THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 10 OF 2020

AINU SHAMSI HAULIERS LIMITED.....APPELLANT

VERSUS

MOSES SAKWA

FAITH AWINO SAKWA(Suing as the administrators of the estate of the late

Ben Siguda Okach (deceased).....RESPONDENT

(An Appeal from the judgment on quantum of damages awarded on 21st January, 2020, by Hon. C. N. Ndegwa, Senior Principal Magistrate, in Mombasa Chief Magistrate's Court Civil Case No. 2121 of 2017).

JUDGMENT

1. The suit against the appellant in the lower court was that on or about the 30th November, 2015, the deceased was walking beside the road at Shimanzi area, when the appellant and/or its authorized driver, servant and/or agent negligently and/or carelessly drove motor vehicle registration No. KBL 183F causing it to knock down the deceased who sustained fatal injuries.

2. The appellant filed its statement of defence dated 6th March, 2018, where it denied being the beneficial and/or registered owner of motor vehicle registration No. KBL 183F. It also denied the occurrence of an accident on 30th November, 2015 involving the deceased and the said motor vehicle. The appellant also denied that the said accident if at all it occurred, was caused by the negligence, carelessness or recklessness on its part, its authorized driver, servant and/or agent, as alleged and put the respondents to strict proof thereof.

3. The appellant also denied that the respondents incurred special damages of Kshs. 98,700.00 and averred that in the event the said accident occurred, then the same was caused and/or contributed to, by the negligence of the deceased.

4. In the lower court, parties recorded a consent on liability on 14th October, 2019 in the ratio of 30:70 as against the respondents and the appellant, respectively. Judgment on quantum was entered for the sum of Kshs. 2,120,000/= in general damages and Kshs. 98,700.00 for special damages making a total of Kshs. 2,218,700/= less 30% contribution. The respondent was therefore awarded a net of Kshs. 1,539,090.00 in damages. The respondent was also awarded costs of the suit and interest at court rates.

5. The appellant was dissatisfied with the decision of the Trial Magistrate on the quantum awarded and on 17th February, 2020, he filed a memorandum of appeal raising the following grounds of appeal-

i. That the learned Magistrate erred in law and fact in awarding Kshs. 30,000/= under the head of pain and suffering when the deceased died on the same day;

ii. That the learned Magistrate erred in law and fact in awarding a global sum of Kshs. 2,000,000/= as loss of dependency without any explanation in law and fact of how the said assessment was arrived at;

iii. That the learned Magistrate erred in fact and law in failing to use the multiplier approach and by adopting the lump sum approach;

iv. That the learned Magistrate erred in fact and law by totally disregarding the appellant's submissions filed on the 13th November, 2019 and relying entirely on the respondent's submissions filed on the 22nd October, 2019;

v. That the learned Magistrate erred in law and fact by awarding the respondent the sum of Kshs. 2,000,000/= global figure on loss of dependency without any evidence in support of the same; and

vi. That the learned Magistrate erred in law and fact in failing to make any proper findings on quantum in accordance with the facts placed before him and in light of the submissions.

6. The appellant's prayer is for this Court to allow the appeal with costs, set aside the judgment delivered by the Trial Magistrate and for the damages awarded to the respondent to be varied and/or set aside.

7. The appeal herein was canvassed by way of written submissions. On 24th November, 2020, the law firm of V. N. Okata & Co. Advocates filed written submissions on behalf of the appellant. The submissions by the respondents' Counsel were filed on 8th December, 2020 by the law firm of Sherman Nyongesa & Mutubia Advocates.

8. Ms. Okata, the appellant's learned Counsel submitted that the respondents' witness claimed that the deceased was a TukTuk driver who was making between Kshs. 1,500/= and Kshs. 5,000/= per day but no evidence was adduced to support the claim. She indicated that the said witness stated that the deceased was 30 years of age whereas the death certificate showed that at the time of death, the deceased was 40 years of age. She submitted that under the Fatal Accidents Act Cap 32, Laws of Kenya, damages are assessed by taking into account the multiplicand, multiplier and dependency ratio.

9. It was submitted by the appellant's Counsel that the deceased was a 40-year-old man who had two children and that he lived with his family at Mtongwe in a leased house. That the income of the deceased was not proved as no documentary evidence was availed before the Trial Court. The appellant's Counsel submitted that the sum of Kshs. 10,000/= as the minimum wage for a TukTuk driver should have been adopted as the multiplicand. She placed reliance on the case of **Voi Pleasant View School Limited v Rose Mutheu & another** [2017] eKLR, where the case of **Authur Nyamwate Omutondi & others v United Millers Limited & 2 Others** [2009] eKLR, was cited with approval. In the said case the Court held that proof of income is basic to a claim of loss of dependency under the Fatal Accidents Act, thus if income is not proved then no award of dependency can issue.

10. Ms. Okata further submitted that dependency is a matter of fact and must be proved but PW2 did not show dependency as she did not disclose how much the deceased spent on the family. She thus proposed a multiplicand of Kshs. 10,000/= per month with a multiplier of 12 for the deceased who was 40 years old. She relied on the case of the **Estate of the late J.O.O v Kenya Power & Lighting** HCCC No. 59 of 2009, where a multiplier of 12 years was adopted for the deceased who was 40 years old.

11. She urged this Court to substitute the loss of dependency from Kshs. 2,000,000/= arrived at by means of the global sum approach with an award of Kshs. 960,000/=. She submitted that in the case of **Chen Wembo & 2 Others v IKK & HMM** [2017] eKLR, the Court reduced the lump sum payment from Kshs. 1,680,080.00 to Kshs. 600,000/=.

12. She also urged this court to reduce the award for pain and suffering to Kshs. 10,000/= since the deceased died immediately. She submitted that an award under loss of expectation of life should not be awarded in line with the case of **Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini v Aziri Kamu Lubia & Another** [1882-1988] 1 KAR 727.

13. On his part, Mr. Mutubia, learned Counsel for the respondents relied on the case of **Kigaragar v Agripiana Mary Aya** [1982-1988] KAR 768, where the Court of Appeal held that an appellate court would interfere with the Trial Court's decision if it was shown that the sum awarded was demonstrably wrong or that the award was based on wrong principle or it was so manifestly excessive or inadequate, that a wrong principle may be inferred. He submitted that the test for interference with the decision of the lower court is not whether the award was excessive but rather manifestly excessive. He posited that where the award appears merely excessive, an appellate court should not interfere. He cited the case of **Butt v Khan** [1982-88] KAR 1, to buttress his submission.

14. The respondents' Counsel further submitted that the Trial Magistrate held in the judgment that since there were no financial records produced to show how much the deceased was earning, the multiplier approach would not be appropriate in the circumstances. Mr Mutubia was of the view that the Trial Magistrate was right in awarding the respondents Kshs. 2,000,000/= for loss of dependency after considering the circumstances of this case.

15. He relied on the case of **Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (Suing as the Administrator and Personal Representative of Anthony Mwiti Gakungu (deceased)** [2020] eKLR, where the Court in dealing with a similar issue held that where the salary of a deceased has not been proved, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The said court further stated that the global sum approach would be an estimate informed by the special circumstances of each case. Mr. Mutubia urged this Court to dismiss the appeal in its entirety, with costs to the respondent.

ANALYSIS AND DETERMINATION.

The only issue for determination is if the Trial Court erred in adopting the global sum approach instead of the multiplier approach.

16. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR, the court stated as follows-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and

reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

17. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in ***Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA*** held that-

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

18. Similarly, in **Butt v Khan** (supra) it was held -

> ***"An appellate court will not disturb an award for damages unless it is 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".***

19. From the proceedings of the lower court, the respondents testified that prior to his death, the deceased was a TukTuk driver. That he was married to PW2, Faith Sakwa and they had two children. PW1 indicated that he was PW2's Uncle. The respondents also testified that the deceased earned between Kshs. 1,500/= and Kshs. 5,000/= per day which he expended in taking care of his family.

20. This Court notes that no documentary evidence was produced by the respondents to prove that the deceased was working as a TukTuk driver earning Kshs. 1,500/= and Kshs. 5,000/= per day. The death certificate shows that the deceased was 40 years old and he died as a result of haemorrhagic shock 2 degrees due to pelvis fracture due to a road traffic accident.

21. In regard to the issue of damages awarded under the Law Reform Act, the court in **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)** [2019] eKLR observed that-

> ***"The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident."***

22. In the present case, none of the witnesses indicated whether the deceased died immediately after the accident or how long it took before he died. I am therefore guided by the death certificate which indicates that the deceased died at Coast General Hospital. From the foregoing, it is evident that the deceased did not die immediately after the accident happened but endured pain and suffering before he lost his life. In the case of **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another** [2017] eKLR, the Court stated as follows-

> ***"As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death…. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."*** (emphasis added).

23. In view of the above decisions and bearing in mind that this Court has been invited to exercise its discretion when considering the award made by the Trial Court, I find that the award made in the sum of Kshs. 30,000/= for pain and suffering was not excessive. I therefore uphold the said award.

24. Looking at awards made under loss of expectation of life, the Court in the case of **Rose v Ford** [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate.

25. In **Benham v Gambling** [1941] AC 157 it was held that-

> ***"In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."*** (emphasis added).

26. In the present case, the deceased was aged 40 years, he was married and had two children. It was said that he was a TukTuk driver and he was able to take care of his family from the earnings he made. The Trial Magistrate in the judgment made an award of Kshs. 90,000/= for loss of life. The appellant's Counsel submitted that no award under this head should have been made in line with the case *of* **Kemfro Africa Ltd v Aziri Kamu Lubia & another** (supra).

27. Due to different interpretations of the above decision as to whether an award of loss of expectation of life under the Law Reform Act and an award of loss of dependency under the Fatal Accidents Act amounts to double compensation, the Court of Appeal in **Hellen Waruguru**

Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eKLR, held as follows-

> ***"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges.*** It was held, *inter alia*, that***: -***
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> ***An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."***

28. In light of the foregoing decisions, I am not persuaded that the respondent should not be awarded damages under loss of expectation of life I also see no rationale as to why damages for loss of expectation of life should be deducted from the award under loss of dependency. I therefore uphold the Trial Court's judgment under loss of expectation of life in the sum of Kshs. 90,000/=.

29. When making an award for loss of dependency, the Trial Magistrate stated that despite the fact that the deceased was a TukTuk driver, no financial records were produced to show how much he was earning hence the multiplier approach would not have been appropriate in the circumstances. He then went ahead to adopt the global sum approach and awarded the respondents Kshs. 2,000,000/= for loss of dependency.

30. In the present case, the claim that the deceased was a TukTuk driver was not controverted by the appellant before the Trial Court. The deceased's earnings could however not be ascertained. The appellant suggested Kshs. 10,000/= as the minimum wage for a TukTuk driver. Since no documentary evidence was produced as proof of the deceased's monthly income, the Trial Court could have adopted either the multipler approach or global sum approach. He adopted the latter approach. Since that was a matter that fell in the discretion of the magistrate I hold that he did not misdirect himself in that regard. In the case of **Mwanzia vs Ngalali Mutua Kenya Bus Ltd** cited in **Albert Odawa vs Gichumu Githenji Nku Hcca No.15 of 2003** [2007] eKLR, where the court made the following observation;

> ***"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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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."***

31. In the judgment delivered in the lower court, the Trial Magistrate gave reasons for adopting the global sum approach. It is therefore this Court's finding that he did not err in so doing. He reasoned that since no receipts were produced to prove the deceased's earnings, the global sum approach was the best way to go about in making an award for loss of dependency. The appellant claimed that the award made of Kshs. 2,000,000/= was excessive and should be reduced to Kshs. 960,000/=. Looking at the case of **Acceler Global Logistics v Gladys Nasambu Waswa & Christopher Obedi Hanna** (suing as the Administrators and legal representatives of the estate of **Agripa Melise Williem)**, the deceased was a 41-year-old driver and no proof of monthly income was produced. Although in the said case the multiplier approach was adopted in calculating the loss of dependency, the High Court on 10th January, 2020 upheld an award that had been made by the Trial Court on 19th December, 2018, in the sum of Kshs. 2,129,184 for loss of dependency.

32. Although in the above case and in the present one different approaches were used to resolve the issue of loss of dependency, the bottom line is that both the deceased persons were drivers in the former case he was aged 41 years and in the present case he was aged 40 years. Apart from the fact that the deceased persons fell in the same age bracket and that they use to be drivers, proof of income was not produced in both cases.

33. In the case of **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased)** [2016] eKLR**,** the Court held as follows-

> ***"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."

34. As was correctly held in the case of **Butt vs. Khan** (supra), it is not the work of an appellate court to disturb the award made by the Trial Court without any sound reasons. Taking into consideration the fact that the deceased was married and had 2 young children aged 6 and 4 years at the time PW2 testified in the lower court, the length of dependency on the deceased by his wife who was 29 years old and young the children would have been for very many years. I therefore find that the Trial Court's award of Kshs. 2,000,000/= for loss of dependency was not inordinately high hence the appeal fails on this ground.

35. The appellant in its memorandum of appeal alleged that the Trial Magistrate disregarded its submissions and relied entirely on the respondents' submissions. I have carefully considered the judgment of the Trial Court. It is clear that the submissions of all the parties were well considered by the said court. The fact that the Trial Court failed to agree with the submissions of the appellant's Counsel does not mean that they were not considered.

36. The upshot is that this Court finds that the appeal herein lacks merit and the same is dismissed in its entirety. The costs of the lower court case and this appeal are awarded to the respondents. Interest is also awarded to the respondents at court rates.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **28th** day of **May, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of-

Ms Muyoka holding brief for Ms Okata for the appellant

Mr. William Wafula for the respondent

Ms Bancy Karimi – Court Assistant.