IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 35 OF 2014

BETWEEN

BOARD OF GOVERNORS OF KANGUBIRI GIRLS HIGH SCHOOL……..1ST APPELLANT

JOSEPH KARIMI MWANGI ……..….....….....2ND APPELLANT

AND

JANE WANJIKU MURIITHI .....1ST RESPONDENT

JAMES MURIUKI MWANGI ……...….....……. 2ND RESPONDENT

(An appeal against the Judgment of the High Court at Nyeri (Sergon, J.) dated 21st February, 2014

in

H.C.C.A No. 90 of 2009)

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JUDGMENT OF THE COURT

1. A road traffic accident occurred on 2nd November, 2005 in which a cyclist, ***Peter Muriithi Wambugu,*** lost his life. The respondents are the personal representatives of the estate of the deceased. By a Plaint dated 27th June 2006, the respondents filed suit against the appellants claiming general damages under the ***Law Reform Act*** (Cap 26) and the ***Fatal Accident Act*** (Cap 32), special damages in the sum of Kshs. 30,495/= and costs of the suit.
2. The particulars giving rise to the claim are stated in paragraphs 4 and 5 of the Plaint as follows: that the 1st appellant is a learning institution which at all material times was the owner of motor vehicle registration no. KAJ 998 S Toyota School Van and the 2nd appellant was the driver thereof; on or about 2nd November 2006, the deceased (Peter Muriithi Wambugu) was lawfully cycling along Gatitu-Kagumo road when suddenly by reason of negligence in driving, managing and or controlling motor vehicle registration no. KAJ 998 S on the part of the 2nd appellant as

driver of the said vehicle, an accident occurred in which the deceased (Peter Muriithi Wambugu) sustained fatal injuries. The respondents' averred that the 1st appellant was vicariously liable.

3. The particulars of negligence of the 2nd appellant were pleaded in the Plaint and at paragraph 9 of the Plaint it was averred that prior to his death, the deceased was aged 31 years and was employed as a driver earning about Kshs. 15,000/= per month. The respondents claimed for general damages for pain and suffering, lost years and loss of expectation of life on behalf of the estate of the deceased.
4. In a joint statement of Defence dated 9th November 2006, the appellants averred that the accident was occasioned due to the negligence of the deceased who was *inter alia* ridding his bicycle on the wrong lane of the road; riding his bicycle in excessive speed; riding a defective bicycle in a *zigzag* manner and failed to observe the highway code thus causing the accident.
5. The trial magistrate addressed the issue of whether the 2nd appellant was negligent and if there was contributory negligence on the part of the deceased. In finding the 2nd appellant solely liable for the accident the trial magistrate stated as follows:

> *"**The deceased could not have been in the middle of the road. The sketch plan shows that DW1 made skid marks measuring 20 meters before hitting the deceased. The sketch inevitably shows the deceased was closer to the edge of the road than to the middle of the road. DW1 who was supposed to be on the left lane had enough space to pass the deceased without causing an accident. I find that his defence is not convincing. DW1 was to blame for the accident. Evidence by PW1 and 2 is clear that DW1 was driving at a high speed at the time of the accident. The fact of lengthy speed (sic) he made on the road confirms that he had been speeding. ..The driver started skidding 20 meters before hitting the cyclist. DW1 had left is lane at the point of impact. He could not have been passing the deceased as he testified…. He was not on his side when he hit the deceased. He could have avoided the accident if he was careful. I find that the particulars of negligence pleaded are proved on a balance of probabilities as he drove at high speed, failed to take reasonable care of other road users and failed to keep proper look out and give regards to the conditions of the road…. The plaintiff has show that DW1 was to blame for the collision. I find that DW1 was solely to blame for the collision. The 2nd defendant who was the owner of the said vehicle at the material time is vicariously liable. I find liability on the defendants at 100%."***

6. On the question of loss of dependency, the trial magistrate held that the deceased was gainfully employed as a driver earning Kshs. 15,000/= per month. The appellants contend that the deceased was unemployed and did not earn Kshs. 15,000/= per month. The trial court expressed itself as follows:

> ***"The plaintiff proved that the deceased was gainfully employed as a driver earning Kshs. 15,000/=. He died at the age of 31 years and could have lived for many more years and reached the retirement age of 55 years. I find a multiplier of 24 is reasonable. The deceased had a wife and one child who depended on him as the 2nd child was born after his death. I would apply a dependency of 1/3 which will work as 15,000/= X 1/3 X 12 X 24 = 1, 440, 000/=. I therefore award Kshs. 1,440,000/= as loss of dependency. I award Kshs. 15,000/= for pain; Kshs. 100,000/= for suffering and Kshs. 18, 300/= for special damages. I award the plaintiff costs of the suit and interest from the date of judgment."***

