REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HCCA NO. 589 OF 2010

JONA VENZI NGUKO……...……1ST APPELLANT

SALANTA C. HAULIERS……..2ND APPELLANT

VERSUS

JOHN MWAKA AMISI……1ST RESPONDENT

JAMES MUTUKU MWAKA (suing as the father, brother and

personal representative of the estate of

JOSEPH MBATHA MWAKA…….....2ND RESPONDENT

(Arising from the judgment and decree of the Chief Magistrate's court, Milimani commercial Courts, Nairobi delivered on 10th December 2010 by Honourable S.A. Okato (Mr) Principal Magistrate in Milimani CMCC No. 1165 of 2009)

JUDGMENT

This appeal arises from the judgment and decree of the Chief Magistrate's court, Milimani commercial Courts, Nairobi delivered on 10th December 2010 by Honourable S.A. Okato (Mr) Principal Magistrate in Milimani CMCC No. 1165 of 2009. The respondents herein John Mwaka Amisi and James Mutuku Mwaka (suing as father and brother) being the personal representatives of the estate of Joseph Mbatha Mwaka (deceased) instituted proceedings against the appellants herein Jona Venzi Nguko and Salanta C. Hauliers and Bhanchu Industries Ltd. The respondents claimed for general damages, special damages costs of the suit and interest arising from an alleged accident along Waiyaki way at Sodom Area on 9th July 2006 involving the deceased Joseph Mbatha Mwaka and motor vehicle registration No. KAU 948Z/ZC 3850 Mercedes Benz S/Trailer belonging to the 2nd appellant herein who was alleged to be the beneficial owner thereof and the 3rd defendant Bachu Industries Ltd who was the alleged registered owner of said motor vehicle. The respondents alleged that the said motor vehicle No. KAU 948Z/ZC 3850 Mercedes Benz S/Trailer was then being driven by Jona Venzi Nguko, the driver, agent and or servant of the 2nd defendant (2nd appellant herein) Salanta C. Hauliers Ltd.

The plaint dated 2nd March 2009 alleged that the driver Joan Venzi Nguko carelessly and or negligently drove, controlled and or managed motor vehicle registration NO. KAU 948Z/ZC 3850 M/Benz S/Trailer

such that he caused the same to loose control, veer of the road and knock down the deceased who was lawfully walking by the road side as a pedestrian as a consequence of which he sustained fatal injuries.

The respondents also pleaded particulars of negligence and or carelessness on the part of the 1st defendant/driver as follows:-

a) Driving at a speed that was excessive and dangerous in the circumstances.

b) Failing to slow down, brake, swerve and or stop so as to avoid the accident.

c) Driving the said motor vehicle carelessly and dangerously without any regard to the safety of the pedestrians therein and especially the deceased.

d) Failing to take proper look out or at all.

e) Caused the vehicle to have an accident.

The respondents also relied on the doctrine of Res Ipsa Loquitur. The appellants herein were blamed by the respondents for the negligence of the driver of the accident motor vehicle.

The deceased who was aged 19 years old was said to be a casual labourer/mason and by reason of his sudden death, his estate had suffered loss and damage for which the respondents claimed damages both under the Law Reform Act and the Fatal Accidents Act. At the time of his demise, the deceased was unmarried. He was survived by the 1st respondent father, his mother and five siblings.

The appellants herein entered appearance to the suit and filed a joint defence dated 5th June 2009 denying the respondent's claim as alleged save that they admitted the occurrence of the accident on 9th July 2006 but denying that the said accident was due to the negligence of the appellants as particularized in paragraph 7 of the plaint.

The appellants also pleaded that the deceased was the author of the accident in question and or that he substantially contributed to the occurrence in the following manner:

a. He crossed the said road when he knew or ought to have known that it was not safe to do so.

b. He failed to use the pedestrian flyover.

c. He authorized his misfortune by acting recklessly and/or negligently in the circumstances.

d. He undertook dangerous maneuvers on a busy road when he know or ought to have known this to pose danger to himself and other road users particularly the first defendant.

The appellants also denied all other claims by the respondents as pleaded by the respondents and prayed for dismissal of the respondent's suit with costs.

The respondents filed reply to defence dated 17th June 2009 reiterating the contents of the plaint and denying the allegations that the deceased contributed to the occurrence of the accident or in any way as alleged in the defence and put the respondents to strict proof thereof.

