REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 15 OF 2019

BUSCAR E.A LTD.....APPELLANT

-VERSUS-

NANCY WANGARI MWANGI

(*Suing as the Personal Representative of the Estate of SILAS NJUGUNA (Deceased*).....RESPONDENT

(*Being an appeal from the Judgment delivered on 13/02/2019*

at the Senior Principal Magistrate's court in Makindu

by J.D Karani Resident Magistrate)

JUDGMENT

1. In a judgment delivered on13th February 2019, the learned magistrate entered judgment for the respondent (*plaintiff in the trial court*) against the appellant (*defendant in the trial court*) as follows –

> **"Upshot is to enter judgment in favour of the plaintiff as against the defendant at 100% liability.**
>
> **Quantum is assessed as follows –**
>
> **Pain & Suffering …… Kshs. 50,000/=**
>
> **Loss of Expectation of Life ……. Kshs. 100,000/=**
>
> **Loss of Dependency ……Kshs.3, 600,000/=**
>
> **Special ……. Kshs. 34,225/=**
>
> **Total …….. Kshs.3, 784,225/=**
>
> **Costs and interests of the suit**

2. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal on the following grounds:-

> ***1) The magistrate erred infact and in law in awarding manifestly excessive and undeserved damages to the respondent under the Fatal Accident Act of Kshs.3,784,225/=.***
>
> ***2) The trial magistrate misdirected herself in both law and fact in using a multiplicand of Kshs.30,000/= where income of the de ceased had not been proved and was actually not presented in court/ or subjected to mandatory statutory deductions.***
>
> ***3) The learned magistrate erred in fact and law in using a very high multiplicand of 30 years despite the fact that the deceased was 25 years.***

4) The trial magistrate erred in law and in fact in failing to discount the award under the Law Reform Act from the ultimate award thereby making a double award to the respondent who was both a personal representative of the estate of the deceased and a dependent of the deceased.

5) The learned Judge (magistrate) erred in f act and in law in failing to consider conventional awards in cases of similar nature.

3. The appeal proceeded by way of filing written submissions. In this regard, I have perused the written submissions field by counsel for both parties. I note that each counsel relied on decided court cases.

4. This is an appeal on quantum of damages, as liability was entered in court, on the basis of a test case at 100% against the appellant, and in favour of the respondent as the deceased was passenger in the bus.

5. Being an appeal on quantum of damages, I have to bear in mind the principles upon which an appellate court will interfere with an award of damages, which was clearly stated in the case of **Bhutt –vs- Khan (1982 – 88) 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 in so doing arrived at a figure which was either inordinately high or low".

6. I hasten to add that the burden is on the appellant to demonstrate and persuade the appellate court that the trial court erred in assessing the quantum of damages.

7. In the present case, the main complaints of the appellant are two with regard to the computation of the amount for loss of dependency, and that the award under the Law Reform Act was not deducted from the award under the Fatal Accidents Act. There is also a complaint on the quantum awarded for pain and suffering under the Law Reform Act.

8. In my view, the deceased having been injured at the scene and having died in hospital, he must have suffered pain. I thus find the figure of Kshs.50,000/= for pain and suffering to be reasonable. I also find that the figure of Kshs.100,000/= for loss of life expectancy for a 25 years man to be reasonable.

9. With regard to loss of dependency, I note that in submissions, the appellant's counsel proposed to the trial magistrate that it be thus assessed – 21x13,000x12x1/3 = 1,092,000. The trial court on its part assessed the amount as 1/3 x12x30x30,000 = Kshs.3,600,000/=. The only difference thus is the multiplier and the multiplicand, not the ratio of dependency.

10. From the evidence on record, the respondent is the mother of the deceased. It was her evidence that the deceased was aged 25 years and studying at Bridgewood College – Ngong Nairobi and that he would do butchery job when school closed and earned Kshs.20,000/= per month and send her Kshs.10,000/= per month.

11. I note that, in determining the multiplicand of Kshs.30,000/= the trial court relied on diploma graduate survey earnings of 2017 which put their incomes at between Kshs.29,000/= to Kshs.35,000/= per month. In my view this was an error because the plaintiff/respondent neither tendered such evidence nor suggested that her late son be treated as such, and instead relied on the income for the butchery work. In the absence of documentary proof therefore the magistrate should not have relied on a figure above the Kshs.20,000/= per month testified to by the respondent (plaintiff).

12. Though the appellant's counsel relied on a figure of Kshs.13,000/= per month, I find that figure too low and not supported by any evidence on record. Based on the evidence on record, I will thus interfere with the multiplicand of Kshs.30,000/= and instead apply a multiplicand of Kshs.20,000/=.

13. With regard to the multiplier of 30 years, in my view it is reasonable as retirement age in Kenya is now generally at 60 years having been raised from 55 years, and all that the trial court has done is to use the old retirement of 55 years as the cut off point. I will thus not interfere with this multiplier, as it is far below the current retirement age.

14. As regards failure of the trial court to reduce the amount awarded under the Fatal Accidents Act from the amount awarded under the Law Reform Act, in my view, there is no requirement for a scientific reduction, where there is no evidence of unfair enrichment see **Kenfro Africa Ltd –vs- Lubia (1987) KLR 30.** Since I don't see unfair enrichment in the present case, I do not fault the trial magistrate for not deducting the award under the Law Reform Act from the amount under the Fatal Accidents Act.

15. For the above reasons, I will allow the appeal in part. I set aside the award for loss of dependency and re-assess it as follows – $20,000x30x12x^1/_3 = 2,400,000$. I retain the other awards of the trial court.

16. Consequently, the award will be as follows –

Pain and Suffering ……..Kshs. 50,000/=

Loss of Expectation of Life …….Kshs. 100,000/=

Loss of Dependancy ……..… Kshs. 2,400,000/=

Special Damages ……..Kshs. 34,225/=

Total …….. Kshs. 2,584, 225/=

17. The appellant will bear the costs in the trial court, as well as 70% of the costs of appeal. Interest will accrue until payment is full.

DELIVERED, SIGNED & DATED THIS 4TH DAY OF APRIL, 2022, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE