REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 90 OF 2018

HASHI HAULIERS.....1ST APPELLANT

ERICK JUMA OUMA.....2ND APPELLANT

-VERSUS-

JOEL SONGOK AND SAMUEL KIBITOK

(suing as personal representatives of the Estate of

ERNEST KIPCHOGE LELEI.....RESPONDENTS

(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa, Chief Magistrate, delivered on 13 July 2018 in Eldoret CMCC No. 135 of 2016)

JUDGMENT

[1] This appeal arises from the Judgment and Decree passed in **Eldoret Chief Magistrate's Civil Case No. 135 of 2016: Joel Songok and Samuel Kibtok Biwott (suing as personal representatives of the Estate of Ernest Kipchoge Lelei**, in which the respondents had sued the appellant seeking compensation in general and special damages. The suit was filed pursuant to the **Law Reform Act, Chapter 26** of the **Laws of Kenya** and the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya** in connection with the fatal injuries suffered by the deceased in a road traffic accident. The accident occurred on **23 December 2015** at **Matunda Trading Centre**, along the Eldoret-Kitale Road, involving the appellant's Motor Vehicle **Registration No. KBD 410P/Trailer ZC 9457.**

[2] In the respondent's Plaint, they contended that the deceased was lawfully being carried as a pillion passenger on **Motor Cycle Registration No. KMDB 040P** when the 2nd appellant so negligently drove managed or controlled **Motor Vehicle Registration No. KBD 410P and Trailer ZC 9457** that he caused the same to be involved in an accident with **Motor Cycle Registration No. KMDR 040P**; and that as a result, the deceased sustained fatal injuries to which he succumbed on the spot. Although the appellants filed a Statement of Defence, denying the allegations of negligence, the parties ultimately settled the question of liability by consent at the ratio of 80:20 in favour of the respondents. The duty of the learned trial magistrate was consequently limited to assessment of the quantum of damages payable.

[3] On the basis of the evidence adduced by the 1st respondent, the trial magistrate ascertained the dependency ratio, the multiplicand and the multiplier and thus came to the following awards both under the **Law Reform Act,** and the **Fatal Accidents Act:**

[a] Pain and suffering - **Kshs. 50,000/=**

[b] Loss of expectation of life - **Kshs. 200,000/=**

[c] Loss of dependency - **Kshs. 1,320,000/=**

Less 20% contribution - **Kshs. 314,000**

Total Award - **Kshs. 1,256,000/=**

[4] Being dissatisfied with Judgment of the trial magistrate, the appellants filed the instant appeal on **7 August 2018** on the following grounds:

> **[a]** That the learned trial magistrate erred in law and in fact in the manner, method, mode and/or calculations applied in assessing damages under loss of dependency.
>
> **[b]** That the learned trial magistrate erred in law and in fact in applying a multiplier of 22 years that was excessive in the circumstances, by failing to take into consideration the imponderables and/or vicissitudes of life and thereby failing to discount the multiplier appropriately.
>
> **[c]** That the learned trial magistrate erred in law and in fact in adopting a multiplicand of **Kshs. 15,000/=** that was excessive in the circumstances by failing to apply the minimum wage applicable at that time in lieu of a pay slip.
>
> **[d]** That the learned trial magistrate erred in law and in fact in assessing damages at **Kshs. 1,570,000** which amount was/is manifestly excessive.
>
> **[e]** That the learned trial magistrate erred in law and in fact in failing to consider the appellants' written submissions on the issue of loss of dependency or at all.
>
> **[f]** That the learned trial magistrate misdirected himself wholly on the law regarding principles to be applied in computing general damages under the **Law Reform Act** and under the **Fatal Accidents Act.**

[5] In the premises, the appellants prayed that the appeal be allowed and that the Judgment of the trial court in respect of quantum be set aside. The appellants further prayed that this Court be pleased to assess damages under loss of dependency as well as damages for pain and suffering. They also prayed for any other order that the Court may deem fit to grant as well as costs of the appeal.

[6] The appeal was canvassed by way of written submissions, pursuant to **Paragraph 6** of the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 20th March 2020**. The appellants' written submissions were accordingly filed herein on **2 February 2021**, challenging the award on the ground that the multiplicand of **Kshs. 15,000/=** and the multiplier of 22 years were totally unwarranted. Counsel underscored the fact that the deceased was neither married nor in gainful employment; and therefore that the lower court ought to have used the minimum wage of **Kshs. 10,107/=** instead.

[7] It was further the submission of **Mr. Ombonya** for the appellants that since the deceased died on the spot, there was no justification for an award of **Kshs. 50,000/=** for pain and suffering. He relied on a related appeal, namely, **Eldoret HCCA No. 89 of 2018: Hashi Hauliers & Another vs. James Kingora Kamunya** in which a similar award of **Kshs. 50,000/=** under the head of pain and suffering was reduced to **Kshs. 10,000/=.** Counsel had no quarrel with the dependency ratio of 1/3 applied by the lower court.

[8] On behalf of the respondents, **Mr. Mwinamo** filed his written submissions herein on **11 December 2020**. He submitted that the deceased suffered a lot of pain before his death; and therefore that the award of **Kshs. 50,000/=** was justified. He relied on **Mombasa: Mwalla Katana Mwagongo vs. Kenya Post and Telecom** in which an award of **Kshs. 100,000/=** was made for pain and suffering. On loss of expectation of life, counsel submitted that, at 38 years old, the deceased had high prospects of staying longer in this world; and therefore that the award of **Kshs. 200,000/=** was not in any way excessive. **Mombasa HCCC NO. 478 of 1994: Kiptampan Lockorir vs. Kadenga Kenga & Another** was cited to justify the lower court's award on this head.

[9] On loss of dependency, counsel urged the Court to take into account that the deceased was in good health; and that he was a farmer earning approximately **Kshs. 15,000/=** per month; which is what the lower court adopted as a multiplicand. In his view the deceased's monthly income was sufficiently proved and therefore that the award on loss of dependency was equally justified. He relied on **Nakuru HCCC No. 999 of 1994: John Mwangi vs. Partick Kariuki & Another** and **Kakamega HCCC No. 12 of 1985: Miriam Sei & 2 Others vs. John Njenga Kihuyu & Another** to buttress his submissions. He consequently urged the Court to dismiss this appeal with costs to the respondent.

[10] This being a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the lower court with a view of making its own conclusions and findings on the basis thereof; while giving an allowance for the fact that it neither saw nor heard the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[11] Counsel for the parties are in agreement that the appeal is basically on quantum and therefore only one issue arises for my consideration, namely, whether the assessment of damages was properly undertaken by the trial court in line with the applicable principles. It is now trite that matters to do with assessment of damages are matters within the discretion of the trial court; and that an appellate court ought to respect that discretion if properly exercised; and to do so even when, on the facts, it would have come to a different conclusion. This was aptly expressed by the Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** [2015] eKLR thus:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not**

disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[12] The correct approach in such circumstances remains what was proposed in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others** [1957] EA 748, by the Court of Appeal for East Africa, namely:

"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase…A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."

[13] The evidence adduced before the trial court by the two Respondents was in the form of the testimony of the 1st respondent. He adopted his witness statement dated **22 February 2016** and the bundle of documents filed with the Plaint, marked the **Plaintiff's Exhibits 2-5**. That evidence was entirely unrebutted, noting that the appellants opted to adduce no evidence. Accordingly, credible evidence was presented before the lower court to demonstrate that, the deceased was aged 38 years at the time of his death; that he was single; and that prior to his death, the deceased was in good health. It is further not in controversy that the deceased was the sole breadwinner for his family, which comprised his mother and 3 brothers; and that they have all suffered loss and damage by reason of the deceased's untimely and tragic death.

[14] It is noted however that, whereas the 1st respondent stated that the deceased used to earn **Kshs. 35,000/=** per month from his farming activities, no evidence was adduced in proof thereof. He conceded in cross-examination that he had nothing to show the lower court in proof thereof. Accordingly, there is nothing to prove either the **Kshs. 35,000/=** hypothesized by the 1st respondent as the multiplicand; or the sum of **Kshs. 15,000/=** adopted by the learned trial magistrate. In the circumstances, counsel for the appellant's proposed the minimum wage then applicable of **Kshs. 10,107.10**; which proposal was supported by **Legal Notice No. 117 of 2015**. The learned trial magistrate totally ignored that proposal and gave no reason for such a departure.

[15] Where, as in this case, there was no proof of the deceased's monthly income, the best course would have been for the lower court to award a global sum. In this regard, the decision of **Hon. Ringera, J.** in **Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another**, (as quoted by **Koome J.,** (as she then was) in **Albert Odawa vs. Gichimu Gichenji [2007] eKLR), is instructive. He took the view, with which I agree entirely, that**:

"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."

[16] The observation in **H. West & Son Ltd vs. Shephard** [1964] AC 326, is equally instructive, namely, that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[17] And in **Stanley Maore vs. Geoffrey Mwenda** [2004] eKLR, the Court of Appeal suggested thus:

"…It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

[18] Thus, in **Hashi Hauliers & Erick Juma Ouma vs. James Kingora Kamunya (suing as the administrator to the estate of James Kingora) (supra)** arising out of the same accident, an in which liability had also been settled by consent at 80:20 in favour of the plaintiff, the same learned magistrate made the following awards:

[a] pain and suffering **- Kshs. 50,000/=**

[b] Loss of expectation of life **- Kshs. 100,000/=**

[c] Loss of dependency **- Kshs. 1,000,000/=**

[19] On appeal, the global award of **Kshs. 1,000,000/=** less 20% contribution was upheld**.** I find that approach more reasonable, given the

circumstances at play in this appeal; particularly the fact that the deceased's monthly income was not satisfactorily proved before the lower court. Thus, on the authority of **Stanley Maore vs. Geoffrey Mwenda** (supra), I would adopt the same approach and set aside the amount for loss of dependency from **Kshs. 1,320,000/=** and replace it with a global sum of **Kshs. 1,000,000/=.**

[20] As for pain and suffering and loss of expectation of life, the guiding principle, was well captured in **Sukari Industries Limited vs. Clyde Machimbo Juma** [2016] eKLR thus:

> ***"... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years..."***

[21] I would agree with the appellants that, since the deceased died on the spot, a nominal award of **Kshs. 10,000/=** would suffice. Accordingly, the award for pain and suffering made by the lower court is hereby reduced to **Kshs. 10,000/=** from **Kshs. 50,000/=.** On loss of expectation of life, an award of **Kshs. 200,000/=** was made. Since the same court handled the two suits arising from the same accident, it is inexplicable why in the suit the subject of this appeal a higher figure of **Kshs. 200,000/=** was awarded. Hence, I would reduce that item to **Kshs. 100,000/=** on the principle that like circumstances should attract more or less similar awards. Indeed in **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the Court observed that:-

> ***"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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."***

[22] In the result therefore, the total amount due to the estate and dependants of the deceased, **Ernest Kipchoge Lelei**, is as hereunder:

Under the Law Reform Act:

· Loss of expectation of life - **Kshs. 100,000**

· Pain and suffering - **Kshs. 10,000**

Under the Fatal Accidents Act

· Loss of dependency - **Kshs. 1,000,000**

Total - **Kshs. 1,110,000**

Less 20% liability **Kshs. 222,000**

Net due **Kshs. 888,000**

[23] In the result, the Judgment of the lower court is hereby set aside and substituted with Judgment in favour of the Respondents in the aforestated sum of **Kshs. 888,000/=** together with interest thereon from the date of the lower court's judgment until full payment. The Respondents will also have costs of both the lower court suit and the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY 2021

OLGA SEWE

JUDGE