The 3rd defendant in the court below, Bachu Industries Ltd entered appearance and filed defence on 25th March 2009. it denied the plaintiff/respondents' claim that it was the registered owner of the accident motor vehicle at the material time of the accident and or that it was vicariously liable for the acts of the 1st defendant/appellant herein, it also denied ever having any interests in the accident motor vehicle and also denied that the respondents had served it with demand notice of intention to sue.

Pleadings closed and the respondent's case commenced for hearing before S.A. Okato (Mr) Principal Magistrate who, upon hearing the parties and considering their written submissions, found the 1st defendant/appellant driver of the accident motor vehicle liable at 100% in negligence and the 2nd and 3rd defendants vicariously liable for the acts of the 1st appellant. The trial magistrate awarded the respondents general damages of kshs 744,000/-and special damages of kshs 46,870/- costs of the suit and interest.

It is that judgment and decree of the subordinate court delivered on 10th December 2010 that provoked this appeal by two of the defendants in the lower court, who are the appellants herein.

The appellants' memorandum of appeal dated 20th December 2010 and filed on 21st December 2010 sets out 7 grounds of appeal challenging the decision of the trial magistrate. These grounds are:

1. That the learned magistrate erred in his judgment in holding that the 1st appellant was 100% liable for the accident and the 2nd and 3rd defendants vicariously liable jointly and severally .

2. That the learned magistrate erred in law and fact in finding that the 1st appellant did not produce any statements he recorded with the police in which he blamed the deceased for the accident.

3. That the learned magistrate erred in law and in fact in his finding and misapprehended the evidence before him hence arrived at a wrong finding on liability and thereby held the 1st appellant 100% liable for the accident.

4. That the learned magistrate erred in law and fact in disregarding and failing to appreciate the whole evidence tabled by the 12st and 2nd appellants.

5. That the learned magistrate erred in law and fact by awarding damages to the 1st and 2nd respondents which were excessive in the circumstances of this case.

6. That the learned magistrate misdirected himself by awarding the 1st and 2nd respondents highly excessive damages for loss of dependency under the Fatal Accidents Act based on a high multiplicand of kshs 6,000 and a multiplier if 31 years while disregarding the evidence before the court together with the 1st and 2nd appellant's submissions.

7. That the learned magistrate consequently erred in not exercising his discretion judicially and family.

The appellants prayed to this court to set aside the lower courts judgment on liability and hold that the deceased was the author of the accident and dismiss the suit.

Alternatively, the appellants prayed that liability be apportioned at 50% against the deceased and 50% to the 1st and 2nd appellant ; that the quantum of damages under the Fatal Accidents Act be reduced drastically; that costs of the lower court and in this appeal be awarded to the appellants and that this court do grant such other relief that it may deem fit and just.

The parties advocates agreed to have the appeal disposed of by way of written submissions, which they both dutifully filed and exchanged. In the appellant's submissions dated 3rd October 2014, it was submitted that the allegations of negligence against the appellants were not proved and they combined grounds No. 1,2,3 and 4 to argue that the learned trial magistrate erred in failing to consider the fact that the evidence tendered by DW1, was tendered by an eye witness whose evidence was crucial in

determining the issue of liability wherein the 1st appellant testified thus, inter alia:

> ***" That I saw him intending to cross and I slowed. Passed him by the cabin and checked through the side mirror and saw that person throw himself into the rear wheels . I braked and members of the public came and told that I was the third time the deceased was jumping into a vehicle"***

In the appellant's view, it was not possible for the 1st appellant to take any evasive action to void the accident by reason that he had already a moving vehicle.

The appellants also submitted that PW3 could not be relied on as a witness for the respondents because albeit she claimed to have been with the deceased at the zebra crossing waiting to cross the road, her name was not in the police abstract as one of the witnesses to the accident and that the statement she alleged to have recorded at the police station was never produced in evidence and that she was not a truthful witness because the investigating officer could have taken down her name and other details. In the appellants' view, the evidence of PW3 should have been disregarded.

The appellants also attacked the evidence of PW1 contending that he was not the investigating officer and further, that his evidence corroborated DW1's evidence as recorded in the occurrence Book report that the deceased threw himself at the appellant's motor vehicle. In their view, the evidence of DW1 was lucid on how the accident occurred and therefore the trial magistrate erred in not considering he appellant's evidence in arriving at his judgment on liability; and that he ought to have found that the deceased was 100% liable.

On quantum, the appellants contend that the award of kshs 744,000 under loss of dependency was highly excessive. They relied on the case of **Butt vs Khan (1982-88) KAR** 1 that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. Further, that it must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect an arrived at a figure which was either inordinately high or low.

