IN THE COURT OF APPEAL

AT NAIROBI

**(CORA GITHINJI, NAMBUYE & OKWENGU, JJ.A) **

CIVIL APPEAL NO. 100 OF 2017

BETWEEN

ROSEMARY MWASYA…… APPELLANT

AND

STEVE TITO MWASYA ……..…… 1ST RESPONDENT

JACINTA NDINDA MUENDO (Both suing as the legal representatives

of the estate of SHERRINA KOKI TITO

Deceased)……..2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (K. Sergon, J.) Dated 6th November, 2015 **in HCCC No. 221 of 2011)**

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JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court **(J.K. Sergon, J.)** Dated the 6th day of November, 2015.

The background to the appeal is that, the respondents sued the appellant vide a plaint dated the 20th day of June, 2011, in their capacity as legal representatives of the estate of the deceased, seeking both general and special damages, together with attendant costs. The cause of action arose from a fatal accident that occurred on the 11th day of December, 2010, involving motor vehicle registration number KBR 100B owned by the appellant, and in which the deceased was travelling as a lawful passenger.

In the said plaint, the respondents set out particulars of negligence attributed to the appellant in the manner she drove, controlled and or managed the said vehicle resulting in the said fatal accident:

The appellant filed a defence dated the 27th day of July, 2011, averring *inter alia* that the accident was wholly caused by, and/or was substantially contributed to by the particularized negligence of the owner and/or authorized driver, servant and or agent of the owner of motor vehicle registration number KBH 358C Hino Lorry, and that she would accordingly take out 3rd party proceedings as against the mentioned

persons.

The respondents joined issue with the appellant's defence vide a reply to defence dated the 1st day of August, 2011.

Only the respondents tendered evidence through one witness. Thereafter parties filed their respective written submissions. The learned Judge after assessing, analizing and evaluating the record before him pinned liability against the appellant at 100%; and then allowed Kshs. 155,000.00; and Kshs. 14,502,680/= as special and general damages respectively, together with an order for attendant costs.

The appellant was aggrieved. She preferred the appeal under review raising seven grounds of appeal compressed into four broad issues in her written submission as follows:

> ***(a) whether the multiplicand of Kshs. 118,564/= used by the trial court in its judgment was fair and or supported by the evidence.***
>
> ***(b) whether the multiplier of 30 years used by the trial court was justified in this case.***
>
> ***(c) whether it was proper to admit the police abstract without calling the maker; and lastly***
>
> ***(d) whether the trial court placed reliance on erroneous considerations thus arriving at a wrong decision.***

The appeal was canvassed by way of written submissions as filed and adopted by the respective learned counsel both of whom elected not to highlight them.

In support of issue number (a), the appellant urged us to fault the learned Judge on the choice of the multiplicand for the reason that the figure applied had been erroneously plucked from a schedule attached to the respondent's submissions and therefore not tested at the trial. Secondly, it was based on a wrong assumption that a university student would access employment immediately upon completion of the university. Thirdly, that it ignored evidence adduced that at the material time, the deceased was dependant on the 2nd respondent for support. Fourthly, it also failed to take into consideration the minimum wage as suggested to him by the appellant. Fifthly, the learned Judge also failed to apply the comparables cited to him by the appellant and thereby arrived at an erroneous award.

To buttress the above submission, the appellant cited among others the case of ***Ng'ang'a & 2 others versus Owiti & Another [2008] 1KLR(EP) 749*** for the proposition that submission is not evidence, but a way by which parties crystallize the substance of the case, the evidence and the law relating to that case. It is away by which the courts' focus is sought to be concentrated on the main aspects of the case which affects its outcome.

On the need to take into consideration comparables, the appellant cited ***James Gakinya Karienye & another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) versus Perminus Kariuki Githinji [2015] eKLR; Albert Kubai Mbogori versus Violet Jeptum Rahedi [2017] eKLR*** for the proposition that precedents exist to create uniformity and consistency in the advancement of jurisprudence generated by courts of law on the subject.

In support of issue number (b), the appellant relied on ***Beatrice Wangui Thairu versus Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)*** for the proposition that when choosing a multiplier, the court must bear in mind the expectation of the earning life of the deceased, the expectation of life and dependency of the dependants and that the sum arrived at must then be discounted to allow for the legitimate considerations of the fact that the award is being received in a lump sum and would if wisely invested yield returns in the nature of an income.

