**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. E088 OF 2023**

***(Being an Appeal from the Judgment delivered by Hon. B. Ireri, Senior Principal Magistrate, Makindu Law Courts, on 4th September, 2023 in SPM Civil Case No. 254 of 2019)***

**MOMBASA MAIZE MILLERS ..... 1ST APPELLANT**

**PATRICK MUSILA MUSYIMI ..... 2ND APPELLANT**

**VERSUS**

**JOSEPH MUTUKU MULINGE *(Suing as the legal representative of the estate of KIVUITU MUTUKU (Deceased)*** **..... RESPONDENT**

**JUDGMENT**

1. The Deceased, **Kivuitu Mutuku,** was involved in a road accident on 27th February, 2018, in which he sustained fatal

injuries and died on the spot. His legal representative, the Respondent, blamed the Appellants for the accident and brought a suit at the lower Court seeking general damages under the Fatal Accident and Law Reform Act as well as special damages of Kshs.650,000/=. The Court delivered the Judgment on 4th September, 2023 in which it found the Appellants 100% liable.

2. The lower Court awarded the Respondent a total award of Kshs.6,768,000/= which comprised Kshs.6,438,000/= for Loss of Dependency and Kshs.330,000/= for funeral expenses. In arriving at the award for Loss of Dependency, it utilized the multiplier approach where in it applied a multiplicand of Kshs.32,190/=, a multiplier of 25 years, and dependency ration of 2/3. It also appears that, in the judgment, the Court also awarded the Respondent Kshs.50,000/= for Pain and Suffering and Kshs.100,000/= for Loss of Expectation of Life, but these 2 awards were not captured in the Court's final disposition.
3. The Appellants were dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated

29th September, 2023 in which they listed the following Grounds of Appeal;

1) ***That the Learned Trial Magistrate erred in law and fact by finding the Appellants 100% liable for the accident.***
2) ***That the Learned Trial Magistrate erred in law and fact by awarding a high amount in General and Special Damages.***
3) ***That the Learned Trial Magistrate erred in law and fact in failing to attach due weight to Appellants' submissions on the main suit.***
4) ***That the Learned Trial Magistrate erred in law and fact by adopting a multiplicand of 2/3.***
5) ***That the Learned Trial Magistrate erred in law and fact by awarding an amount that is extremely high in the circumstances.***
6) ***That the Learned Trial Magistrate erred in law and fact by delivering a judgment that was lopsided and biased in favor of the Respondent.***

7) ***That the Learned Trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellants.***

4. They asked the Court to allow the appeal and set aside the judgment of the lower Court.
5. The Appeal was canvassed by way of written submissions.

**Appellants' written submissions**

6. The Appellants submitted that the lower Court was wrong in finding them 100% liable. They submitted that the Respondent did not discharge his duty in proving liability on a balance of probability, arguing that the he had not explained how the accident happened and did not call an eye witness to corroborate his evidence. They also submitted that the Respondent's testimony on how the accident occurred was hearsay and hence unreliable, arguing that he was not at the scene of the accident when the accident happened.
7. On damages, the Appellants submitted that the awards for damages were too high and an erroneous estimate of the

loss, arguing that the magistrate applied the wrong principles in the assessment of damages. They submitted that the lower court should not have used the dependency ratio of 2/3, given that the Deceased was not married and did not have children. They submitted that, instead, the lower Court should have used a dependency ratio of 1/3, insisting that dependency is a question of fact, and that the Respondent had failed to prove that the listed persons were being supported by the Deceased.

**Respondent's written Submissions**

8. The Respondent submitted that the lower Court was right in finding the Appellants 100% liable for the accident. He argued that the Appellants failed to prove any contributory negligence on the part of the Deceased or the rider. He submitted that the Appellants' defense was of no probative value, arguing that they failed to call any witness to support their defense. On damages, he submitted that the lower Court's assessment was reasonable and should not be interfered with. He submitted that the dependency ration of

2/3 was right, arguing that even though the Deceased was unmarried, he had dependents.

## Issues for Determination

9. Having considered the Grounds of Appeal and the submission by the parties, there are two issues for determination;

    a) **Whether the lower Court's finding on liability is justified.**

    b) **Whether the lower Court's award for Loss of Dependency was properly arrived at.**

10. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR.**

11. Accordingly, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

**Whether the lower Court's finding on liability is justified**

12. It is trite law that he who alleges must prove. **Section 107 of the Evidence Act Cap 80 Laws of Kenya** provides that

> ***"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

13. Therefore, the burden lay on the Respondent to show that the Appellants were negligent and thus 100% liable for the accident. The Respondent had the legal burden of proof to show firstly that the 2nd Appellant (the driver) was negligent, and that it was his negligent actions/omissions

that caused the accident. The question before this Court is whether the Respondent adduced sufficient evidence to prove this. I shall analyze his evidence on the issue of liability.

14. At the trial, the Respondent was the only witness, **PW1**. He told the Court that he did not witness the accident and that he went to the scene after the accident. He stated that he found two people who had died at the scene, one of them being the Deceased, his son. He testified that people at the scene told him that the accident vehicle lost control and left its side of the road, as a result of which it hit the motor cycle in which the Deceased was a pavilion passenger. The Respondent did not call any other witness.

15. He also produced a police abstract dated 4th April, 2018 in which the police blamed the 2nd Appellant for the accident. I note that the Appellants did not object to the production of the police abstract, given that it was produced by the Respondent rather than the police.

16. There was no other independent witness who could attest to the fact that the accident motor vehicle had left its

side of the road and that the 2nd Appellant was negligent. For these reasons, I find that Respondent's testimony that the 2nd Appellant was negligent is not verifiable because he was not an eye witness to the accident.

17. The question now, is whether, the Respondent's testimony was sufficient to discharge the burden of proof imposed on him by the law. In other words, did the Respondent's sole testimony establish, on a balance of probabilities, that the 2nd Appellant was negligent?

18. The Court notes the unique circumstances of this case. It notes that the Deceased died on the spot and thus he is not here to shed light on what actually happened at the time of the accident. It also notes that, the 2nd Appellant was the driver of the accident M/V and he must have information on what actually happened. The Respondent did the most that he could do to prove his claims and he placed the blame at the 2nd Appellant's doorstep.

19. In these circumstances, the Court invokes **Section 112 of the Evidence Act Cap 80 of the Laws of Kenya** which provides thus:

***"In Civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

20. Courts have held that the above section is applicable in cases where a Defendant deliberately withholds evidence as to the cause of an accident. The binding authority on this issue is the Court of Appeal's decision in **Rahab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General 2 others [2012] eKLR**, where the Court held as follows;

***"The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant's suit. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, we think was meant to deal with situations as those in the present case…..The appellant alleged negligence against all the respondents as the cause of the accident***

***in which her daughter died. She was not there at the scene and could not have known how the accident happened…***

***..Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of res Ipsa Loquitor, but from the evidential burden as imposed under Section 112 of the Evidence Act.***

***The burden was on the respondents to disprove on their part as the cause of the accident was a***

***matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares ……..”***

21. In **Janet Njoki Kigo (suing as the personal representative of the estate of the late Benson Irungu Wanjohi) vs Daniel Karani Gchuki (2016) eKLR,** the Court applied the same principle. In that case, the plaintiff had not witnessed the accident and did not call evidence as to how the accident took place. The defendant similarly did not call evidence to show how the accident took place. The Court invoked the provisions of **Section 112** of the **Evidence Act Cap 80** to find that the defendant was liable for the accident.

22. The Court held as follows;

***“Where it is trite clear like in the instant case that the plaintiff was not present when the fatal accident occurred and the defendant who was the***

***driver of the material motor vehicle involved in the accident is possessed of the evidence of how the accident occurred but deliberately fails to adduce that evidence with the sole intention of frustrating the plaintiff's suit, Section 112 of the Evidence Act would be invoked by the court to deal with such a situation….The rebuttable presumption of fact therefore, is that the defendant was negligent, which negligence caused the accident in which the deceased died, and it is not a presumption which arises out of the doctrine of Res Ipsa Loquitur, but from the evidential burden as imposed under Section 112 of the Evidence Act. The cause of the accident being a matter especially within the defendant's knowledge but he failed to tender any evidence in that regard as required by law, it follows that the defendant was to blame and therefore liable in damages to the plaintiff".***

23. In the instant case, the 2nd Appellant was the driver of the accident M/V. He survived the accident and therefore I presume that he is possessed of the evidence of how the accident occurred. He did not testify in court and thus the Court did not get an opportunity to hear his explanation or account of what transpired. I therefore find that this is an appropriate case for the Court to invoke **Section 112** of the **Evidence Act** to deal with this situation.