According to the appellants, the respondents (PW2) witness evidence on the earnings of the deceased who was alleged to be a casual labourer was hearsay and therefore the learned magistrate erred in believing that the deceased used to earn kshs 6,000/- per month as there was no proof of earnings by the deceased therefore he should have applied a minimum wage of kshs 2,536/- and a multiplier of 28 years.

On the award under the Fatal Accidents Act, it was submitted that the trial magistrate did not consider the appellant's submissions in arriving at the award. They relied on the case of **Kemfro Africa Ltd & Another vs Lubia & Another (NO. 2) (1987) KLR 30** where the Court of Appeal reiterated principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial court ie that if the trial magistrate(court in assessing damages took into account an irrelevant factor or left out of account a relevant one or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage.

The appellants therefore urged the court to allow the appeal and dismiss the respondent's case with costs.

In the alternative, the appellants urged this court to find and apportion liability at 50% against the deceased and 50% against the appellants and drastically reduce damages awarded under the Fatal Accidents Act, or make any other relief as the court may deem fit and just.

In opposing this appeal, the respondents filed their submissions dated 22nd October 2014 contending that the trial magistrate properly analyzed the evidence before arriving at the decision that he made that the appellants were 100% liable for the accident.

According to the respondents, their case was well supported by the evidence of PW3 Salome Wambui Mweu an eye witness who was standing with the deceased as they waited to cross the road and that the lorry emerged and veered off the road hitting the deceased at a pedestrian crossing.

The respondents also contended that the appellants witness DW1 corroborated the evidence of PW3 that the accident occurred at a stage and that the driver of the accident motor vehicle saw the deceased intending to cross the road and he slowed down. According to the respondents it is impossible for a person to throw himself under the rear wheels and that in any event the appellants did not plead that as part of the particulars of negligence on the part of the deceased. Further, that if the deceased had attempted suicide then the doctrine volents non fit injuria should have been pleaded as well. In their view, the 1st appellant having seen the deceased intend to cross the road at a stage, he should have stopped to allow the deceased cross before proceeding with his journey, as a prudent driver would have been expected to do.

The respondents relied on the decision in **Jackson Mutuku Ndetai v A.O Bayusuf & Sons HCCA 231/2002 Nairobi** quoting **Grant v Sun Shipping C. Ltd (1948) 2 ALL E R 238** that a prudent man will guard against the possible negligence of others when experience shows such negligence to be common and that a driver ought to do all that he can in the circumstances to prevent the accident occurring.

On quantum, the respondents supported the award made by the trial court urging this court not to disturb awards made by the trial court as quoted above by the applicants in the case **of Kemfro Africa Ltd v Lubia,** maintaining that the award was not inordinately high. The respondents also relied on 2 cases of **Tarmal Wire Products v Ramadhan Fondo Ndegwa HCCA 243/2010 and Spin Knit Limited v Johnstone Orara HCCA 9/2004,** urging the court to dismiss the appeal as it lacks merit.

I have carefully considered the appeal herein. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act and as espoused in several decisions of the Court of Appeal among them, **Kenya Ports Authority vs Kiston (K) Limited (2009) 2 EA 212** wherein the Court of Appeal held inter alia,

" ***On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that regard secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with the parties in the evidence"*** See also **Selle v Associated Motor Boat Co. Ltd**. This court is also bound by the principles that would enable it interfere with the decision of the subordinate court as set out in the renowned case of **Mbogo vs Shah & Another (1968) EA 93 and Mwangi v Wambugu (1984) KLR 453** wherein the Court of Appeal held:

" A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with evidence in the case generally."

My duty in determining this appeal therefore is to re-evaluate re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the leaned trial magistrate are to stand or not and give reasons either way while at the same time cautioning myself of the need to avoid interfering with the decision arrived at by the lower court as was held in the **Mwangi v Wambugu (supra) case and Mbogo v. Shah (supra)** cases.

Applying the above established principles and reanalyzing or re-evaluating the evidence on record, James Mutuku Mwaka testified as PW2 to the effect that the deceased James Mbatha Mwaka was his

brother. That on 10th July 2006 PW2 received a report of the death in a road accident on 9th July 2006. He then left Mombasa for Parklands Police Station where the accident was reported and was shown the motor vehicle that knocked him as well as its driver. He went and indentified the deceased's body in the morgue and saw a flattered body. The family then arranged to have the body interred. They did a search and found that the motor vehicle that fatally knocked the deceased belonged to Bachn Industries Ltd. He produced a copy of records to that effect. He also took out letters of administration. He produced a letter by the chief identifying the deceased's dependants, death certificate, demand notice to the owners of the motor vehicle and receipts for funeral expenses incurred.

