IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 76 OF 2003

JAMES MUGO MANYARA ……. APPELLANT

VERSUS

JAMES GITU WAMBUGU ……..…… RESPONDENT

(Appeal from the original Judgment in Chief Magistrate's Court at Nyeri in Civil Suit No. 554 of 2002 dated 22nd May 2003 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)

J U D G M E N T

James Mugo Manyara, hereinafter referred to as the appellant is aggrieved by the Judgment delivered by the Senior Resident Magistrate Nyeri in Chief Magistrate Civil Case No. 554 of 2002 on 22nd May 2004 in which the Senior Resident Magistrate gave judgment in favour of James Gitu Wambugu (hereinafter referred to Respondent) suing as the administrator of the estate of Henry Wambugu Gitu (hereinafter referred to as deceased) for general damages of Kshs.120,000/= in respect of loss of life Kshs.204,000/= in respect of lost years Kshs.5,000/= for pain and suffering and special damages of Kshs.17,000/=.

It is the appellant's contention:

- **That the trial magistrate erred in finding the Appellant to blame for the accident.**
- **That there was no evidence to support the award for lost years and**
- **That the trial magistrate applied wrong principles in awarding damages for lost years.**
- **That the award for expectation of life was inordinately high**
- **That there was no evidence to support the award in respect of pain and suffering.**

The Respondent's suit was brought under the Law Reform Act (Cap 32) and arose from an accident involving the Defendant's motor vehicle Registration No. KAB 517J and the deceased who was riding on bicycle.

During the trial in the lower court the Respondent and two other witnesses Anthony Njaramba (P.W.2) and James Njaramba Kibiru (P.W.3) testified P.W.2 and P.W.3 testified that they witnessed the accident. P.W.2 was standing at a Bus stage whilst P.W.3 was at the junction. Both maintained that the deceased and the Defendant's motor vehicle were traveling towards the same direction. The deceased who was ahead stopped at the junction to Kangubiri and indicated that he was turning right into the junction, the Defendant's motor vehicle however at the same time moved to the right to overtook the cyclist and in the

process hit the cyclist.

The Defendant version of the accident was that the cyclist emerged from a feeder road on the left and that despite applying brakes he could not avoid knocking the cyclist. He maintained that there was no one at the scene, but the people came out of their homes after the accident.

I have reconsidered and evaluated the evidence. Although the appellant maintained that there was no one at the scene it is evident that both P.W.2 and P.W.3 were able to witness the accident from the position in which they were. The trial magistrate also found that the deceased was on his way from the shop and not to the shop as contended by the appellant. The trial magistrate who saw the witnesses and assessed their demeanour believed and accepted the version given by the Respondent's witnesses and I have no reason to depart from the same. Moreover, although the appellant claimed that the trial magistrate did not take the proceedings of the inquest into account no certified copies of these proceedings were produce so that the trial magistrate could see the findings.

Further even assuming that the inquest proceedings did not recommend any criminal action against the appellant that in itself would not absolve him of liability in a civil suit where the burden of proof is much lighter.

I find that there is no justification for me to interfere with the finding on liability nor is there any justification for me to interfere with the apportionment of blame.

As concerns the quantum of damages it is a well established principle that an appellate court can only interfere with the quantum of damages awarded where the same is demonstrably wrong or is either manifestly low or excessive or where the trial court has proceeded on wrong principles in arriving at the award ***(Shabani v/s City Council of Nairobi [1985] KLR 517, Kigaragari v/s Aya [1985] KLR 273)***

With regard to the award in respect of lost years. It was submitted that the trial magistrate proceeded on wrong principles as there was no evidence to support the finding that the deceased aspired to be a Doctor or that he could have been a teacher, and that no school records were provided and therefore there was no basis for the award of Kshs.120,000/=.

The case of ***Hassan v/s Nallian Mwangi Kamau Transporters & 4 others [1986] KLR 457*** provides an appropriate authority on factors to be considered in assessment of general damages for lost years. The court has to make the best estimate it can based on the known facts and the prospects of the deceased at the time of his death. The plaintiff's evidence was that the deceased was 16 years of age and was at the material time a standard VIII student. There was no evidence as to his general performance in school or what his aspirations were. The finding of the trial magistrate that the deceased aspired to be a doctor was therefore not supported by evidence. A letter which purports to be from the headmaster of the deceased's former school was produced in evidence. The author was however not called to testify. There was therefore paucity of evidence. Be that as it may the monthly income of 2,500/= adopted by the trial magistrate was basically the minimum wage in the year 2003. Even assuming that the deceased did not go beyond standard VIII, he would still have earned the minimum wage at the very least. I have no doubt that the deceased would have assisted his parents as he indeed was doing at the time of his death. In the circumstances given the multiplicant of 10 years that the trial magistrate appeared to have adopted, the general damages awarded of Kshs.204,000/= was not so manifestly excessive as to warrant the interference of this court.

As concerns the award in respect of loss of expectation of life although the amount of Kshs.120,000/= was on the high side, it was not so manifestly excessive nor can it be said to have been based on wrong principles.

Although general damages of Kshs.5,000/= was awarded for pain and suffering there was no basis for this award as the evidence was that the deceased died on the spot and was therefore mercifully spared any pain. I would therefore set aside the award in this regard.

Finally the special damages were all specifically pleaded and proven and I have no reason to interfere.

The upshot of the above is that I do uphold the judgment and award of the lower court except for the award of Kshs.5000/= in respect of pain and suffering which I do set aside. The appeal is otherwise dismissed.

The Appellant shall pay costs of this appeal to the Respondent. Orders accordingly.

Dated signed and delivered this 5th day of December 2006.

H. M. OKWENGU

JUDGE