24. I find that there is a rebuttable presumption of fact that the 2nd Appellant was negligent and that his negligence caused the accident in which the Deceased died. The burden of proof was on him to disapprove or rebut this presumption, given that the cause of the accident was a matter especially within the 2nd Appellant's knowledge. He deliberately failed to tender any evidence in that regard as required by law. It thus follows that the 2nd Appellant was to blame and therefore liable in damages to the Respondent. I find the Appellants 100% liable for the accident.

**Whether the lower Court's award for Loss of Dependency was properly arrived at**

25. The Respondent testified that the Deceased was a salaried employee of Bidco Africa Limited and he produced a pay slip to prove his monthly earnings. I have seen the said pay slips, they are for January 2018 and February 2018. Given that the Deceased's monthly income is ascertainable, I find that the multiplier approach is the most suitable tool for assessing the award for Loss of Dependency.

26. The first issue for determination is the multiplicand. The Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015) eKLR** held that the multiplicand should be arrived at by deducting statutory deductions from the gross pay. It observed as follows;

> ***"On the issue of the salary, the deceased's last pay-slip was produced and it showed clearly his***

***gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error…….***

***As emphasized above, <u>the net income determines the multiplicand and it is only net of statutory deductions.</u> In this case, Hellen testified, and it is apparent from the pay-slip, that the net salary after statutory deductions was Kshs.19,373,.. There is no reason why the High Court should have interfered with that figure."***

27. According to the pay slip, the Deceased's gross pay was Kshs.39,753/=. On the other hand, his statutory deductions were Kshs.7, 062.60/= comprising NHIF (Kshs.950), NSSF (Kshs.1552.60/=), and PAYE (Kshs.4560/=). Thus, the multiplicand in this case will be

arrived at by deducting Kshs.7, 062.60/= from Kshs.39,753/=, which comes to **Kshs.32,690.40/=.** This is the multiplicand.

28. The next issue for determination is the multiplier. The Respondent told the Court that the Deceased was 30 years at the time of his death. He produced a death certificate, which indicates that the Deceased was 30 years old. I thus find that the Deceased was 30 years at the time of his death.

29. I have had an occasion to familiarize myself on how the Courts have decided on the issue of a multiplier in similar circumstances. The Court in **Musili & another v China Wu Yi Limited & another [2017] KEHC eKLR** utilized a multiplier of 25 years for a Deceased who had died at 32 years. The Court in **Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & another [2019] KEHC eKLR** utilized a multiplier of 30 years for a Deceased who died at 29 years.

30. I presume that, everything being equal, the Deceased would have worked to the official retirement age of 60

years. The Court is also mandated to appreciate and give allowance for the vagaries, vicissitudes and uncertainties of life, together with the fact that the payment under this head is also being made in a lump sum. In the end, I find that multiplier of 27 years would be reasonable.

31. The last issue is the dependency ratio. The Appellants submitted that the Court should use the ratio of 1/3, arguing that he was unmarried and had no children. On the other hand, the Respondent submitted that the Court should use the ratio of 2/3, arguing that, even though the Deceased was unmarried and had no children, he used to support his parents and siblings.

32. In **Albert Kubai Mbogori v Violet Jeptum Rahedi [2017] KECA 682 (KLR)**, the Court of Appeal held that the degree of dependency is a matter of fact and the extent of dependency depends on the circumstances of each case. The Court observed as follows;

> ***"The degree of dependency on the deceased's income is a matter of fact. In Boru –vs-Onduu [1982-1988] KAR 299, the Court expressed that,***

***"The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation."***

33. The Respondent told the lower Court that, together with his wife, they used to depend on the Deceased. The Respondent stated that the Deceased used to give him money in cash or send by Mpesa. He, however, did not furnish evidence on how much the Deceased used to spend on them (the Respondent and his wife).

34. The Respondent also told the Court that the Deceased used to pay school fees for his siblings. I have looked at the record and there is a Chief's letter dated 4th June, 2018. The Respondent produced the letter as part of his evidence. In the letter, the Deceased had four (4) siblings who were aged as follows; Denis (36 years), Eunice (33 years), Cornelius (29 years), and Catherine (24 years).

35. During the hearing, the Respondent did not substantiate on his claims that the Deceased used to pay school fees for his siblings. He did not state who among the 4 siblings was in school or college at that time. This Court also noted that, at the time of the accident, all the siblings were adults.

36. I associate with the observations of the Court in **Dismas Muhami Wainarua v Sopon Kasirimo Maranta (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased) [2021] eKLR,** where the facts were at fours with the instant case. The Court observed as follows;

> ***43. Dependency is a fact that should be proved by evidence …That notwithstanding, the ages of his siblings were not given to show that they depended on the deceased in any way. There was need to prove through evidence, that the deceased's brothers and sister were his dependants which the respondent did not do.***

***44. The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been 2/3. The respondent's counsel agreed that the dependency ratio of 2/3 was on the higher side and suggested a ratio of ½. Although the deceased was not married, it would be difficult to assume without evidence that he gave ½ of his income towards his parents' support. The ratio of 1/3 would be appropriate.***

37. It is most likely that the Deceased must have been taking care of his parents. Although the Deceased was not married, it would be difficult to assume without evidence that he gave ½ or 2/3 of his income towards his parents' support. The ratio of 1/3 would be appropriate.

38. Having determined the Multiplicand as Kshs.32,690.40/=, the multiplier as 27 years, and the dependency ratio as 1/3, the award for Loss of Dependency is as follows;

**32,690.40x12x27x1/3=3,530,563.2/=.**

39. Furthermore, I have relooked at the lower Court's award on Pain and Suffering and Loss of Expectation of Life, where in the Court awarded the Respondent Kshs.50,000/= and Kshs.100,000/=, respectively. On the issue of Loss of Expectation of Life, I find that the award by the lower Court was reasonable and the same is hereby upheld.

40. On the award for Pain and Suffering, I note that the Deceased died on the spot. I have also considered how Courts have decided on the award of Pain and Suffering in similar circumstances. Majority of the awards range from Kshs.10,000/= to Kshs.30,000/=. In this case, I find that an award of Kshs.25,000/= would be reasonable and appropriate. The lower Court's award for Pain and Suffering is hereby reduced from Kshs.50,000/= to Kshs.25,000/=.

41. Lastly, I have relooked at the Respondent's claim for special damages for the funeral expenses. I am satisfied that the same was properly pleaded and proved. In addition, the lower Court properly took into consideration the fact that half of the funeral and burial expenses had been met by

donations from well-wishers. I therefore uphold the lower Court's award of Kshs.330,000/= for funeral expenses.

42. In the end, the Appeal succeeds. The amount payable to the Respondent will therefore be as follows;

a) Pain and suffering…….. Kshs.25,000/=

b) Loss of Expectation of Life…… Kshs.100,000/=

c) Loss of Dependency…….. Kshs.3,530,563.20/=

d) Special Damages…….. Kshs.330,000/=

**Grand Total…….. Kshs.3,985,563.20/=**

**Disposition**

43. The Appeal succeeds.

44. Judgment is entered in favor of the Respondent as against the Appellants jointly and severally as follows;

***a) The Judgment of the lower Court on liability assessed at 100% against the Appellants, jointly and severally, is hereby upheld.***

b) ***The lower Court Judgment on the award of damages is hereby set aside and substituted with an award of Kshs.3,985,563.20/=.***

c) ***The Appellants to have the costs of this Appeal assessed at 35,000/=, while the Respondent to have the costs of the lower court.***

d) ***The award will attract interest at court rates from the date of judgment at the trial Court.***

**DATED, DELIVERED** and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **6TH** day of **MARCH, 2026.**

**……**

**HON C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Ms. Wekesa, Advocate holding brief for Mrs. Kariuki, Advocate for the Appellant

Ms. Munyao, Advocate, holding brief for Mr. Muumbi, Advocate for the Respondent