REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 76 OF 2013

(CONSOLIDATED WITH CIVIL APPEAL NO. 65 OF 2013)

MARTIN MUITHYA.....1ST APPELLANT

JOSEPH KAMOTHO..... 2ND APPELLANT

VERSUS

LYDIA MOSWETA KWAMESA (Suing as the Legal

Representative to the Estate of the Late

DANCUN OGOGA ATURA..... RESPONDENT

RULING

1. The Respondents herein sued the Applicants herein in the lower Court in ***Nakuru CMCC No. 483 of 2001*** sounding in the tort of negligence arising from the road traffic accident that claimed the life of Dancun Ogoga Atura (Deceased). The Respondents are the Legal Representatives to the estate of the Deceased.

2. The Respondents prevailed in the lower Court – getting an award of 100% liability. They were, however, dissatisfied with the quantum of damages as calculated which they found too low. They appealed to this Court. The Applicants were equally dissatisfied – in their case finding the calculations to be duplicative and hence too high. They also appealed. The two appeals – being ***Nakuru High Court Civil Appeal No. 76 of 2013*** and ***No. 65 of 2013*** – were consolidated by Mulwa J. and heard together.

3. Mulwa J. rendered her judgment on 26/09/2019. She allowed the Respondents' appeal, enhanced the award and simultaneously dismissed the Applicants' Cross-Appeal.

4. The Applicants have now approached this Court seeking, in the main, a review of the Court's judgment. They believe that the Court's judgment contains an error on its face as the Court used a different multiplicand in the consequential paragraph where it calculates the award than the multiplicand the Court had rationalized in its decision. The Applicants believe that this was simply a scrivener's error which should be corrected by way of this review Application. While the judgment dated 26/09/2019 was delivered by Mulwa J., she has since left the station on transfer hence falling on this Court to determine the instant Application.

5. The full Application dated 01/09/2020 contains the following prayers:

a) – Spent –

b) THAT the Honourable Court be pleased to allow the firm of Kimondo Gachoka & Co. Advocates to come on record for the Appellants in place of the firm Kairu McCourt Advocates.

c) – Spent –

d) THAT this Honourable Court be pleased to review its judgment delivered herein on 26th September, 2019.

e) THAT the sum of Kshs. 985,050/- deposited in Court as security pending appeal be and is hereby released to the Respondents' advocates, Gekonga & Company Advocates.

f) THAT the Proclamation and warrants of attachment and sale of the Applicants' moveable property dated 17th July, 2020 be and

are hereby set aside.

g) *THAT this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interests of justice.*

6. It is readily obvious that the main issue for determination is whether the Court erroneously used a multiplicand of Kshs. 10,000/- when it had intended to use a multiplicand of Kshs. 8,500/- in calculating the amount payable for loss of dependency.

7. This is what the Court stated in the two relevant paragraphs in the Judgment dated 26/09/2019:

12. As to the income earnings, in the absence of proof of income by documentary evidence, the Regulations of Wages (General Amendment) Order of 2010 [..] ought to apply. I have looked at the said Basic Minimum wages.

In comparison, the monthly wages for a car van driver was Kshs. 8,400/-.

It is to be noted that the Deceased was a motorbike operator, meaning he could have been making much more. I am persuaded that a reasonable and average monthly earnings are in the region of Kshs. 10,000/- per month. I accordingly set aside the amount applied by the trial magistrate of Kshs. 4,500/- and substitute it with Kshs. 8,500/-.

15. A dependency ration of 2/3 shall remain uninterrupted. Thus loss of dependency will be enhanced to Kshs. 10,000/- x 12 x 2/3 x 30 = Kshs. 2,400,000/-

8. The Applicants are persuaded that the Learned Judge intended to use Kshs. 8,500/- as the multiplicand and not the Kshs. 10,000/- she deployed in paragraph 15 of the judgment to come up with the award of Kshs. 2,400,000/-. They believe that this is an error apparent on the face of the record within the meaning of section 80 of the Civil Procedure Act and Order 45, Rule 1(b) of the Civil Procedure Rules.

9. The Respondents, on the other hand, are not similarly persuaded. They believe that the Court, in fact, intended to use Kshs. 10,000/- as the multiplicand and that there is no error in paragraph 15 of the Judgment dated 26/09/2019.

10. So, did the Court intend to use Kshs. 8,500/- (which appears in paragraph 14) or Kshs. 10,000/- (which appears in both paragraphs 14 and 15) as the multiplicand?

11. The answer is supplied by contextual reading of the judgment. It is obvious in paragraph 14 that the Learned Judge is making an argument for enhancing the multiplicand used by the Trial Magistrate. She considers the comparable minimum wages for a car van driver – which is Kshs. 8,400/- - and finds it too low because the Deceased operated his own motor bike for gain. She, therefore, settles for the enhanced figure of Kshs. 10,000/- as the more reasonable monthly income for the Deceased. However, in the last sentence of that paragraph the Learned Judge erroneously mis-types the figure of Kshs. 8,500/- as the enhanced figure. It is obvious that this is an error because her earlier remarks and reasoning shows she had enhanced the figure to Kshs. 10,000/-. That is the correct figure the Learned Judge uses to calculate the dependency damages in paragraph 15 of the judgment. Differently put, there is no error in paragraph 15 of the judgment. The inconsequential scrivener's error is in paragraph 14 of the judgment which mis-states the figure as Kshs. 8,500/- instead of Kshs. 10,000/-. In my view, a contextual and structural reading of the judgment makes this quite clear.

12. The upshot is that there is no consequential error apparent on the face (of paragraph 15) to be corrected. The correct multiplicand was used as intended by the Learned Judge; and the correct award was given. The substratum of the instant Application, therefore, dissipates.

13. The Respondent does not contest the other requested prayers – and there would be no reason to do so anyway. Hence, the final disposition is as follows:

a) The Court declines to review paragraph 15 and 21 of the Judgment dated 26/09/2019 and hereby confirms that the calculations therein are correct.

b) The firm of Kimondo Gachoka & Co. Advocates is permitted to come on record for the Appellants in place of the firm of Kairu McCourt Advocates.

c) The sum of Kshs. 985,050/- deposited in Court as security pending appeal be and is hereby released to the Respondents' advocates, Gekonga & Company Advocates as part of the decretal amount.

d) Costs of this Application are awarded to the Respondents.

e) **All the other prayers in the Application dated 01/09/2020 not granted above are hereby declined and dismissed**.

14. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2022.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.