In cross examination PW3 stated that he did not witness the accident and that the deceased was aged 19 years, a casual labourer. Further, that the deceased had told them that he earned kshs 6,000/- per month and used to assist his siblings and he used to go home.

In reexamination, the witness stated that the deceased was a mason who used to earn kshs 200/- per day.

PW3 Salome Wambui Mweu testified that she was a business lady and that on 9th July 2006 she was at Sodom estate at Kangemi standing on the left hand facing Nakuru, at about 3.00p.m. that there were many people waiting to cross the road and she saw a lorry emerge from the city centre heading for Western Kenya. The lorry veered off the road and hit the deceased. PW3 and other pedestrians ran away, to escape being crushed by the said lorry. She identified the lorry as being motor vehicle Registration No. KAU 948Z. she stated that onlookers rushed to where the vehicle had stopped and found that the deceased had died. She testified that they were at a zebra crossing and that she had not known the deceased before but she gave the police her mobile phone number and later received a call from Mutuku-PW1 informing her that the matter was in court.

In cross examination by Ms Ochieng , the witness responded that she worked as a cereals seller at Kangemi along Thiongo Road. She was called by the deceased's brother, Mutuku and recorded her statement at the police station, although she conceded that her name was not on the police abstract. She confirmed that they were at a zebra crossing on the left side of the road and that there were other vehicles; but that the vehicle that hit the deceased veered off the road, hitting he deceased by its from tyres and that after the accident, the deceased was trapped in the tyres. PW3 also stated that the lorry was speeding but stopped off the road after the accident. That there were about 15 people at the scene of accident. She also stated that she did not know the part of the vehicle which hit the deceased and stated that the flyover was far.

In re-examination, the witness stated that part of the lorry was off the road on the left and that they started running away that is why she never saw the part of the vehicle that hit the deceased. She maintained that the accident occurred at a zebra crossing.

PC Justus Shembewa No. 45751 attached to D.T.O Gigiru testified as PW1 and stated that on 9th July 2006 the station received a report of a fatal road accident which occurred at 6.30 p.m. along Waiyaki Way involving motor vehicle KAU 948 Z and a pedestrian Joseph Mbatha Mwaka (deceased). The accident was booked as report No.13. He produced a police abstract form showing the name of the driver as Jona Venzi Nguko of Salantac Hauliers.

In cross examination the witness conceded that he did not investigate the matter which was still under investigations; that the investigating officer was PC Langat and that the scene was visited as per the occurrence book.

At the close of the plaintiff's case the defendant called DW1 Jona Venzi Nguko who was the driver of the accident motor vehicle and who told the court that he worked for Salantac Hauliers. He had been a driver since 1992 for all vehicles. On 9th July 2006 at about midday he was from Mombasa driving motor vehicle KAU 948 Z semi trailer ZC 3850 carrying raw material for making of cement weighing 32 tonnes. Reaching Kangemi area on a climb ahead, and driving at 45 kilometer per hour, there was a

stage ahead. He saw one person standing alone, a man intending to cross and DW1 slowed down. When DW1 passed the pedestrian by the cabin and checked through the side mirror he saw the said person throw himself into the rear wheels. He applied breaks and members of the public rushed to the scene and told him that it was the third time the deceased was jumping into a vehicle and that he had survived two previous attempts. DW1 checked and found the deceased trapped in the wheels, removed the body to the mortuary and he drove the vehicle to Kabete police station and later to Parklands police station.

The vehicle was inspected and he was left to drive on to Uganda after leaving his details with the police. He testified that he was never charged with any offence. He denied that he was speeding or careless and stated that there was no zebra crossing and neither was there any crowd of people. That he was in his lane on the left and that had he been driving carelessly and speeding he would have killed many people. He maintained that the deceased caused the accident.

In cross examination by Mr Nduthu counsel for the plaintiff DW1 stated that he was driving on the left lane and that the deceased was standing off the road on the left. That the deceased threw himself onto the vehicle and that he saw that when he looked through the side mirror. He stated that when members of the public came to where he was they consoled him not to worry albeit he did not know if those people recorded their statements with the police. He stated that his vehicle was inspected and it was not defective otherwise he would have been charged.

The 3rd defendant Bhachu Industries did not participate in the hearing. Parties then filed their submissions.

