REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.63 OF 2018

EVANSON NDUNGU MUKUNYA.....APPELLANT

VERSUS

JNM & MWN (Suing as the Legal Representative of the estate of JMN).....RESPONDENT

(Being an appeal from the decree and judgment of Hon. Nelly W. Kariuki, SRM,

in Nyeri CMCCC No.197 of 2017 delivered on 12/10/2018)

JUDGMENT

1. The respondents had sued the appellant at the lower court claiming general and special damages under the Fatal Accidents Act and the Law Reform Act after the respondents` son was fatally knocked down by the appellant`s motor vehicle while travelling as a pillion passenger along Nyeri-Mweiga road. Consent on liability was recorded at 20:80 in favour of the respondents. The trial court in assessing the damages awarded Ksh.100,000/- for pain and suffering and Ksh.109,600/- in special damages. On loss of dependency it applied a multiplicand of Ksh.8,000/- and a multiplier of 45.The loss of dependency was computed as follows: 8,000 x 12 x 45 x1/3= 1,440,000. The appellant was aggrieved by the award and filed the instant appeal.

2. The grounds of appeal are that:

(i) The learned magistrate erred in law and in fact in awarding general damages for pain and suffering of Ksh.100,000/=

(ii) The learned magistrate erred in law and in fact in awarding special damages of Kshs.109,600/= and failing to subject the same to contribution.

(iii) 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 by the advocates for the parties, the firm of **C.W. Githae & Co. Advocates** appearing for the appellant and **Keli & Mwaura Advocates** representing the respondents.

Submissions –

4. The advocates for the appellant submitted that the police abstract and the post mortem report indicated that the deceased had died about 30 minutes after the accident. Therefore, that the award of Ksh.100,000/- for pain and suffering was excessive. They urged the court to reduce the award to Ksh 20,000/-.

5. On loss of dependency it was submitted that there was no proof of the earnings of the deceased. That the witnesses for the respondents PW1 and PW2 stated in their evidence that the deceased was a form 3 student though that he used to do casual work in the evenings after school. That PW2 stated that the deceased`s income was not steady as there were days he did not get work.

6. It was submitted that the deceased died at the age of 18 years. That the trial court in awarding damages under the Fatal Accidents Act should have been guided by the Legal Notice No.117 of 2015 which was in operation at the time of the deceased`s death which put the minimum wage in the area of the deceased`s residence at the time at Ksh.5,844.20 per month. Therefore, that the trial court erred in adopting a multiplicand of Ksh.8,000/-. In any case that as the court had accepted the fact that the deceased was a student it should have proceeded under “lost years”. In this respect counsel relied on the case of **Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 Others (2014) eKLR** where the deceased was a student whose future prospects were unknown and Majanja J. awarded a global sum of

Ksh.120,000/- for the loss to his estate.

7. It was submitted that dependency is a matter of fact and that the multiplier will depend upon the likely dependency of the dependants and not the likely remainder of productive years of the deceased. That the deceased was expected to have eventually established his own home and the dependency of his parents would have substantially reduced. Therefore, that the trial court in adopting a multiplier of 45 years was based on speculation and not founded on any facts or evidence. The advocates urged the court to adopt a multiplier of 20 years. They relied on the case of **Samuel Mwaura Kimani v Clement Gachanja** (UR), which authority was however not made available to the court.

8. It was submitted that the award on special damages of Ksh.109,600/- ought to have been subjected to contributory negligence on the part of the respondents of 20%.

9. The advocates for the respondents on the other hand submitted that the deceased died on the same day of the accident. That no authority was tendered by the appellant to support the proposition that an award of Ksh.100,000/- was excessively high. Counsel 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 similar amount where the deceased had died minutes later after the accident.

10. It was submitted that there is no rule that requires special damages to be subjected to contributory negligence. The advocates relied on the cases of **Timsales Limited v Harun Thuo Ndungu** (2010)eKLR and **Hashim Mohamed Said & Another v Lawrence Kibor Tuwei** (2018)eKLR where it was held that special damages are not subject to deduction by way of contributory negligence.

11. The advocates submitted that the deceased died at the age of 18 years. That he was unmarried. That his father Pw1 testified that the deceased used to earn Ksh.800/- per day that translated to Ksh.24,000/- per month. That the adoption by the trial court of minimum earnings of Ksh.8,000/- per month was proper.Counsel relied on the case of **Bernard Karanja & Another v J.M.K & Another** (2017) eKLR where Nyamweya J.(as she then was) upheld the use of a minimum monthly wage of Ksh.8,000/- for a casual labourer. Reliance was also made on the case of **Mwita Nyamohanga & Another v Mary Robi Moherai (Suing on behalf of the estate of Joseph Tagare Mwita (deceased) & Another** (2015) eKLR where the deceased was a taxi driver and his wife testified that he was earning Ksh.9,000/- per month. Majanja J. held that this was sufficient evidence to prove the income of the deceased, hence there was no need to fall back to the Regulation of Wages Order.

12. Further reliance was made on the Court of Appeal decision in **Jacob Ayiga Maruja v Simeon Obayo** (2005) eKLR where the widow of the deceased had testified that her late husband was a carpenter and used to earn Ksh.5,000/- per month. The court 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 his monthly earnings 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 that only documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

13. It was submitted that the use of a multiplier of 45 years by the trial court was proper as retirement in private business is far beyond 60 years and comes when one is unable to carry out any activities, as was held by the Court of Appeal in **Jacob Ayiga Maruja v Simeon Obayo** (supra). That the adoption of a multiplier of 45 years by the trial court was cognizant of that fact.