7. Aggrieved by the decision of the trial magistrate, the appellants lodged a first appeal to the High Court which was dismissed. A second appeal has been filed before this Court citing the following grounds of appeal:

a. ***The learned Judge erred in law in upholding the finding of the trial magistrate on liability.***

b. ***The learned Judge erred in law in upholding the finding on dependency which was manifestly so high as to amount to a miscarriage of justice.***

c. ***The learned Judge erred in law in entertaining a salary of Kshs. 15,000/= per month which amount was imaginative.***

d. ***The learned Judge erred in setting an unprecedented assessment which was outside other Kenyan award for comparable loss of dependency.***

e. ***There was no good or proper basis for the said assessment of damages.***

8. At the hearing of this appeal, learned counsel, **Mr. G. M. Gori** appeared for the appellants while learned counsel, **Mr. Gathiga Mwangi** acted for the respondents.
9. Counsel for the appellant reiterated the grounds of appeal and emphasized that the thrust of the appeal was the failure by the two courts below to consider and make a determination on contributory negligence on the part of the deceased and the error by the High Court in upholding the finding by the trial magistrate that the deceased was gainfully employed and earning a salary of Kshs. 15,000/= when there was no evidence to that effect.
10. It was submitted that the learned Judge erred in re-evaluating the evidence on record; he ignored the evidence by the 2nd appellant that the deceased was riding his bicycle in the middle of the road in the middle of the road; the deceased suddenly turned right and fell in front of the 2nd appellant's vehicle. It was the appellants' case that the High Court did not consider the 2nd appellant's testimony that the he did not drive his vehicle off the road . Counsel submitted that had the two courts below considered this evidence, a finding of contributory negligence on the part of the deceased could have been made.
11. On the issue of loss of dependency, counsel for the appellant submitted that there was no proof that the deceased was employed and earned a salary of Kshs. 15,000/= per month. It was submitted that no letter accepting employment, pay slip or proof of payment of income tax to the revenue authorities was tendered in evidence. Due to these anomalies, counsel submitted that the trial court and the learned Judge erred in law and fact in finding that the deceased was gainfully employed and was earning a monthly salary of Kshs. 15,000/=. It was submitted that whereas a letter of offer of employment to the deceased was tendered in evidence, the same was a copy and not an original and did not prove that the deceased took up the employment.
12. Counsel submitted that the learned Judge erred in re-evaluating the evidence and arrived at the wrong conclusion that the deceased was gainfully employed. It was submitted that since the deceased was not employed, the sum of Kshs. 15,000/= should not have been used to calculate loss of dependency. In the alternative, counsel submitted that the minimum wage for a driver as per the ***Regulations on Wages and Conditions of Employment Act*** should have been used to fix the income of the deceased. The appellant also submitted that the learned Judge erred in upholding the use of 24 as the multiplier as this was on the higher side.
13. Counsel for the respondents opposed the appeal emphasizing that this is a second appeal which is confined to points of law under ***Section 72*** of the ***Civil Procedure Act***. On the issue of contributory negligence, it was submitted that the two courts below addressed the issue and analyzed the sketch maps and evidence of the witnesses and correctly arrived at the conclusion that the 2nd appellant was solely to blame for the accident. In addition, counsel submitted that before the trial court, the appellants proposed contributory negligence of 50% and revised their proposal before the High Court to 30%. It was submitted that the appellants' proposals on contributory negligence is not based on any factual evidence and should be ignored.
14. On the submission that the monthly salary of the deceased should have been based on the ***Regulations for Wages and Conditions of Employment Act***, the respondent submitted that these Regulations were never referred to before the trial magistrate and were introduced for the first time at the High Court. This Court was urged to ignore the Regulations as the trial court never considered the issue. On the multiplier of 24, it was submitted that it was not high as it is in accord with numerous decisions where the deceased is 31 years of age.
15. We have considered the written submission by the appellant and examined the judgment of the High Court. This is a second appeal and this Court in enjoined to consider only points of law. ***Section 72*** of the ***Civil Procedure Act*** stipulates that:-

"Except where otherwise expressly provided in this Act or by any other law for the time

being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

In ***Kenya Breweries Ltd. –vs- Odongo- Civil Appeal No. 127 of 2007,*** Onyango Otieno, J.A held,

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

16. The vicarious liability of the 1st appellant in this case is not contested. In the case of ***Kenya Bus Services Ltd –v- Humphrey [2003] KLR 665*** which followed ***Karisa –v- Solanki [1969] E A 318;*** the following proposition was made:

"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard- v -Sully (1931) 47 TLR 557)."