In their written submissions, the plaintiff/respondents counsel submitted that PW3 who was an witness was clear that the deceased was standing off the road when he was knocked by the accident motor vehicle and denied the assertion that the deceased threw himself into the lorry. They contended that DW1's evidence that the deceased threw himself into the parth of the lorry was a pure untruth as he was being on the defensive to mislead the court that he was not to blame for the accident. theyurged the court to find the defendants liable and apportion liability at 70:30 in favour of the plaintiffs.

On quantum, the respondent's counsel submitted that the deceased was 19 years and his death had deprived him of normal expectation of life due to the defendants wrongful acts. They prayed for kshs 10,000/- for pain and suffering.45,020 funeral expenses, kshs 100,000/- for loss of expectation of life and on loss of dependency they prayed for a multiplier of 35 years and a multiplicand of shs 6,000 with a dependency ratio of 1/3 thus 6,000 x 1/3 x 35 x 12= 840,000 but urged for kshs 950,000/- in view of inflation. He also prayed for specials of kshs 46,870 together with costs and interest.

In their opposing submissions, the 1 and 2 defendants counsels submitted that PW3 Salome Wambui Mweu was not a truthful witness since her name was not in the police abstract secondly, that the DW1 was never charged with any offence; that there had been since the accident no further investigations and maintained that the version as given by DW1 as to how the accident occurred should be taken to be the truth; and that the deceased was the author of his own death for jumping into the rear wheels of the truck.

On quantum the defendants/appellants submitted that kshs 10,000/- would be sufficient damages for pain and suffering since the deceased died on the spot, kshs 80,000/- for loss of expectation of life and that under the Fatal Accident Act, although pleaded that the deceased was a casual employee, no evidence was led to prove his employment or earnings hence urged the court to take 2,536 applicable to unskilled workers in 2006 as per the attached Kenya Gazette Supplement No. 37. It was conceded that the dependency ratio of 1/3 was acceptable since the deceased was unmarried giving a multiplier of 28 years hence kshs 284,032. The defence relied on **HCC 2409/99 Nairobi David Ngunje Mwangi vs Board of Governors Njiris High School and HCC 815/2000 Nairobi Mary Wahu v Warsame Omar Faral.**

On special damages, the defendants submitted that the plaintiff. The defendants nonetheless urged the

court to dismiss the plaintiff's suit with costs as liability had not been proved against the defendants.

In his judgment delivered on 10th December 2010, the learned trial magistrate Mr S.A. Okato found the defendants liable and awarded the plaintiffs a sum of kshs 900,870 general and special damages.

In his view, the evidence of DW1 that the deceased threw himself into the rear wheels of the vehicle was not true because he never produced any statement he recorded with the police in which he blamed the deceased for the accident.

Further, that PW3 Salome Wambui Mweu was an eye witness whose evidence was direct and reliable and independent.

From the above re-evaluation and re-examination of the record, and having considered the grounds of appeal and submissions on the same, there are only two issues for my determination:

1. Who was to blame for the accident; and

2. Whether this court should interfere with the quantum as arrived at by the trial court.

On the first issue of who was to blame for the accident, the plaintiffs witness No. 3 Salome Wambui Mweu was clear as to what transpired on the material day when she and other people, about 15 in number were standing off the road in readiness to cross the road at a pedestrian (zebra) crossing along Waiyaki way. That the defendant's lorry came from Nairobi in high speed, veered off the road and hit the deceased. The people on the road ran away to avoid being hit and returned later only to find the deceased dead. That she recorded her statement and gave her number to the police who in turn gave it to the deceased's brother who called her and informed her that the matter was in court hence she came to testify on the same.

On the other hand, the defenceDW1 who was also the driver of the accident motor vehicle denied that he was responsible for the accident. He blamed the deceased for jumping into the rear wheels of the lorry after it had by passed him and that he learnt from the people who came to view the accident that the deceased had on two previous occasions attempted to jump into vehicles, implying that he was on a suicide mission.

The trial magistrate believed the testimony of PW3 Salome Wambui Mweu and rejected DW1's evidence because he did not produce his statement that he recorded with the police in which he blamed the deceased for the accident, and proceeded to find the defendants liable for the fatal accident.

In the appellants view, the trial magistrate erred in law and fact in failing to consider the fact that the evidence tendered by DW1, was very crucial in determining the issue of liability as per his testimony on page 96 of the record of appeal and therefore erred in relying on PW's evidence at page 95 of the record yet she had conceded that her name was not in the police abstract and the fact that she never produced the statement she recorded at the police station as evidence hence she was not a truthful witness.

The defendants/appellants also submit that since DW1 was not charged with any offence, then he was not to blame for the accident since the deceased threw himself into the path of the appellant's motor vehicle.

In my own assessment, DW1 was solely to blame for the accident for the following reasons:

DW1 was clear in his evidence that he saw the deceased off the road, intending to cross the road. He therefore knew the intention of the deceased before hand. He did not testify that he ever warned the deceased of his approach. He does not state at what distance he saw the deceased intend to cross the road. Albeit DW1 stated that he slowed down, and that he only saw the deceased jump into the rear

wheels of the lorry, and that the deceased was alone on the road, and that there was no zebra crossing that evidence is rebutted by PW3 who was an independent witness to the accident. PW3 was clear that she and many other people about 15 were standing on the left side of the road intending to cross at a zebra crossing when the lorry came in high speed, veered off the road and hit the deceased as a result the rest of the pedestrians scampered for safety and returned later after the lorry had stopped ahead to find the deceased dead. PW3 admitted that the driver stopped off the road and not on the road. If indeed the deceased had jumped into the rear wheels of the vehicle, and if indeed the driver saw that happen, he could have stopped there and then without swerving off the road, so that the police could come and find him at the scene of accident and assess whether the theory of the deceased jumping into the rear wheels of the lorry was true. In this case, there was no sketch plan of the accident of the accident produced in evidence. However, I find the evidence of PW3 consistent as to how the accident occurred. Furthermore, the driver DW1 in his evidence in chief contradicted himself when he testified as follows: ***" one person was standing alone……I was not speeding ……there was no crowd of people"*** and later stated that "***had I been driving carelessly and speeding I would have killed many people……"***

This court wonders, why the driver would kill many people who were not on the road since the deceased was alone on the road, where there was no zebra crossing and that there was no crowd of people intending to cross the road as testified by PW3 Salome Wambui Mweu. I find that indeed as testified by Salome Mweu, there were many people on the road intending to cross the road, and that the driver veered off the road that is when he knocked the deceased as others scampered to safety.

In this case, and in my view, it was not necessary, however, that the driver of the accident motor vehicle or even the witness PW3 produces their statements recorded with the police on how the accident occurred and neither was production of the statement of PW3 a mandatory requirement to prove that she witnesses the accident. There was no evidence on record to suggest that PW3 had been 'bought' to give evidence in the case in favour of the plaintiffs as to how the accident occurred. The trial magistrate had the best opportunity to observe, see and hear the witnesses as they testified and believed or disbelieved the evidence as presented. In my view, nothing prevented the defendants/appellants from finding out from the police file whether indeed PW3's contacts and or statement was there or not. It cannot be that since her name did not feature in the police abstract then she did not witness the accident. There is nothing on record in the evidence to suggest that PW3 was couched to give the kind of evidence that she gave regarding the material accident.

In addition, since PW1 a police officer was the first one to testify in the matter on behalf of the plaintiff, nothing prevented the defendants/appellants herein from recalling the police officer and questioning him on whether PW3 was one of the eye witness to the accident and or whether the police file contained her statement or contacts. In addition, nothing prevented the defendants/appellants from questioning PW2 the plaintiff on how he got the contacts of PW3 to come and testify on their (plaintiffs /respondents)behalf

Since the defendants/appellants had an opportunity to hear all those alleged "***lies***"that the plaintiff's witness had told the court, they could have even produced a police file showing the scene of accident to disprove PW3's evidence that the deceased was knocked off the road. What the respondent needed to prove was liability of the appellants on a balance of probability and not beyond reasonable doubt and in my view, evaluating the evidence o record, they discharged that burden.

Albeit the appellants contend that the driver was not charged with a traffic offence, it should be known that the standard of proof required in criminal cases is higher than that in civil cases. If for example investigations are shoddy, then no charge of any kind can stand against the offender, as the evidence must prove a criminal charge beyond any shadow or cloud of doubt, unlike in civil cases where a party is only required to prove liability on a balance of probabilities.

In this case, and on the evidence tendered which I have re-evaluated, my own independent conclusion is that the driver of the lorry was wholly responsible for the occurrence of the accident. It was incumbent upon him to explain why, according to PW3, he veered off the road thereby hitting the

deceased whom he saw ahead of him, intending to cross the road.

The theory that the deceased jumped into the rear wheels of the lorry in a bid to probably commit suicide does not hold: Nothing prevented the driver from getting the contacts of any of those individuals on the road who consoled him not to worry for reasons that the deceased had on two previous occasions attempted to take his own life by jumping into vehicles.

In my view, that evidence by DW1 was farfetched and as to what other pedestrians told him concerning the deceased's previous intention is pure hearsay and fabrications incapable of belief in the present circumstances, besides that piece of evidence being inadmissible.

I therefore find that the trial magistrate did not err in fact in finding that the driver of the motor vehicle KAU 948Z was responsible for the occurrence of the accident. In my view, the driver failed to prove that the deceased must have contributed to the occurrence of the accident for reasons that there is no evidence that the deceased was crossing the road when he was hit. PW3 was clear that pedestrians were at a zebra crossing waiting for vehicles to pass before they could cross. DW1 also confirmed that he saw the deceased standing off the road intending to cross hence he should have exercised due care and attention so as to avoid the accident. He also failed to slow down or swerve to avoid the accident and failed to take proper look out thereby killing the deceased who was off the road. The respondents in my view proved their case against the appellants on a balance of probabilities.

I must add that a driver of a motor vehicle must be on the lookout and a driver approaching a pedestrians crossing or bus stop must be cautious. There would, in my view, be no basis for this court to find that DW1 and the deceased were to blame for the accident in equal measure of the ratio of 50%: 50%. By merely being found on the road with the intention to cross does not connote negligence for which contributory negligence should be attributed. This court also notes that among the particulars of the deceased's negligence pleaded in paragraph 5 of the defence dated 5th June 2009, none of them refer to the act of the deceased jumping into the rear wheels of the vehicle or being suicidal. The said particulars were as follows:

> ***a) He crossed the said road when he knew or ought to have known that it was not safe to do so.***
>
> ***b) He failed to use the pedestrian fly over.***
>
> ***c) He authorized his misfortune by acting recklessly and /or negligently in the circumstances.***
>
> ***d) He undertook dangerous maneuvers on a busy road when he knew of ought to have known this to pose danger to himself and other rod users particularly the 1st defendant.***

In my view, If as at that time the driver of the accident motor vehicle was for sure, confident of his defence that the deceased jumped into the rear wheels of the vehicle, then that act should have been specifically and not generally pleaded and his evidence on that aspect would on be proving what was pleaded. Parties are bound by their pleadings. The defendants did not seek to amend their defence to include that particular of negligence. That leaves this court with no option but to conclude that the defendant's witness DW1 evidence of the deceased jumping into the rear wheels and that he did so, as informed by the by standers in a bid to accomplish the previously attempted suicide is an afterthought.

Furthermore, if the DW1's version of how the accident occurred were true, then he would have pleaded inevitable accident since it would not have been possible for him to have control over or avoid such accident even if he applied the greatest skill and care. In inevitable accidents one does not even attempt to shift the blame to the victim, but pleads that there was nothing that a prudent driver could have done to avoid the occurrence of the accident. This was not the case here. The two defendants/appellants hereto pleaded that the deceased contributed to the occurrence of the accident and specifically set out those particulars of negligence which in my view they should have attempted to prove. They did not. In the premise, I find that the 1st defendant was negligent and wholly to blame

for the accident at 100% and that the 2nd appellant is vicariously liable for the acts of negligence of the 1st appellant who admitted being its driver/agent at the material time of the accident. I also find no basis for the submission by the respondent's counsel that the court should have found the appellants 70%liable and disregard it.

The plaintiff produced a search of the accident motor vehicle to show that it was registered in the names of the 3rd defendant who is not a party to this appeal.

However, the 1st and 2nd defendants who are appellants herein demonstrated that the 3rd defendant had no interest in the motor vehicle and by virtue of Section 8 of the Traffic Act, I find that the motor vehicle was in control and use of the 1st appellant on behalf of the 2nd appellant its beneficial owner and who is vicariously liable for acts of the 1st appellant driver. That issue is also uncontroverted.

On quantum, the appellants contend that the awards on loss of dependency of kshs 744,000 was excessive as there was no evidence that the deceased was earning kshs 6,000/- and that the trial magistrate erred in law in failing to consider the submissions by the appellants.

The principles laid down **in Butt vs Khan (1982-88) KAR** speak to the court in deciding whether or not to interfere with an award of damages. The same principles were applied in **Kemfro Africa Ltd & Another v Lubia & Another No.2 (supra)** that:

> ***" the principles to be observed by an appellate court in deciding whether it is justifiable ion disturbing the quantum o f damages awarded by a trial judge were held by the former court of appeal for Eastern Africa to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilanger v Manyoka (1961) EA 705: Lukenya Ranching & Farming Co.Op Society Ltd v Karoloto (1979) EA 414. This court follows the same principles."***

Applying the above principles to this appeal, the respondents pleaded that:

" At the time of his death, the deceased was aged 19 years and single. He was full of life, energetic and very healthy. He would have lived upto age of 80 years were it not for the accident. The deceased upto and until the time of his death was working as a causal labourer/mason and earning a minimum of kshs 6,000/-."

There is no dispute as to the dependants and the fact that he used to support his 53 year old mother and siblings.

In his testimony, the 1st respondent in his evidence in chief did not testify as to what the deceased did for a living and or how much he was earning. However in cross examination, he did state that " ***the deceased told us he used to be paid kshs 6,000/- …….I have nothing to show what the deceased used to earn. He used to assist our family. The deceased was staying at Kangemi. The deceased used to come home."***

In cross examination, the 1st respondent stated:

" The deceased was a mason who used to earn about kshs 200/- per day."

The trial magistrate accepted the wage of kshs 6,000/- per month. He also stated that the deceased would have worked upto age 55 years and adopted a multiplier of 31 years.

There is no indication that the trial magistrate considered submissions by the appellant's counsel. I agree with the appellants that the trial magistrate erred in law and fact in failing to consider the submissions by

the appellants' counsel.

In my view, had the trial magistrate considered those submissions vis avis the pleadings and sworn testimony by the plaintiff/respondent, he would have found that it was not certain as to what exactly the deceased used to do and or earn per month or per day. That in itself, however, does not mean that the deceased was not doing anything to eke a living, as there was no contrary evidence that the deceased worked as a casual labourer and lived in Kangemi and that he used to support his family whom he used to visit.

The appellants supplied the court below with gazette notice of what an unskilled employee would be earning per month and per day where it is not clear as to the specific job that the deceased was engaged in at any one particular time since he was not in a formal employment.

Gazette Notice No. 37 of 9th May 2006 by the Minister of Labour in my view, was the applicable guide as it provided for basic minimum wage for unskilled employees. Since there was no evidence of what the deceased was paid on a monthly basis, I would adopt the daily wage of kshs 106.45 payable to casual workers at that time as per the legal Notice No. 37 of 9th July 2006.

The deceased was not married. He was only 19 years of age, a young adult. There was no evidence that he was sickly or would not live up to age 55 as a working person then. However, his level of education was not disclosed. The dependency ratio of 1/3 is not disputed. The trial magistrate used a multiplier of 31 years. I see no ground upon which I can interfere with that multiplier.

In the premise, I would award the plaintiffs loss of dependency calculated as follows:-

106.45 x 30 x 12 x 31= 1,187,982 x 1/3= 395,994

In the end, I set aside the award by the trial magistrate and substitute it with kshs 395,932 for loss of dependency.

Awards for pain and suffering as well as for loss of expectation of life remain undisturbed as no issue was raised by the appellant concerning the same. The same applies to special damages as pleaded and awarded by the trial magistrate which the appellant has not challenged in this appeal.

Consequently, this appeal on liability is dismissed. I uphold the trial magistrate's decision and find the appellants liable in negligence for the death of the deceased at 100%.

The appeal on quantum succeeds to the extent that the deceased's earnings are reduced from kshs 6000/- per month to kshs 3193 per month thereby substantially reducing loss of dependency to kshs 395,994.

Pain and suffering …….....kshs 10,000

Loss Expectation of life ..... kshs ..100,000

Special damages …….....kshs 46,870

Totals kshs 552,864

The respondents shall have costs of the suit in the lower court and interest on general damages calculated at court rates from date of judgment in the lower court until payment in full on the sum awarded herein together with interest on special damages from date of filing suit until payment in full. As the appellants have only succeeded half way they shall have half of costs of this appeal.

Dated, signed and delivered in open court at Nairobi this 6th day of July 2015.

ROSELYNE EKIRAPA ABURILI

JUDGE

6/7/2015

Coram R.E. Aburili J

C.A. Samuel

No appearance for respondents

No appearance for appellants (Mr Julius Katumo clerk from the firm Guram for the appellant in court states:

I have been waiting to get an advocate to hold our brief but they are all busy). I am ready to take the judgment and pass the message to the office.

R.E. ABURILI

JUDGE

Court- Judgment read and pronounced in open court as scheduled .

R.E. ABURILI

JUDGE

6/7/2015