Analysis and determination–

14. 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) eKLR 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."***

15. 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."***

16. I will then consider the appeal on the three sub-headings, i.e, the award on pain and suffering; the award on special damages and the award on loss of dependency.

Pain and suffering -

17. The police abstract indicated that the accident occurred on the 4/12/2016 at 1520 hours while the post mortem report indicated that the

deceased died at 1550 hours of the same day. This means that the deceased died about 30 minutes after the accident. The trial court awarded Ksh.100,000/- in general damages for pain and suffering. The appellant argues that that sum was excessive while the respondents take the contrary view. The respondents cited the case of **David Kahuruka Gitau & George Kuria v Nancy Ann Wathitu Gitau & Mercy Wangui Nganga** (supra) where Mativo J. upheld an award of similar amount for a deceased who died 30 minutes after the accident.

18. 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 an award of similar amount 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.

19. The appellants did not tender in any authority to support their contention that the award for pain and suffering was excessive. Putting due consideration to the above precedents, I hold that the award of Ksh.100,000/= for pain and suffering was not excessive. I thereby uphold the award.

Special damages –

20. The respondents had claimed special damages of Ksh.109,600 /- comprising of Ksh.550/- being money paid to the Registrar of Motor Vehicles for copy of records of the accident vehicle; Ksh.29,050/- being money for funeral expenses and Ksh. 80,000/- being money paid towards legal fees for obtaining grant of letters of administration of the deceased`s estate. Receipts were produced during the hearing in proof of money paid to the registrar of motor vehicles and for obtaining grant of letters of administration. Some receipts were produced for funeral expenses. The funeral expenses claimed of Ksh. 29,050/- was a modest figure. The claim for special damages was therefore proved. The question is whether the award ought to have been subjected to deduction of contributory negligence of 20%.

21. The respondents cited two authorities, **Timsales Limited v Harun Thuo Ndungu** (supra) and **Hashim Mohamed Said & Another v Lawrence Kibor Tuwei** (supra), where it was held that special damages are not required to be subjected to contributory negligence. I am in agreement with the holding in the two authorities. The appellant did not tender in any authority to show the contrary. The argument by the appellant that special damages ought to be subjected to contributory negligence has no legal basis.

Loss of dependency –

22. The evidence adduced at the lower court was that the deceased died at the age of 18 years. That at the time of his death he was a form 3 student. That he used to do casual work after school and was earning Ksh 800/- per day. However, that his income was not steady.

23. 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."***

24. 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".***

25. 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.**

26. 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 student and his income could not be computed with certainty. In the circumstances of the case a global award would have been more appropriate.

27. 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.

28. The trial magistrate accepted that there was no evidence to proof the earnings of the deceased and resorted to the minimum wage in assessing the damages. The court then held that:

> **I have considered the authorities submitted by parties. I am inclined to take the view in the case of Bernard Karanja (supra). The Hon. Judge sustained the use of a minimum wage of Ksh. 8,000 by the lower court in calculation of the monthly wage of the deceased who was also a casual labourer. In this case, I am of the view that a minimum wage would apply succinctly as the deceased was a student and therefore it is reasonable to assume that he was not able to work every day of the week considering that he was a form 3 student. I therefore will proceed with Kshs 8,000 as the monthly wage.**

29. The fact that the court in the case of **Bernard Karanja** (supra) applied a minimum wage of Ksh.8,000/- for a casual labourer does not mean that the court set that figure as minimum earnings to be adopted for every casual labourer. The earnings have to be proved by way of evidence. Since there was no evidence to prove the earnings of the deceased who was still a student but who from the evidence used to earn money from casual labour, the trial court should have reverted to the minimum wage as provided by **The Regulation of Wages (General) (Amendment) Order** 2015 that set the minimum wage for a casual labourer in Nyeri in 2016 at Ksh.5,845/-. I therefore find that the trial court acted on wrong principles of law in assessing the income of the deceased and as a result arrived at a figure that was inordinately high of Ksh.8,000/-. I thereby set aside the multiplicand of Ksh.8,000/- and substitute it with one of Ksh.5,845/-.

30. The deceased died at the age of 18 years. The respondent had proposed a multiplier of 45 years. The trial magistrate accepted the multiplier of 45 proposed by the respondents but gave no reason for doing so. Neither did the magistrate cite any authorities to support that proposition.

31. The choice of a multiplier is a discretion of the trial court. The discretion has however 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 being given 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.

32. In **Muthike Muciimi Nyaga (Suing as Administrator of the estate of 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.

33. 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 35 years to be reasonable. The loss of dependency is therefore as follows:

$$5{,}845 \times 12 \times 35 \times 1/3 = 818{,}300.$$

34. The up short is that the appeal on the awards on pain and suffering and special damages is dismissed. The appeal on loss of dependency is partly successful and is reduced to Ksh.813,300/-. For the avoidance of doubt, the awards on pain and suffering and loss of dependency are subject to contributory negligence by the respondents while the award on special damages is not subject to contributory negligence. 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 holding brief for Mwaura for Respondents

Parties: - Absent

Court Assistant: - Mr. Kinyua

30 days R/A.