REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 11 OF 2020

GILBERT KIMATARE NAIRI & LILIAN

NAPUDOI NAIRI (Suing as personal Representative

of the Estate of JACKLINE SEIN

LEMAYIAN (DECEASED).....APPELLANTS

VERSUS

CIVISCOPE LIMITED.....RESPONDENT

(An appeal from the judgement and decree (Hon. Nthuku, SRM) delivered on 25th February 2020 in SRMCC No. 19 of 2019 at the Senior Resident Magistrate's Court Loitokitok).

JUDGMENT

1. The appellants filed a suit through a plaint dated 8th April 2019, before trial court on behalf of the estate of the estate and dependants of the late **Jackline Sein Lemayian** who died following a road traffic accident that occurred on 13th March 2019 along Loitokitok-Emali road. She was a pillion passenger on motor cycle registration No, KMCT 263V which was involved in an accident with motor vehicle registration No. KCN 504G. The deceased died on the spot. The suit was brought under both the Law Reform Act and The Fatal Accidents Act.

2. The respondent filed a statement of defence dated 9th September 2019 denying the appellants' claim. It denied occurrence of the accident, or that the deceased was a pillion passenger. the respondent stated that the vehicle was correctly driven or managed. The respondent pleaded in the alternative that the accident was caused by the negligence of the rider for the motor cycle and particularized acts of negligence.

3. The suit fell for hearing before **Hon. N. Nthuku, (SRM)** and in a judgment delivered on 25th February 2020, the driver of the vehicle was held wholly liable for the accident given that the deceased was a pillion passenger and she did not in any way contribute to the occurrence of the accident.

4. On quantum, the trial court awarded Kshs. 20,000 for pain and suffering; Kshs. 100,000/= for loss of expectation of life and Kshs. 600,000/= for loss of dependency. The court awarded special damages of Kshs. 50,000/= for funeral expenses.

5. The appellants were aggrieved with the quantum and filed a memorandum of appeal rising only two grounds, namely:

> ***1. That the learned trial magistrate misdirected herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions thereby made an erroneous judgement on quantum of damages:***
>
> ***2. That the learned magistrate erred in law and fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing quantum and thereby arrived at very low figures.***

6. They asked this court to set aside the trial court's judgement and reassess judgment on liability and quantum based on the evidence on record.

7. Parties agreed to dispose of this appeal by way of written submissions.

8. The appellants filed written submissions dated 10th September 2020. They submitted that the trial court found in SRMCC No. 21of 2019 that both the driver of the motor vehicle and the motor cycle rider equally to blame for the accident. It is the appellants' case that the trial court failed to give due considerations to submissions as well as their evidence especially PW2 who witnessed the occurrence of the accident,

that the vehicle was being driven at high speed and was overtaking another lorry thereby collided with the motor cycle carrying the deceased. This they maintained, was contrary to the respondents' evidence that it was the motor cycle that rammed into the motor vehicle. They blamed the trial court for failing to analyse the testimonies and apportioned liability at 50:50.

9. According to the appellants, both witnesses agreed that the scene of the accident was at a shopping centre with a speed limit of 50km/h. They blamed the trial court for holding that there was no independent witness when their eye witness was an independent witness. They urged this court to find that the driver of the motor vehicle was 100% to blame for the accident.

10. On quantum, the appellants blamed the trial court for allowing an inordinately low award. They argued that the trial court should have allowed Kshs. 50,000/= for pain and suffering instead of Kshs. 20,000/=.

11. Regarding loss of expectation of life, they argued that they had prayed for Kshs. 150,000/= based on the deceased's age (31 years) but the trial court awarded Kshs. 100,000/=.

12. Regarding the loss of dependency, the appellants argued that the deceased was 31 years, a farmer and earned Kshs. 50,000/= from employment. (PW2), she was also a business lady earning at least Kshs. 90,000/= from the business. They had proposed minimum wage of Kshs. 12,000/= and multiplicand of 29 years since the deceased would have worked up to 60 years. and, therefore, the trial court was in error when it awarded a lump sum of Kshs. 600,000/= under this head. It also erred by finding that there was no evidence of dependency. They relied in ***Jacob Ayiga Maruja v Simeon Obayo*** [2005] eKLR. The appellant prayed for Kshs. 2,784,000/= thus, 12,000 x 29 x 2/3.

13. The respondent filed written submissions dated 24th January 2021. It submitted that the deceased was a pillion passenger on motor cycle registration No. KMCT 263V which collided with motor vehicle KCN 504G and the deceased died on the spot. The respondent arguing that the appellants did not call the traffic police to produce sketch plan for the scene.

14. On pain and suffering, the respondent argued that the trial court's award of Kshs. 20,000/- was inordinately high considering decisions on the issue. It relied on ***Harjeet Singh Pandal v Helen Aketch Okudho*** [2018] eKLR where Kshs. 10,000/= was awarded and also ***Florence Awour Owuoth v Paul Jackton Ombayo*** [2020] eKLR where the deceased died on the spot and an award of Kshs. 10,000/= was made.

