REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 83 OF 2019

DAVID ODHIAMBO.....APPELLANT

VERSUS

HARISON OGOLA OTIENO &

BENTER AWINO OKWE (Both suing as Legal Representatives of the

Estate of EUNICE ACHIENG OTIENO Deceased).....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon Agutu (RM)

delivered at Kisumu in Chief Magistrate's Court

Case No 495 of 2017 on 14th February 2019)

JUDGMENT

INTRODUCTION

1. In his decision of 14th February 2019, the Learned Trial Magistrate, Hon M. Agutu, Resident Magistrate, entered judgement in favour of the Respondents herein against it in the following terms:-

a. Pain and Suffering	**Kshs 80,000/=**
b. Loss of Expectation of Life	**Kshs 100,000/=**
c. Loss of Dependency	**Kshs 1, 643,100/=**
d. Special Damages	**Kshs 43,663/=**
	Kshs 1,866,763/=
Less 10% contributory negligence	**Kshs 186,673/=**
	Kshs. 1,680,087/=

Plus cost of the suit and interest at court rates. Notably, parties recorded a consent on liability at 90%-10% in favour of the Respondent herein.

2. Being aggrieved with the said decision, on 16th July 2019, the Appellant filed a Memorandum of Appeal dated 20th June 2019. He relied on five (5) grounds of appeal.

3. Parties filed Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written

Submissions.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

> **"...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..."**

6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

> **a. Whether or not the Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded under the Fatal Accidents Act Cap 32 (Laws of Kenya); and**
>
> **b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.**

7. As the grounds of appeal were related, the court deemed it proper to address them together under the separate and distinct heads of the income of the deceased, the multiplier and the dependency ratio.

I. INCOME OF THE DECEASED

8. It was the Appellant's submissions that the Respondents failed to prove dependency and deceased's earnings as was required by the law and as such they were not entitled to the damages that were awarded by the Trial Court. He argued that although Harrison Ogola Otieno (hereinafter referred to as PW 2), the sister to Eunice Achieng Otieno (hereinafter referred to as "the deceased") testified that the deceased was an Mpesa shop attendant earning Kshs 45,000/=, he admitted on cross-examination that he did not have any evidence to prove that the deceased was earning a sum of Kshs 45,000/=.

9. He argued that as there was no proof of income, the Trial Court erred in awarding a sum of Kshs 10,954/= as the deceased monthly income while relying on Regulations of Wages (general) (amendment) Order 2015 without considering the Regulation of Wages Order which he submitted was for a sum of Kshs 5,496.90.

10. In support of this argument, he relied on the case of **Francis K. Nthiwa vs Gregory K. Mwangangi & Another [2009] eKLR** and the case of **Tobias Odoyo Oburu vs Jane Kerubo Miruka & Another [2018] eKLR.**

11. On the other hand, the Respondents submitted that it was not rebutted in evidence that the deceased was a shop attendant and that the minimum wage applicable for a shop attendant at the material time as per Legal Notice No 117, The Regulation of Wages (General) (Amendment) Order 2015 was Kshs 14,785.75 for residents of Nairobi, Mombasa and Kisumu. They pointed out that the Trial Court in fact applied a sum of Kshs 10,954/= which was a lesser minimum wage than the legally applicable one.

12. A perusal of the proceedings revealed that as was correctly pointed out by the Appellant, the Respondents did not adduce any documentary evidence to support the fact that the deceased used to earn a monthly income of Kshs 45,000/=.

13. Having said so, this court had due regard to the case of **Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR** where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated as follows:-

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand will 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 documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."**

14. This court therefore appreciated that the deceased's income need not have been proven by documentary evidence. However, it took the view that adopting a minimum figure blindly can also cause great injustice to a respondent because failure to adduce evidence of income could also imply that a person was not engaged in any gainful employment. Having said so, the court noted that the Appellant did not really object to an award of income having been made. His only contention was that the Trial Court ought to have adopted the minimum income for Regulation of Wages Order 2015 which was Kshs 5,496/=.

15. Notably, the deceased died on 21st February 2016 when the Regulations of Wages (General) (Amendment) 2017 was not yet in force. The same came into force on 1st May 2017. The Trial Court therefore ought to have adopted the Regulations of Wages (General) (Amendment) 2015.

16. A perusal of the Regulations of Wages (General) (Amendment) Order 2015, provided a minimum wage for a shop assistant as Kshs 14, 785.70, as was submitted by the Respondents. However, the Trial Court exercised its discretion judiciously and adopted a sum Kshs 10,954/= that was the minimum wage for a general worker. It was not clear where the Appellant obtained the figure of Kshs 5,496/= as the minimum wage for general workers outside the Nairobi, Mombasa and Kisumu cities and the Municipalities of Mavoko, Ruiru and Limuru was Kshs 5,844.20.