Turning to issue number (c), the appellant took issue with the learned Judge's failure to call the maker of the Abstract from police to shed light on the outcome of the investigations since the abstract indicated that

investigations were still ongoing. In the appellant's view, tendering evidence on the outcome of the investigation would have been instrumental in guiding the court on the issue of apportioning of liability on the causation of the accident.

Relying on ***P. Kirugi & another versus Kabiya & 3 others [1987] KLR 347***, the appellant urged us to invoke the provisions of sections **107** and **108** of the Evidence Act Cap 80 laws of Kenya, and hold that the learned Judge fell into error when he failed to hold that the burden of proof lay with the respondents to prove their claim on a balance of probability, notwithstanding, the appellant's failure to tender evidence in her defence.

In support of issue number (d), the appellant relied on ***Selle versus Associated Motor Boat Co. Ltd [1968] EA 123*** as approved and followed in ***Lake Flowers versus Culla Frankline Nganga and Josephine Mumbi Ngugi NKR Civil Appeal No. 210 of 2006***, to remind us of our mandate as

a fist appellate court and ***Butt versus Khan [1982-88] KAR*** on principles that guide the an interference or otherwise of an award arrived at.

In opposing the appeal, the respondent submitted that their uncontroverted evidence demonstrated clearly that the appellant was negligent in the manner in which she drove, managed and or controlled the accident motor vehicle when she recklessly tried to overtake another motor vehicle KBH 358C, but lost control and overturned; that PW1 was unchallenged on her testimony that both she and the deceased had donned safety belts as at the time of the accident; that the learned Judge took into consideration the vagaries of life when he pegged the deceaseds' age for accessing salaried employment at twenty five (25) years and the retirement age at fifty five (55) years at a time when the retirement age had been raised to sixty (60) years of age; that the learned Judge was in order when he used an extract of the salary survey of Kenya as the said action was supported by the uncontroverted evidence of the respondents that the deceased was pursuing a degree of Bachelor of Commerce at the University of Nairobi and accountancy at Strathmore University; that the choice of Kshs. 118, 546/= was reasonable in the circumstances; that the learned Judge was entitled to rely on the only evidence tendered before him by the respondents to reach the conclusions reached; that the appellant has not pointed out any extraneous or irrelevant matters that the learned Judge allegedly took into consideration.

With regard to the production of the abstract from police without calling the maker, the respondent submitted that the appellant did not indicate at the pre-trial stage of the proceedings that she would require the maker of the abstract to attend court and tender it in evidence; that objections were raised against production of the abstract through PW1, but production of the abstract through PW1 was approved after hearing submissions from both sides; that the learned Judge gave sound reasons as to why he allowed production of the abstract through PW1 against which the appellant never appealed.

Lastly, the respondents urged us to find that even if the evidence relating to the mode of production of the abstract from police was to be discounted, their evidence stood unchallenged as it drew support from the appellant's own defence in which she admitted that indeed an accident occurred; that the accident occurred on the same date and time as pleaded in the plaint; that the motor vehicle she was driving on the material day, namely, KBK 100B is one of the two vehicles that were involved in the accident and that she placed blame for the causation of the accident on the owner, driver and or agent of motor vehicle registration number KBH 358C but in respect of whom she elected not to take out 3rd party proceedings for purposes of seeking any contributions from them.

To buttress the above submissions, the respondent cited ***William Kinyanjui & Another (Suing as the legal Representative of the Estate of Jane Florence Njeri Kinyanjui (deceased) versus Benard M.Wanjala . Another [2015] eKLR*** on the principles that guide an appellate court in disturbing an award or quantum of damages by the trial court; and, ***Charter***

House Bank Limited (under statutory Management) versus Frank N. Kamau [2016] e KLR for the proposition that failure to adduce evidence by a defendant in support of the defence does not only invariably entitle the plaintiff to a judgment but it also lessens the burden on such a plaintiff in proving a

case on a balance of probability.