In ***Ormrod and Another –v- Crossville Motor Services Ltd and Another*** **1953 (2) AER 753** ***CA,*** at 55A-B Denning LJ said**,**

"The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver."

17. One of the issues raised in this appeal relates to contributory negligence. Whether contributory negligence exists is a question of fact. This Court stated in ***Jabane –-v- Olenja [1986] KLR 661*** at pg 664, that it will not lightly differ from the findings of fact of a trial court which had had the benefit of seeing and hearing all the witnesses, and will only interfere with the findings if they are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did (See ***Ephantus Mwangi –v- Duncan Mwangi Wambugu (1982-88) 1 KAR 278*** and ***Mwanasokoni –v-Kenya Bus Services (1982-88) 1 KAR 870).***
18. In the instant case, the learned Judge in dismissing the appeal stated that he had re-examined the evidence on record and from the testimony of PW1 and PW2, the 2nd appellant was driving at high speed since he was unable to control the motor vehicle; that the sketch map produced indicated there were skid marks closer to the edge of the road meaning the deceased was knocked down at the side of the road; that there is no way in the circumstances the deceased could be apportioned liability.
19. On our part, we note that the two courts below having evaluated the evidence on record made a determination of fact that the appellants were solely to blame for the accident and were 100% liable. There is a concurrent finding by the two lower courts that the deceased did not contribute to the accident. We are unable to fault the finding and conclusion by the two courts below that the appellants were 100% liable for the accident.
20. On the issue of loss of dependency and whether the deceased was gainfully employed, PW 3,

David Kanyi Njagua, testified that he employed the deceased as his driver at a monthly salary of Kshs. 15,000/=. He stated that the used to pay the deceased in cash. Based on this evidence, the two courts below held that the deceased was gainfully employed at a monthly salary of Ksh. 15,000/=. The appellant has urged this Court to find that in the absence of a pay slip and any documentary proof that the deceased was earning Kshs. 15,000/= per month, the learned Judge erred in upholding the decision by the trial magistrate. We reiterate that this is a second appeal which must be confined to matters of law. The two courts below have established the fact that the deceased was gainfully employed and we see no reason to interfere with this finding of fact.

21. As regards loss of dependency, in the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – v- A.M.M. Lubia & another (1982-88) 1 KAR 777*** it was stated:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the 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 Ilango – v- Mayoka (1961) EA 705,709-713)."***

22. In ***Denshire Muteti Wambua – v- Kenya Power & Lighting Co,Ltd.- Civil Appeal No. 60 of 2004***, this Court reiterated the aforementioned principles under which this Court would interfere with the award of damages. In the case of ***Arrow Car Limited – v- Bimomo & 2 others (2004) 2 KLR 101***, it was stated that comparable injuries should as far as possible be compensated by comparable awards. In ***Denshire Muteti Wambua – v- Kenya Power & Lighting Co. Ltd. (supra)*** it was stated that awards have to make sense and have to have regard to the context in which they are made; they have to strike a chord of fairness. As was stated by Lord Denning in ***Kim Pho Choo – v – Camden & Islingtom Area Health Authority (1979) 1 All ER 332,*** in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant.

23. In the instant case, on the issue of multiplier, we adopt the following findings by Nambuye, J.A in ***Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005:-***

> ***"This court has given due consideration to the aforeset out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles:-***

a. ***The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.***

b. ***It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.***

c. ***The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.***

d. ***Death through natural causes and departure for greener pastures elsewhere is also a factor."***

We have examined case law where the deceased is 31 years of age. In ***Rachael Ivasha Igunza – v- Nyenjeri Kamau - H.C.C.C. No. 340 of 1993,*** the deceased was 33 years old and a multiplier of 22 was used. In ***Mary Awino Adunga – v- John K. Wambua & another H.C.C.C. No. 482 of 1994,*** the deceased was 32 years and a multiplier of 23 was adopted. In ***Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others (supra)***, the deceased was 31 years of age at the time of his death. The Court held,

> ***"In this court's opinion a multiplier of 25 years is not only appropriate but fair to both sides."***

This Court is conscious of the legal principle that an appellate court should not replace the views of the trial court with its own views simply because it is an appellate court. We are satisfied that the multiplier of 24 adopted by the trial court and confirmed by the learned Judge is not on the higher side and we decline to interfere with the same. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 25th day of November, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHAKOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR