REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J.)

CIVIL APPEAL NO. 60 OF 2018

BERNARD PHILIP MUTISO.....APPELLANT

VERSUS

TABITHA MUTISO.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Machakos delivered on the 30th day of May, 2018 by Hon. A. Lorot (Mr.) Senior Principal Magistrate in CMCC No. 1024 of 2002)

BETWEEN

TABITHA MUTISO.....PLAINTIFF

VERSUS

BERNARD PHILIP MUTISO.....DEFENDANT

JUDGMENT

1. The Respondent herein, by way of a Plaint dated 14th September, 2018 in the trial court claimed general damages and costs of the suit against the Appellant. The cause of action, according to the plaint, arose on or about 12th October, 1996 when the deceased, **Jimmy Mutuku Mutiso,** who was lawfully tricycling along Machakos-Mutituni Road when he was knocked down and killed instantly by motor vehicle registration number KWW 058 driven by the Appellant and/or owned by the Appellant. According to the Respondent, the said accident was caused by the negligence of the driver of the said vehicle particulars whereof were set out. The Respondent also relied on the principle of *res ipsa loquitor* and claimed damages against the Appellant on behalf of the estate of the deceased.

2. In his defence, the Appellant denied that the accident was caused by his negligence and instead attributed the accident to the negligence of the deceased and similarly set out what in his view amounted to the said negligence.

3. In order to prove his case, the Respondent called, as PW2, **Peter Kioko Makenzie** who testified that on 12th October, 1996 he was pushing the deceased on his wheelchair from Machakos on his way his home. At St. Valentine, the deceased asked PW2 to buy cigarette at which point PW2 decided to cross the road to the shopping centre. However, as he crossed the road he saw a motor vehicle from the opposite direction which was over speeding, crossing the bumps while moving in a zig-zag manner. By then the said vehicle was too close to him with full lights. According to PW2, the motor vehicle had left the tarmac and was being driven on

the *murram* outside the tarmac. In order to avoid being hit by the vehicle, he tried to flee but fell down, got up and ran away. The deceased, who was off the road, was however not so lucky and he was hit by the motor vehicle and thrown off. According to PW2, the accident occurred outside St. Valentine Shopping Centre.

4. PW2 stated that he noted that the motor vehicle's registration number was KWW 058 Pick Up. The said vehicle however fled from the scene fearing attacks from the members of the public. According to PW2, by that time the deceased was groaning beside the wheel chair but was assisted by a good samaritan to go to the Hospital but the deceased succumbed while undergoing treatment. By the time the police arrived at the scene he was not present.

5. PW1, **Corporal Aaron Morondi No.48671** attached to Machakos Traffic Base stated that on 12th October, 1996 at 8.00 pm an accident report was filed in their office involving a Peugeot 504 Pick Up Registration Number KWW 058 which was being driven by Lt. Col. Mutiso. The report was that the said vehicle had hit a pedestrian as it was being driven along Machakos road near St. Valentine on your way to Kangundo. According to the statement by the Appellant, he saw a dark object on the road and rammed into it and it was after hitting the object that the Appellant realized the object was a disabled person who was being pushed by two people. According to the Appellant, he saw two people throw the disabled person onto the road after which they ran away in order to avoid being hit. Apart from the Appellant, two other witnesses, **Mandy Musyoka Mutiso** and **Peter Kioko Makenzie** recorded statements.

6. It was his evidence that the police visited the scene and commenced investigations. In his evidence, the sketch plan showed that the point of impact was on the extreme left. As a result, the police formed the opinion that the deceased was being pushed on the road contrary to the traffic rules. He stated that by that time, the road was full of potholes and 3 bumps. PW1 stated that the vision of the road was very poor and there were many trees which provided shade on the road.

7. It was confirmed by him that the person who was hit died and that the owner of the motor vehicle was Lt. Col. Mutiso who was the driver of the motor vehicle at the material time of the accident.

8. In cross-examination by **Macharia**, PW1 stated that the Appellant was driving on the left side on his way to Machakos which was the correct side of the road. He stated that the deceased wheel chair was hit while on the extreme left side which was supposed to be used by the Appellant. According to PW1, the 2 pushers were using the left side of the road as you face Machakos which was contrary to the traffic rules.

9. PW3, **Tabitha Ndila Mutiso,** the deceased's mother heard the news of the deceased's death on 12th October, 1996 when she was at home around 7.30 pm. It was her evidence that the deceased was 40 years, a businessman at Machakos operating a shop at Mjini (Swahili village). She produced the death certificate, burial permit dated 17th October, 1996, grant *ad litem colligenda bona* dated 13th October, 1999, postmortem report dated 16th October, 1996. According to PW3, the deceased, who was earning about Kshs. 15,000/- monthly, used to assist her. She stated that she had other two children who were casual workers but who were not assisting him. She disclosed that the deceased fell from a tree leading to lose of his feet occasioning him injuries that confined him to a wheelchair when he was in his mid -years.

10. The witness prayed for damages.

11. In cross-examination, the witness admitted that she had no documentary evidence to back up his evidence regarding the deceased's earnings but insisted that the deceased was 40 years old and was planning to marry before he died. She stated that she had no children. He stated that Mutuku could stand but could not walk far.

12. At the close of the Respondent's case, the Appellant, who was present in Court, opted not to call any evidence in rebuttal but instead relied on the evidence given by PW1.

13. In his Judgment, the trial magistrate found that the road had speed bumps, potholes and darkness hence a prudent driver properly directing himself to safety and caution would approach the road at a speed he is capable to manage. He pointed out that the police record and the Appellant's statement to the police show that the Appellant had seen a dark object ahead but still went ahead to ram into it. The trial magistrate held that the Appellant must have been at a speed he could not manage control of the motor vehicle. According to the Trial Magistrate, PW2 the only eye witness account was unchallenged. The Trial Magistrate held the Appellant 100% to blame for the accident.

14. On quantum of damages, the Trial Magistrate awarded the Respondent as follows; Pain and suffering at Kshs. 10,000/-, Loss of expectation of life at Kshs. 100,000/-, Loss of dependency at Kshs. 720,000/- with costs and interest.

15. Aggrieved by the Judgment, the Appellant has appealed citing the following grounds:-

(1)THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate the serious triable issues raised in the Appellants' defence and in allowing the Respondent's claim.

(2)THAT the Learned Trial Magistrate erred in law and in fact in disregarding the evidence of the police officer who visited the scene of the accident and in finding that the Appellant was 100% liable for the accident.

(3)THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate the evidence that the deceased was wholly to blame for the accident and in failing to apportion liability at 100% against the deceased.

(4)THAT the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondent had no locus to institute the suit and was not entitled to damages under the Law Reform Act.

(5)THAT the Learned Trial Magistrate erred in law and in fact in failing to weigh and evaluate the evidence placed before the court.

(6)THAT the Learned Trial Magistrate erred in law and in fact in awarding damages for loss of dependency and loss of income when no evidence was adduced proving dependency and loss of income.

16. Based on the said grounds, the Appellant urged the court to allow the appeal, set aside the judgment of the Chief Magistrate Court (Machakos) in CMCC No. 1024 of 2002 and award him the costs of the appeal.

Appellant's submissions

17. Regarding liability, it was submitted that the deceased contributed to the occurrence of the accident as he was on the wrong side of the road and failed to make himself visible. According to the Appellant, the deceased's negligence was buttressed by PW2 and PW1 who acknowledged that at the time of the impact they were on the wrong side of the road. It was submitted that PW2 acknowledged that he left the deceased on a wheelchair unattended on the edge of the road and crossed over to the other side of the road to buy cigarettes. According to the Appellant the accident would have been averted were it not for the negligence of the deceased and PW2. Reliance was placed on **Trakana Mombasa Limited & Another vs. George Amwayi Isaya (2020) eKLR** on the proposition that pedestrians too owe a duty of care to other road users and they ought to move with due care and follow the Highway Code. The Appellant has urged the court to find contribution by the deceased at 50% to be reasonable.

18. According to the Appellant the fact that the road had potholes, bumpy and impaired by shades of trees especially at night has not been controverted. Reliance was placed on the case of **Caroline Anne Njoki Mwangi vs. Paul Ndungu Muroki Civil Case No. 739 of 2013** where the court held that in the absence of an official police sketch/map and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio of 50% each. It was submitted that the sketch plans show that the point of impact was on the extreme left side of the road from Kangundo to Machakos and the wheelchair was being pushed on the wrong side contrary to the Traffic Act. According to PW1's testimony, it was submitted that the point of impact was on the extreme left side of the road and not off the road [pedestrian lane]. It was contended that since PW2's evidence is uncorroborated, the court should be cautious to place reliance on that evidence.

19. The Appellant urged the court to find that the deceased was equally liable based on the case of **Abbay Abubakar Haji & Another vs. Marair Freight Agencies Limited Civil Appeal No. 67 of 1983**.

20. On quantum, it was submitted that there was no evidence to support the Respondent's testimony that the deceased had a shop at Mjini area of Machakos and was earning a monthly sum of Kshs. 15,000/-. Reliance was placed on the case of **Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995** where the Court of Appeal held that the issue of dependency is always a question of fact to be proved by he who asserts. According to the Appellant the earnings were not backed by any evidence and none was adduced in court as exhibits to prove that he ran a shop and earned Kshs. 15,000/- per month in 1996.

Reliance was placed on the case of **Wambua vs. Patel & Another [1986] KLR** where it was held that the court should not allow the Plaintiff to pluck a figure from the air. No licenses were produced to prove the existence of a business/shop hence the trial magistrate erred in assessing the net income of the deceased based on proposed earnings of Kshs. 15,000/- hence the deceased's earnings which were based on assumptions should be set aside. In this regard the Appellant cited the cases of **Isaack Kimani Kinyanjui & Another vs. Loise Gathoni Mugo & Another Civil Appeal No/. 120 of 2015**, **John Wamae & 2 Others vs. Jane Kituku Nziva & Another Civil Appeal No. 119 of 2017** and **Mary Khayesi Awalo & Another vs. Mwilu Malungu & Another ELD HCC No. 19 of 1997[1999] eKLR**. According to the Appellant, the trial court should have been guided by the minimum wage in 1996 or applied the principle of a lumpsum in awarding general damages.

21. In conclusion, the Appellant urged the court to set aside the trial court judgment and find the deceased was equally (50%) to blame for the accident. On quantum, the Appellant urged the court to apply the minimum wage of 1996 to compute the award for lost years.

22. In the Appellant's view, the award ought to be as follows:

Pain & suffering *Kshs.10, 000/-*

Loss of expectation of life *Kshs.100, 000/-*

Lost years

4241(Minimum wage) x 12 x 12 1/3=Kshs. 203,568/-

Total (less 50%) Kshs. 313,568/-

Grand Total Kshs. 156,784/-

Respondent's submissions

23. On behalf of the Respondent it was submitted that PW1 and PW2 confirmed that the point of impact was on the extreme left of Kangundo-Machakos road and particularly so, off the tarmac road as you face Machakos and that this was supported by Pexb 1, the whole police file. According to the Respondent, it is not in contention that at the time and place of the accident, Machakos-Kangundo road had three bumps, pot holes and darkness with trees shading the aforesaid road. It is also not disputed that the Appellant was driving motor vehicle registration number KWW 058 at a very high speed notwithstanding the bad state of the road and the fact that he was not only next to St. Valentine Shopping Centre but also near St. Valentine High School contrary to the Traffic Rules regarding the requisite speed whilst driving in such an area. It was submitted that the deceased was hit whilst on a wheel chair being pushed by PW2 after crossing the road.

24. From the evidence, it was submitted that the driver ought to have seen the Musyoka Mutiso who was ahead of the deceased and PW2 since the motor vehicle lights were beamed to full. It was submitted that the fact that the Appellant recorded a statement with the police stating that he saw a dark object on the road and still went ahead and rammed into it means that he didn't exercise care, caution and safety. It was submitted that since the deceased was being pushed on the opposite direction and that the Appellant was unable to control the motor vehicle owing to the high speed thus skying the speed bumps and moving in a zig zag manner, the Appellant is 100% liable for the accident. According to the Respondent, the Appellant was 100% liable since PW2 was the only eye witness and his evidence was uncontroverted as the Appellant waived his right to testify. Reliance was placed on Section 107-109 of the ***Evidence Act*** and the case of **Martha Diro Odero (Suing as the Administrator and Personal Representative of the Estate of Willy Patrick Ochieng Ndiro (Deceased) vs. Come Cons Africa Limited [2015] eKLR**.

25. As to whether the Respondent was entitled to damages, it was submitted that at the time of his demise, the deceased who was a businessman was aged 40 years old, and though was on a wheelchair, enjoyed good health and lived a happy and vigorous life with his family. He was the sole breadwinner of his immediate family earning Kshs. 15,000/- per month as per PW3. According to the Respondent as a result of the untimely death, the family lost the deceased's support and source of comfort.

26. Regarding the award for pain and suffering, the Respondent submitted that Kshs. 200,000/- was reasonable since the accident

occurred at 7.30 pm and the deceased dies at 8.25 pm at Machakos General Hospital. Reliance was placed on the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR** where the deceased dies 4 months hence his pain was prolonged and the court upheld an award of Kshs. 200,000/-. On loss of expectation of life, it is submitted that the deceased who was only 40 years old was deprived of his normal expectations as a result of the death hence an award of Kshs. 200,000/- was reasonable. Reliance was placed on the case of **Martha Diro Odero (Suing as the Administrator and Personal Representative of the Estate of Willy Patrick Ochieng Ndiro (Deceased) vs. Come Cons Africa Limited (supra).**

27. On damages for lost years it is submitted that the deceased was the sole breadwinner for the family entirely depended on him. Reliance was placed on the case of **Benham vs. Gambling [1941]AC**. Regarding multiplier, it is submitted that the deceased would have worked upto the age of 60 years noting the nature of his work hence a multiplier of 20 years was reasonable. Reliance was placed on the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR** where the deceased was aged 44 years and the court applied a multiplier of 16 years. On Multiplicand, it is submitted that the deceased was a businessman earning a net monthly income of Kshs.15, 000/- though not married, he was the sole provider for the family who depended on him hence a multiplicand of 2/3 should apply.

28. According to the Respondent, it is trite law that a person's profession and earnings are neither proved by production of academic certificates nor documentary evidence. Reliance was placed on the case of **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** and **Rev. Fr. Leonard O.Ekisa vs. Major Birgen [2005] eKLR** that dependency was a matter of fact which need not be proved by documentary evidence.

29. In the Respondent's view, the damages for loss of dependency ought to have been computed as follows:

Kshs. 15,000/- x 20 x 12 x 2/3=Kshs.2,400,000/-

30. Therefore, the total claim ought to have been as hereunder:

Pain & Suffering	*Kshs. 200,000/-*
Loss of expectation of life	*Kshs. 200,000/-*
Loss of dependency	*Kshs. 2,400,000/-*
Total	*Kshs. 2,800,000/-*

31. In conclusion, it is submitted that as the Respondent's evidence was uncontroverted by the Appellant, the appeal ought to be dismissed with costs to the Respondent.

Determination

32. I have considered the submissions in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must 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 this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

34. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question….it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

35. It was therefore held by the Court of Appeal in **Ephantus Mwangi & Another vs. Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

36. In this appeal, it is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities and if so what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt since Section 107 (1) of the ***Evidence Act,*** Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

37. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

38. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

39. In **Evans Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

40. This position was re-affirmed by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR** where the Court expressed itself as hereunder:

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

41. It follows that the initial burden of proof lay on the plaintiff, the Respondent in this appeal, but the same could shift to the Defendant, the Appellant in this appeal depending on the circumstances of the case.

42. The question then is *what amounts to proof on a balance of probabilities*. **Kimaru, J.** in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLR 526** stated that:

"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

43. Similarly, **Lord Nicholls of Birkenhead** in **Re H and Others (Minors) [1996] AC 563, 586** held that;

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

44. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

"Denning J, in Miller vs. Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance of preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

45. In this appeal, the Appellant seeks to have the court substitute the trial court's findings of 100% liability with equal liability between the deceased and the Appellant. The Appellant does not dispute that he was the owner of motor vehicle registration number KWW 058 which was involved in the accident. However, he asserts that the accident was solely or substantially caused by the deceased and PW2 who was pushing the deceased's wheelchair.

46. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In **Khambi & Another vs. Mahithi and Another [1968] EA 70**, it was held that:

"It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge"

47. In this case, the Appellant relies on the information contained in the police file which stated that the deceased was being pushed on the road contrary to the traffic rules. That evidence, however, was opinion evidence and as opined in ***Cross & Tapper on Evidence***, 11th Edition by **Colin Tapper**, at page 566:

"A witness may not give his opinion on mattes that the court considers call for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of truth. There are thus two broad spheres of evidence of opinion. The first concerns matters calling for specialised skills or knowledge. In this sphere, the only questions are whether the subject of inquiry does raise issues calling for expertise, and whether the witness is a qualified expert…In the law of evidence, 'opinion' means any inference from the observed facts, and law on the subject derives from the general rule that witnesses must speak only to that which was observed by them. The treatment of evidence of opinion by English law is based on assumption that it is possible to draw a sharp distinction between inference and the facts on which they are based."

48. However, such evidence, even if given by an expert is not necessarily binding and as was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

49. The Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

"… such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

50. In **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** it was held that:

"It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

51. In this case, at the close of the Respondent's case, the Appellant though present chose not to testify instead relying on the evidence of PW1. PW1 was, however, not an eye witness but testified based on the information gathered from other witnesses and at the scene. Apart from PW2 whose evidence was that the accident occurred outside the road, there was no other primary evidence on how the accident occurred. In light of the only eye witness evidence given by PW2, I find that the trial Court was properly entitled to rely on the said evidence. The Appellant had the opportunity to testify but for reasons known only to him, declined to seize that opportunity, instead taking the risk that the opinion evidence of PW1 would relieve him of the liability.

52. It is a well-known rule of evidence founded on section 119 of the ***Evidence Act*** that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. See **Green Palms Investment Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003; Bukenya & Others vs. Uganda [1972] EA 549; R. vs. Uberle [1938] 5 EACA 58**.

53. In this case the only people who could have explained the circumstances under which the accident occurred were **Musyoka Mutiso** who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

54. In the foregoing premises, there is no basis upon which I can interfere with the finding of liability by the trial court.

55. Regarding quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

56. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made"" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

57. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

58. Under the award of damages for loss of dependency, the Appellant has only challenged the trial magistrate finding that the deceased earned Kshs.15, 000/- per month from a shop at Mjini area in Machakos. According to the Appellant, the amount was plucked from the air by the Respondent since no licenses were produced in court as proof that the deceased operated a shop. The Appellant has asked this court to interfere with the trial magistrate finding on earnings. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."

59. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported).** held at page 248 that:

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

60. It therefore follows that the method followed in awarding loss of dependency is the multiplicand (annual net income) multiplied by a suitable multiplier (expected working life lost by the deceased by the premature death), and further by a dependency ratio (ratio of the deceased's income utilized on her dependents).

61. The Appellant contends that no evidence was adduced proving dependency. In her evidence PW3, **Tabitha Ndila Mutiso**, stated that the deceased was her son and used to assist her but her other children never assisted her. Although PW3 stated that the deceased earned Kshs. 15,000 per month from the business, PW3 never stated how much she was given by the deceased. It is not in dispute that the deceased was the son of the Respondent and the deceased was at the time of his demise unmarried. In those circumstances it is only reasonable to deduce that the deceased was supporting his mother in one way or another. The court in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** opines that:

"Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country..."

62. The Court of Appeal in the case **Kenya Breweries Limited vs. Saro, [1991] KLR 408** was of the view that:-

"the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents."

63. As was appreciated by **Ringera, J.** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993**:

"Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future."

64. According to **Udo Udoma, CJ**, in **Suleiman Muwanga vs. Walji Bhimji Jiwani and Another [1964] EA 171**:

"It is right also that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school, and after school on gaining employment, to make contribution towards maintenance of the family, the term family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as kindred or extended family. In which case it seems to be nothing strange that the deceased should have been said to have been serving not only her mother but also her grand-parents when she was alive and even if she had to train as a nurse she would still have had to serve them any time she came home in addition to her financial contributions."

65. A similar view was expressed in **Akol vs. Industrial Sales Promotion Ltd [1973] EA 248**, where **Opu, J**. stated that:

"For the purpose of clarifying the matters in this case, a distinction must be drawn between suits where a parent claims for loss of prospective financial assistance consequent on the death of his child and those whose claim is based on the loss of services of the child as a result of the child's death. It is right that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school and after school, on gaining employment, to make a contribution towards the maintenance of the family, the family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as the kindred or extended family. Therefore owing to the peculiar circumstances of the African family as distinct from the English or European family, an African parent can sue for loss of prospective financial support caused by the death of his child due to negligence on the part of the defendant."

66. It is therefore clear that even in the absence of evidence that the parents depended on the deceased, the court is not barred by that mere fact from awarding damages to the parents as long as there is evidence on record that the parents were either being assisted by the deceased or that they expected some assistance from the deceased. That is my understanding of the decision in **Henry Waweru Karanja & Another vs. Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2107] eKLR** where the court expressed itself as follows concerning the issue of proof of dependency:

"20. I need to dispose off several aspects of the appeal here quickly. First, the Appellant says that the Plaintiff did not prove that they are entitled to any sums for loss of dependency or lost years because she did not prove that she was the mother of the deceased. I do not agree that the Respondent did not prove that she was entitled to this head of damages. She testified quite straightforwardly that she was the mother of the deceased and that the deceased used to give her Kshs. 10,000 every month. In cross examination, all the Appellant's counsel did was to ask her if she had come to court with a letter from the Chief to prove that she was, indeed, the mother to the deceased. The Respondent responded in the negative. The lack of a Chief's letter is not an automatic proof of the negative: that the Respondent is not the mother of the deceased. Indeed, her oral testimony, believed by the Learned Magistrate was sufficient to prove that she was the mother.

The same is true about the proof of dependency. She testified that the Deceased used to give her Kshs. 10,000 per month. It is true that she did not produce any document to prove this – but the law does not say that a document must be produced to prove such an assertion. The law demands that each allegation must be proved on a balance of probabilities. Here, the Respondent testified that she received Kshs. 10,000 per month from the Deceased. She was not cross-examined on the claim. The Learned Trial Magistrate was therefore entitled to make a finding that that was the amount of money she received from the Deceased. In any event, the Learned Trial Magistrate used the sum of Kshs. 10,000/= not as the amount the Deceased used to give to the Respondent but as the total earnings per month for the Deceased."

67. That dependency can be proved by oral evidence was appreciated in **Leonard O. Ekisa & another vs. Major K. Birgen** (supra) as follows:

"Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the

deceased, I differ from his contention. Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.

The evidence of PW2 was that he was a priest and was not getting an income to support his parents. The fact that the deceased's wife was working does not remove her dependency on her late husband. The evidence was that the deceased used to pay for expenses of housing, school fees, food and other items for upkeep of the children. I find that there was dependency by all who were listed in the plaint……."

68. In my view there is sufficient evidence to prove that the Respondent depended on the deceased. The Appellant has not substantiated his assertions in his written submissions despite raising the same as a ground of appeal. It is not disputed that the Respondent was the mother of the deceased.

69. Regarding the earnings, it was PW3's testimony that the deceased earned Kshs. 15,000/- per month. The Appellant assert that the amount was never proved since no documentary evidence was produced in court. Indeed, no document was produced as confirmed by PW3 during cross-examination. However, the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** had this to say on the issue:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

70. In **Priscilla Mwathimba vs. Simon Kaibunga & Another Meru CA 132 of 2008**, the Court opined as follows:-

"While the Appellant did not produce evidence of earnings of Kshs. 30,000.00 per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of Kshs. 5,000.00 as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that the deceased had a wife and six children…can both a shop and farming be producing only Kshs. 5,000.00 per month" This court finds it's unreasonably low to sustain such a family. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural folks compensation for reason that there are no proper records of income."

71. In **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko [2006] eKLR**, the Court of Appeal dealing with paucity of evidence of loss of income observed as follows:

"We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult."

72. In **Wambua vs. Patel & Anor [1980] KLR 336** **Apaloo J** (as he then was) considered such difficulties in the case of a village-man in his mid- fifties dealing in cattle trade, who was injured in a road traffic accident. He stated:

"I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the

figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his likelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods."

73. The Court of Appeal in **Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs. Hellena Wanjiru Rukanga [2020] eKLR** reiterated that:-

"…it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case."

74. In my view where there is believable evidence of the deceased's earnings, the minimum wage principle does not apply. Accordingly, I have no basis for interfering with the trial court's decision as regards the multiplier and the multiplicand.

75. As regards dependency ratio, in the case of **DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR** it was reiterated that:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

76. Considering the relationship between the deceased and the Respondent, I find that the dependency ratio of 1/3rd was proper.

77. The appeal therefore fails.

78. I, however, note that the despite the trial magistrate awarding Kshs.10,000/- for pain and suffering as well as Kshs.100,000/- for loss of expectation of life, the awards were not incorporated in the final award. Section 78 of the ***Civil Procedure Act*** provides that:

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

79. In the premises, this Court has the power under section 99 of the ***Civil Procedure Act*** to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, either of its own motion or on the application of any of the parties.

80. Accordingly, apart from dismissing this appeal, I hereby correct the judgement by incorporating the awards under pain and Suffering of Kshs 10,000.00 and loss of expectation of life in the sum of Kshs 100,000.00 in the final judgement.

81. The costs of this appeal are awarded to the Respondent.

82. Judgment accordingly.

Judgment read, signed and delivered at Machakos this 26th day of April, 2022.

G.V ODUNGA

JUDGE

In the presence of:

Mr Mukula for the Respondent

CA Susan