This is a first appeal. In **PIL Kenya Ltd Vs. Oppong [2009] KLR 442** the court had this to say with regard to the exercise of this mandate:

> ***"It is the duty of the Court of Appeal, as a first appellate court, to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."***

We have given due consideration to the totality of the record, in the light of the rival submissions set out above. In our view, the following are issues that fall for our determination namely:-

> ***(1) whether the learned Judge erred in finding the appellant wholly liable in negligence.***
>
> ***(2) whether the learned Judge misapprehended the evidence and or took into consideration extraneous and irrelevant factors when arriving at the conclusion reached.***
>
> ***(3) whether the learned Judge fell into error when he allowed the production of the Abstract from the police without calling the maker.***
>
> ***(4) whether the learned Judge failed to consider the vagaries of life when choosing a multiplier of thirty (30) years; and,***
>
> ***(5) whether the learned Judge erred in adopting a multiplicand of Kshs. 118,564/=***

Issues numbers 1, 2 and 3 relate to the learned Judges appraisal of the record before finding the appellant 100% liable for the causation of the accident. These will therefore be dealt with as one. It is not disputed that the deceased was a passenger in the motor vehicle owned, driven and or managed by the appellant as at the material time when the fatal accident the subject of this appeal occurred. The fact of the deceaseds' death arising as a result of the injuries sustained in the said fatal accident is also not in dispute. The issue before the trial Judge and now before is who was to blame for the causation of the said fatal accident. The respondents placed that blame wholly onto the appellant, both in their pleadings and the evidence tendered on their behalf through one witness. The appellant resisted that claim by filing a defence which is on record. Notable of this and, as correctly submitted by the respondents, the appellant did not attribute any blame for the causation of the said fatal accident to the passengers then travelling in her vehicle at the material time; but to the owner/agent and or the driver of motor vehicle Registration number KBH 358C and although she pleaded that she would take out 3rd party proceedings against the said persons, she failed to do so.

Faced with the record as it was before him, the learned Judge had this to say:-

> ***"(6) The defendant in her statement of defence did not deny that she is the owner of motor vehicle Registration Number KBK 100B. She also did not object that there was indeed an accident only that the same was not contributed by her but she attributed the accident to a third party motor vehicle Registration Number KBH 358C whom she claimed was negligent as he rammed her from behind causing her to lose control of the vehicle. She averred that she would enjoin the owner of the vehicle as a third party.***
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> **(7)** ***A closer look at the evidence adduced. It is clear that there was an accident in which the deceased suffered fatal injuries. The plaintiff holds the defendant liable for the injuries suffered by the deceased due to her negligence. The defendant has admitted in her pleadings that there was an accident and only claimed that the same was not caused by her own negligence but by the negligence of a third party whom she categorically stated she would enjoin but she did not do so. She also submitted that the 2nd plaintiff as the deceased guardian should have ensured that the deceased had tied her seat belt. The 2nd plaintiff on the other hand claims that indeed the***

deceased had tied her seat belt. Though the parties refer to the issue of seat belt, the same does not exonerate the defendant from negligence on her part. I find that the defendant was negligent and is wholly to blame for the accident."

It is against the above findings that the appellant alleged that the learned Judge took into account irrelevant and extraneous matters. As contended by the respondent, apart from making those assertions, the appellant did not point out in her submissions what she meant by irrelevant and or extraneous matters. On our own, we have considered the above findings as against both the pleadings and the testimony of the respondents' sole witness and find them in tandem, with the record. We therefore agree with the respondents' submissions that no extraneous and or irrelevant factors were taken into consideration by the learned Judge when arriving at the conclusion reached that the appellant was 100% liable for the causation of the accident, and which finding we affirm.

As for the attack on the mode of the production of the abstract from the police; the major reason as to why the appellant has insisted that it should have been tendered in evidence by the maker, was because the copy tendered in evidence indicated that the matter was still under investigation; and that the calling of the maker would have therefore shed light on the result or the outcome of the completion of the investigations as to who was to bear the blame for the causation of the accident. As submitted by the respondents, the appellant failed to intimate to the court during the pre-trial procedures, that she would require the maker of the abstract from police to tender it in evidence. She also failed to appeal against the ruling that disallowed her objection to the production of the said abstract through PW1. In our view, that mode of production can only be faulted if we can satisfy ourselves that on the facts on the record before us, the learned Judge's exercise of discretion to deem it properly tendered in evidence through PW1 was erroneous.

The principles that guide the court when interfering or otherwise with the exercise of such a discretion have now been crystallized by a long line of cases. In ***Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125*** Bosire J.A (as he was then) at page 135 had this to say:-

"….And as is always the case judicial discretion has to

be exercised on the basis of the law and evidence. And as was stated by this Court in the case of Carl Ronning versus Society Navale Chargeurs Delmas Vieljeux (The Fracois Vieljevx)[1984] KLR1, an appellate court may only interfere with the exercise of judicial discretion if satisfied either;

(a) the Judge misdirected himself on law, or

(b) that he misapprehended the facts, or

(c) that he took account of considerations of which he should not have taken an account of; or

(d) that he failed to take account of consideration of which he should have taken account; or

(e) that his decision albeit discretionary one, was plainly wrong."