17. Accordingly, this court came to the firm conclusion that the Learned Trial Magistrate did not err when he adopted the Regulations of Wages (General) (Amendment) Order 2015 and considered the claim under the Fatal Accidents Act by applying a minimum income of Kshs 10,954/=. This court was not therefore persuaded that it should interfere with his award under this head.

II. MULTIPLIER

18. The Appellant argued that a multiplier of 26 years that was adopted by the Trial court was high as considering the vagaries of life, the deceased could not have worked up to sixty (60) years even though that is what is statutorily provided for. He urged this court to adopt a multiplier of twenty (20) years. court. He relied on several cases amongst them the case of **Sammy Kipkorir Kosgei vs Edna Musikoye Mulinya & Another [2017] eKLR** to buttress his point.

19. On their part, the Respondents submitted that the multiplier that was applied by the Trial Court was in fact on the lower side considering that the deceased died at the age of 26 years. It was their submission that a multiplier of thirty one (31) years was appropriate and that the Appellant's suggestion of twenty (20) years was too low in the circumstances. They relied on the case of **James Njiiri & 2 Others vs FPU & Another [2019] eKLR** in this regard.

20. Notably, a perusal of the Judgment showed that the Trial Court adopted a multiplier of twenty five (25) years and not twenty six (26) years as had been submitted by the Appellant herein. Barring the vagaries and uncertainties of life, an average Kenyan man or woman can engage in being a shop attendant beyond the age sixty (60) years as there is no retirement age.

21. However, considering the vagaries and uncertainties of life, this court agreed with the Trial court that a multiplier of twenty five (25) was reasonable in the circumstances of the case. Indeed as could be seen from the cases that were relied upon by the Appellant and the Respondents herein, different courts adopt different multipliers for deceased persons of the same age. Provided that the multiplier adopted is not unreasonable, an appellate court ought not to disturb an award by a trial court merely because it could have adopted a lower or higher figure.

22. This court thus found and held that the Learned Trial Magistrate exercised his discretion judiciously and it was not persuaded that it should interfere with the multiplier that he adopted.

III. DEPENDENCY RATIO

23. The Appellant had argued that the fourth born in a family of (6) children, there was no way the deceased would have been the one providing for her siblings. He submitted that under the provisions of Section 4(1) of the Fatal Accident Act, action could only have been brought for the benefit of the deceased's daughter who was aged seven (7) years at the time the suit was filed.

24. He urged this court to adopt a multiplier of a third (1/3) instead of the (½) dependency ratio that was adopted by the Learned Trial Magistrate. In this regard, he placed reliance on the case of **Chania Shuttle vs Marry Mumbi [2017] eKLR**.

25. On the other hand, the Respondents submitted that a half (½) dependency ratio be upheld on the ground that the deceased was survived by her siblings and a child who she supported, as evidenced by the Chief's letter.

26. Under Section 4(1) of the Fatal Accidents Act, it has been stated that:-

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:"**

27. This court noted from the Judgment herein that the Learned Trial Magistrate considered the said Section 4(1) of the Fatal Accidents Act. He rendered himself as follows:-

> **"Under the provisions of section 4(1) of the Fatal Accident Act, brothers and sisters are not taken into consideration as beneficiaries. The daughter is the only person to whom such a claim can be brought for her benefit."**

28. Having said so, this court took the view that awarding a dependency ratio of a half (½) was unreasonable for the reason that the child was aged six (6) years at the time of the deceased's death in 2016. It was not possible for her to have used half (½) of her income on the said child whose needs at that age were negligible.

29. This court thus agreed with the Appellant that the application of a dependency ratio of (½) was not justified and it could interfere with the same as the Learned Trial Magistrate applied the wrong principles to arrive at the same.

CONCLUSION

30. In that respect, this court found and held that the claim under the Fatal Accident's Act ought to have been for a sum of Kshs 1,095,400/= made up as follows:-

1/3 x 10,954 x 25 x 12 Kshs 1,095,400/=

31. The court did not deal with the other claims in the Judgment herein as the same were not disputed. They therefore remained undisturbed.

DISPOSITION

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 16th July 2019 was partially merited. The effect of this is that the Judgment of Kshs 1,680,087/= that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgment that be and is hereby entered against the Appellant herein for the sum of Kshs 1,187,157/= made up as follows:-

a. Pain and Suffering Kshs 80,000.00

b. Loss of Expectation of Life Kshs 100,000.00

c. Loss of Dependency Kshs 1,095,400.00

d. Special Damages Kshs 43,663.00

Kshs 1,319,063.00

Less 10% contributory negligence Kshs 131,906.30

Kshs. 1,187,157/=

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue from the date of filing suit while damages under the Fatal Accidents Act and the Law Reform Act Cap 26 (Laws of Kenya) will accrue from the date of judgment until payment in full.

33. As the Appellant was partly successful in his Appeal, each party will bear its own costs of the Appeal herein.

34. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE 2021

J. KAMAU

JUDGE