REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 64 OF 2018

EVANSON MUKUNYA.....APPELLLANT

VERSUS

JAMES KARIUKI MAINGI AND MARY NYOKABI KARIUKI (Suing as the legal

representatives of the estate of PAUL KARIUKI MAINGI (Deceased).....RESPONDENTS

(Being an appeal from the judgment and decree of Hon. Nelly W. Kariuki, SRM, in Nyeri CMCCC No. 201 of 2017 delivered on 19/10/2018)

JUDGMENT

1. The respondents herein had sued the appellant at the lower court claiming general and special damages under the Law Reform Act and Fatal Accidents Act after the son to the respondents was killed in a road traffic accident involving a motor vehicle belonging to the appellant. The parties in the case entered consent on liability in the ratio of 20:80 in favour of the respondents. The trial court subsequently assessed the damages and awarded Ksh.100,000/= for pain and suffering. In its award for loss of dependency it adopted a multiplicand of Ksh.12,000/= and a multiplier of 45 years, making the total award for loss of dependency to be as follows:

12,000 x 45 x12 x1/3 = 2,160,000.

2. The appellant was aggrieved by the award and filed the instant appeal. The grounds of appeal are:

1.The learned Magistrate erred in law and in fact in awarding general damages for pain and suffering of Kshs 100,000/=.

2. The learned Magistrate erred in law and in fact in assessing damages for loss of years/ dependency by adopting an erroneous multiplicand and multiplier.

3. The appeal was canvassed by way of written submissions of the advocates for the parties, **C.W. Githae & Co Advocates** for the appellant and **Kelli & Mwaura Associates Advocates** for the respondents.

4. The evidence for the respondents was that the deceased died at the age of 19 years. That he had just completed his forth form. That he was a part-time *boda boda* rider with a daily-earnings of Ksh.1,500/=.

Submissions -

5. The advocates for the appellant submitted that the award of Ksh.100,000/= for pain and suffering was excessive as the deceased had died on the same day of the accident. The advocates urged the court to reduce the said award to Ksh.20,000/=.

6. On loss of dependency, the advocates submitted that dependancy is a question of fact. That the respondents were required to prove that they were factually dependent on the deceased. That the 1st appellant in his evidence had stated that he is the one who paid school fees for the deceased and never stated that he was dependent on the deceased. That the evidence was that the deceased used to do *boda boda* business after school with somebody else`s motor cycle on commission basis. That the pay varied from day to day. The advocates consequently submitted that there was no proof of earnings of the deceased. That in the premises the court should have been guided by the minimum wages as provided under Legal Notice No.117 of 2015 which was in operation at the time of the deceased`s death which was Ksh.5,844.20. That the trial court therefore erred in adopting a multiplicand of Ksh.12,000/=. That in any event as the court had accepted that the deceased was a student should have proceeded under the doctrine of “lost years” and make an award of at the very most of Ksh.500,000/=.

7. The advocates submitted that as dependency was a matter of fact, the multiplier adopted will depend upon the likely dependency of the dependants. That it is likely that the deceased would have established his own family and therefore that the dependency of his parents would

have substantially reduced. That a multiplier of 20 years would have been more reasonable. That the multiplier of 45 years adopted by the trial court was speculative and unreasonable. The advocates urged this court to adopt an income/multiplicand of Ksh.5,844.20/= and a multiplier of 20 years. The advocates relied on an unreported authority that was not made available to the court.

8. The advocates for the respondent on the other hand submitted that the award of Ksh.100,000/= for pain and suffering was proper as the certificate of death indicated that the deceased died a day later after the accident. That in the premises the deceased underwent a lot of pain as the death was not instant. That no authority was tendered by the appellant to support the proposition that the award of Ksh.100,000/= was excessively high. To support the award the advocates relied on the case of **David Kahuruka Gitau & George Kuria v Nancy Ann Wathitu Gitau & Mercy Wangui Nganga** (2016) eKLR where Mativo J. upheld an award of Ksh.100,000/= for pain and suffering where the deceased had died 30 minutes after the accident.