Applying the above to the record before us, it is our finding that the production of the Abstract from the police by the maker in the absence of tendering evidence in support of the defence and the taking out of 3rd party proceedings against persons the appellant shifted blame for causation of the accident would not in any way have affected the conclusion reached by the trial Judge when he pinned liability against the appellant at 100%. Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident. Secondly, PW1s evidence that both she (PW1) and the deceased donned safety belts as at the time of the accident, was not controveted by the appellant. Thirdly, even if the abstract would have indicated that investigations were complete and blame for the accident attributed either wholly or in part to any 3rd party, that alone would not have absolved the appellant from liability in

the absence of any successful third party proceedings being taken out against the owner, agent and or driver of KBH 358C, on the one hand, and on the other hand, production of supportive evidence to exonerate herself from any blame for the causation of the said accident. We therefore find that the learned Judge's findings on liability were well founded on the record before him and we affirm them.

Issues number 4 and 5 are also interrelated and will be dealt with as such. With regard to the choice of a multiplier, and a multiplicand, the trial court was guided by the holding in ***Haniel Mugo Muriuki versus Marris Min Njeramba HCCC No. 24 of 2005*** referred to by the respondent wherein the deceased was a university student aged 24 years old and in which the court therein assessed damages for lost years using a multiplier of 25 years; ***Betty Ngatia versus Samwel Kinuthia Thuita HCCC No. 339 of 1998*** relied upon by the appellant wherein, the deceased was aged 19 years and pursuing a secretarial course. Also referred to was the case of ***Hassan versus Nathan Mwangi Kamau Transporters & 4 others [1986] KLR 457*** for the holding that loss of earnings to be considered in the assessment of damages should be loss of earnings for the profession the deceased was pursuing or would have pursued had death not occurred. In the light of the above, the learned Judge made findings as follows:-

> ***"It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been earned by the deceased, less the living expenses, assuming that one lived and worked up to the age of retirement. It has been suggested that a salary of Kshs. 123,750 per month be used with multiplicand of 30 years less living expenses of 1/3. The plaintiff did not tender any documentary evidence to established this point.***
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> ***However, the plaintiff has presented documents showing that the deceased undertook studies leaning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an appropriate monthly salary of Kshs. 118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the deceased and the defendant agree that the dependency ratio should be 1/3. On the head of lost years I make the award as follows:***
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> ***118,564X30X1/3X12=14,227,680."***

When considered in the light of the appellants complaints highlighted above, and the principles of law cited above, it is our finding that the learned Judge took into consideration the vagaries of life. That is why he settled for the age of twenty five years as the possible age when the deceased would have accessed employment and the age of fifty five (55) years as the age of retirement instead of opting for the prevailing retirement age of sixty (60) years.

As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546/=x 1/3=39,512. When factored into the figure chosen as the multiplicand, it gives a final figure of Kshs 79,034/=.

Loss of dependency would therefore have been worked out as 79,034/=x30x1/3x12=9,484,080.

For the reasons given in the assessment above, we dismiss the appeal on liability and affirm liability at 100% as against the appellant. The multiplier of thirty (30) years and the choice of the multiplicand of Kshs. 118,546/= are also affirmed, save for the factoring in of 1/3rd reduction in the multiplicand to cover the element of taxation. The final award to read as follows:-

(1) Special damages Kshs. 155,000/=

(2) General damages for pain and suffering Kshs. 20,000/=

(3) General damages for lost years Kshs.79,034/=x30x1/3 x12=9,484,080.00.

(4) General damages for loss of expectation of life Kshs. 100,000.00

Total award on damages Kshs. 9,759,080.00.

(5) Special damages to carry interest from the date of filing.

(6) General damages to carry interest from the date of Judgment in the court below.

(7) The appellant who has not substantially succeeded on his appeal will have half (½) costs both on appeal and the High Court.

Dated and Delivered at Nairobi this 16th Day of February ,2018.

E.M. GITHINJI

……..…

R.N. NAMBUYE

……..

JUDGE OF APPEAL

H.M. OKWENGU

……..…

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar