nevertheless her mother had reasonable expectations of future support.
29. Some courts faced with similar situations have used the minimum wage and a reasonable multiplier. In David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR the court used the minimum wage of Kshs 4,000 multiplied by 30 years to reach an award of Kshs 1,680,000. I think in the circumstances of this case a *global sum* of Kshs 400,000 is more appropriate and just. I would reduce the lump sum by 30% to take care of the accelerated payment. The net award under the Fatal Accidents Act is thus Kshs 280,000.
30. The upshot is that this appeal is allowed. The judgment and the decree of the lower court are set aside. Liability is entered against the respondent at 100%. General damages under the Fatal Accidents Act are assessed at Kshs 280,000. The claim under the Law Reform Act is *dismissed*. Special damages are awarded in the sum of Kshs 11,550. That is to say a total of Kshs 291,550 shall be paid by the respondent to the appellant. I also grant the appellant interest at court rates from the date of *this* decree.
31. Costs follow the event and are at the discretion of the court. I will grant the appellant costs in the lower court; and, also in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 4th day of February 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

Ms. Kosgey for the respondent instructed by Mulondo, Oundo, Muriuki & Company Advocates.

Mr. J. Kemboi, Court clerk.