9. The advocates submitted that the evidence by the respondents on the daily earnings of the deceased was not controverted. That the fact that no receipts were produced did not mean that the earnings were not proved. The advocates relied on the Court of Appeal decision in the case of **Jacob Ayiga Maruja v Simeon Obayo** (2005) eKLR where it was held that:

> **"In our view, there was more than sufficient material on record from what the learned Judge was entitled to and did draw the conclusion that the deceased was a carpenter and that his monthly earning were about Kshs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by 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".**

Analysis and Determination–

10. This being a first appeal the duty of the court is to analyze and evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while at the same time bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify-see **Selle & Another v Associated Motor Boat Company Limited** (1968) EA 123. **In Kiruga v Kiruga & Another** (1988) KLR 348 the Court of Appeal observed that:

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."***

11. The appeal herein is on quantum of damages awarded by the trial court. The principles applicable in considering an appeal on quantum are as was stated by the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan** (1982-1988) KAR that:

> ***An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

12. The appeal challenges the award on pain and suffering and on loss of dependency. I will therefore proceed to consider the two issues.

The award on pain and suffering -

13. The appellants challenge the award of Ksh.100,000/= for pain and suffering on the grounds that the same was excessive. In awarding the said amount the trial court accepted the evidence in the postmortem report that the deceased had died about 30 minutes after the occurrence of the accident while undergoing treatment at Nyeri Provincial General Hospital and hence that the said amount was reasonable in the circumstances.

14. In their submissions at the lower court under this heading the advocates for the respondents had asked for Ksh.100,000/= while making reliance on the case of **David Kahuruka Gitau & George Kuria v Nancy Ann Wathitu Gitau** (supra) where similar amount was awarded. They had also cited the case of **Makario Makonye Monyancha V Hellen Nyangena (Suing as the legal representative of the estate of Christopher Bosire Matoke** (Deceased) where Ksh.150,000/= was made under the said heading. In the court below the appellant had urged the court to award Ksh.10,000/= under this head. In this appeal they urged the court to reduce the award to Ksh. 20,000/=. Neither in this court nor in the court below did the appellant cite any authority in support of their proposition. The appellant on the other hand relied on the above cited case of **David Kahuruka Gitau** where a similar sum was awarded for a deceased who died about 30 minutes after the accident.

15. In the case of **Caleb Juma Nyabuto v Evance Otieno Magaka & Another** (2021) eKLR, Wendo J. also upheld an award of Ksh.100,000/= where the deceased had died on the same day of the accident. In **Faraj Mohamed v Tawfiq Bus Service & 2 Others** (2007), Sergon J. made a similar award for pain and suffering to a deceased who died after 8 1/2 hours. In **Stephen Kiarie Muruguru v Seleman Hamadi Koi and Subira & Another** (2018)eKLR, Njoki Mwangi J. upheld an award of similar amount where the deceased died 11 hours after the accident. Putting due consideration to all these precedents, I hold that the award of Ksh.100,000/= for pain and suffering was not excessive. It was within the range awarded by superior courts in recent years.

Loss of dependency –

16. The evidence adduced at the lower court was that the deceased was a part-time motor cycle operator on commission basis and was earning Ksh 1,500/- per month. That he was working after school and on weekends. However, that his pay was not steady. That he died at the

age 19 years after he had just finished his fourth form in 2016.

17. The trial court applied the multiplicand/multiplier method in assessing the income of the deceased. This method was explained by Ringera J. in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another** Nairobi HCCC No. 1638 of 1988 (UR) where he stated 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 purchase. 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 the 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."***

18. However, it has been held that the multiplier method is not cast in stone and should be discarded where it is difficult to ascertain the income of the deceased. In **Mwanzia v Ngalali Mutua & Kenya Bus Services (Msa) Ltd & Another** as cited in **Albert Odawa Gichimu Githenji** Nakuru HCCA No.15 of 2003 (2007) eKLR Ringera J. posited that:

> ***'The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the 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".***

19. In **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as Legal Representative of the estate of Mercy Nzula Maina (Deceased)** (2016) eKLR it was pointed out that:

> **It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.**

20. In the instant case I do not think that the multiplier method was appropriate in assessing the income of the deceased for the reason that the deceased was a form 4 leaver whose income could not be computed with certainty. He did not have a motor cycle of his own but used to work on commission basis. In the circumstances of the case a global award would have been more appropriate.

21. However, the appellant did not appeal on the method used in the assessment of the damages. His appeal was based on the ground that the trial court adopted an erroneous multiplicand and multiplier. I should therefore confine myself to those two issues.

22. The trial court adopted a multiplier of Ksh.12,000/= and in doing so stated as follows:

> **"I have considered the authorities submitted by parties. I am inclined to take the view in the case of DAMARIS WANTHI MUSYOKA VS HUSSEIN DAIRY LTD & ANOR [2012] EKLR. The Hon. Judge ruled that a minimum wage of Kshs 12,000 as a minimum monthly wage as a reasonable income per month in the absence of satisfactory documentary proof. In this case, I am of the view that a minimum wage would apply as there is no actual proof that the deceased earned the proposed sum of Kshs 35,000 per month in his profession. I therefore will proceed with Kshs 12,000 as the monthly wage. Therefore, the award under this heading is calculated as follows:**
>
> **Kshs 12,000 x 12 X 45 X 1/3 = Kshs 2,160,000."**

23. I have perused the case the trial magistrate relied on to arrive at a multiplicand of Ksh.12,000/=. The plaintiff therein had produced documents to prove that she was a farmer and a businesswoman but there was no satisfactory documentary prove of her monthly earnings. The court as a result reverted to the minimum statutory wage and estimated her monthly income at Ksh.12,000/=.

24. The trial magistrate in this matter adopted the sum of Ksh.12,000/= that was used in the case of **Damaris Wanthi Musyoka** (supra) which was meant to be the estimated minimum wage for a plaintiff who was a farmer and a businesswoman. The deceased herein was a part-time motor cycle operator who was being paid on commission basis. He had just finished school. He did not have a motor cycle of his own. His earnings were not steady. Since there was no evidence to prove the deceased`s income the trial court should have placed him in the category of a casual worker and apply the minimum wages as provided by **The Regulation of Wages (General) (Amendment) Order 2015**. Legal Notice No. 117puts the minimum wage for a casual worker in Nyeri in the year 2016 at Ksh.5,845. The sum of Ksh12,000/= adopted by the trial court was in my view too high for a person whose occupation was not clear. I therefore set the deceased`s monthly earnings at Ksh.5,845/-. The award of a multiplicand of Ksh. 12,000/= is set aside and substituted with one of Ksh.5,845/=.

25. The deceased died at the age of 19 years. The appellant had proposed a multiplier of 20 years while the respondent had proposed 45 years. The trial magistrate accepted the multiplier of 45 proposed by the respondent but gave no reason for doing so. Neither did she cite any authorities to support that proposition.

26. The choice of a multiplier is a discretion of the trial court. That discretion has to be exercised judiciously and with reason as was held in the case of **Board of Governors of Kangubiri Girls High School& Another v Jane Wanjiku & Another** (2014)eKLR. See also the Court of Appeal in **Mombasa Maize Millers Limited v WIM (Suing as the representative of JAM (Deceased)** (2016) eKLR. The trial court failed in this respect for not giving reason for its application of a multiplier of 45 years. Without reason the adoption of 45 years appears to have been arbitrary. This is sufficient reason for this court to interfere with the multiplier of 45 years that was adopted by the trial court.

27. In **Muthike Muciimi Nyaga (Suing as Administrator of the estate of James Githinji Muthike) (Deceased)**(2021) eKLR, Mulwa J. upheld a multiplier of 30 years for a deceased who died at the age of 22 years while making reliance on **Xh White Water Ltd v Joseph Kimani Kamau & Another** (2017) eKLR where the deceased who was a nurse died at the age of 21 years and the court adopted a multiplier of 30 years upon considering the vagaries of life. In **Ruth Wangechi Gichuhi v Nairobi City County** (2013) eKLR the court applied a multiplier of 30 years for a deceased who died at the age of 22 years. In view of these authorities, I find that the multiplier of 45 years that was applied by the trial court was on the higher side. I find a multiplier of 34 years to be reasonable. The loss of dependency is therefore as follows:

5,845 x34 x12 x 1/3= 794,920.

28. The upshot is that the appeal on the award on pain and suffering is dismissed while the appeal on loss of dependency is partly successful and is reduced to Ksh.794,920/=. The other orders of the trial court were not challenged and they therefore remain as ordered. Each party to bear its own costs to the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JANUARY 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngechu holding brief for Mrs Githae -for Appellant

Miss.Muthoni Kibara holding brief for Mr. Mwaura-for Respondents

Parties:-Absent

Court Assistant:- MR. KINYUA

30 days R/A.