15. Regarding loss of expectation of life, the respondent relied on the ***Florence Awour case*** (Supra) where Kshs. 80,000/= was made for loss of expectation of life. Similarly, it relied on ***Godana Guyo Halake & Another v Patrick Ndeli Ndoli & Another*** [2017] eKLR where an award of Kshs. 70,000/= was made.

16. Under the Fatal Accidents Act, the respondent argued that there was no proof of earning or evidence of dependency on the deceased. The respondent submitted that the trial court properly analysed the evidence on record and adopted a global figure. The respondent proposed Kshs. 500,000/= as a global sum. It relied on ***M'rarama M'ntherieri v Luke Kiumbe Murithi*** (2015) eKLR where the court applied the global figure and awarded Kshs. 500,000/=.

17. The respondent submitted, relying on ***Mbogo & Another v shah*** [1968] EA 93, that an appellate court should not easily interfere with exercise of discretion by a lower court unless it is shown that the discretion was wrongly exercised. It also cited ***Butt v Khan*** [1977] eKLR for a similar proposition. According to the respondent, the appellant had not shown that the trial court wrongly exercised its discretion and urged that the appeal be dismissed with costs.

18. I have considered this appeal, submissions by parties and the decisions relied on. I have also gone through the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

19. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal held that:

> ***This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High 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 allowances in this respect.***

20. In ***Nkube v Nyamiro*** [1983] KLR 403, it was held:

> ***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.***

21. The 1st appellant, father in law to the deceased, testified adopting his witness statement dated 8th April 2019, that on 13th March 2019, the deceased was a pillion passenger on Motorcycle Registration No. KMCT 263V along Emali- Loitokitok road. The respondent's motor vehicle registration No. KCN 504G was negligently and carelessly driven and caused an accident and as a result, the deceased sustained fatal injuries. The witness stated that the deceased who was 31 years old was working as an employee and earned Kshs. 50,000 per month. She also did business earning Kshs. 90,000 per month. According to the witness, the deceased left behind two daughters and himself whom she took care of. He produced grant of letters of administration, demand letter, death certificate, police abstract, post mortem report and receipts for burial expenses as exhibits.

22. PW2 David Mungai Mundia testified adopting his witness statement dated 26th September 2019, that on 13th March 2019 at about 7.15 Pm, at Sab saba the lorry was being driven at a high speed from Loitokitok to Kimana direction. It was overtaking another lorry but it did not manage to overtake the other lorry. It collided with the motor cycle which was on the last lane being ridden by the deceased's husband with the deceased as a pillion passenger. The motor cycle was travelling in the opposite direction. The lorry hit Richard, his wife (the deceased herein) and their child. Richard was thrown on the side of the road while the front wheel of the lorry crushed the deceased and the child. The driver of the lorry alighted and ran away.

23. The witness who was about 50 meters away rushed to the scene and identified the victims. He called the officer in charge of Kimana police station traffic and the accident was reported and recorded at Loitokitok police station. The driver of the lorry was arrested and placed in the cells. He told the court that the driver of the lorry caused the accident. According to the witness, the deceased was an employee of Ngong Vegetables where she used to harvest French beans. He also told the court that he attended the funeral and that three vehicles transported mourners.

24. In cross examination, the witness admitted that there were other vehicles on the road and that there was darkness at the time of the accident but it was not very dark.

25. DWI Eric Omondi Ochieng, the driver of the lorry, testified that on the material day, 13th March 2019 at about 7.30 pm, he was driving motor vehicle KCL 504G from Loitokitok to Nairobi. Before reaching Kimana, he saw lights ahead of his vehicle. He deemed his lights, reduced speed and put on hazard. There was another vehicle with one light on. He also realized that a motor vehicle with both lights on wanted to overtake the vehicle with one light and indeed overtook it. The vehicle with one light on turned out to be a motor cycle. The motorcycle rammed onto his vehicle's tyre while his vehicle was on its lane. In cross examination, he told the court that he tried to avoid the accident by giving way to the other motor vehicle and the motorcycle. He denied that he was overtaking when the accident occurred. He blamed the motorcycle rider for the accident.

26. The trial court considered the evidence from both sides and held that the deceased was a pillion passenger on the motor cycle. the court also noted that whereas PW2 blamed the driver of the lorry for the accident, the driver on his part blamed the motor cycle rider. The court also noted that the police officer who investigated the accident was not called to testify and that the police abstract indicated that the matter was still under investigations. Since the deceased was a pillion passenger on the motorcycle, the motor vehicle was held wholly liable for the accident.

27. The trial court then went on to award damages of Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life. On dependency under the Fatal Accidents ACT, the trial court found that there was no evidence of earning and therefore, it could not use the multiplicand and multiplier. The court cited the decisions in ***Mary Khayesi Awalo & Another v Mwilu Mulungi & Another*** (ELD. HCCC No. 19 of 1997) and ***Albert Odawa v Gichimu Gichenji*** (NKR HCCA 15 of 2003 [2007] eKLR.

28. In the latter decision **Ringera, J**, (as he then was), stated that he multiplier approach is just a method of assessing damages as opposed to a principle of law and can and should be abandoned where the facts do not favour its application. The court then awarded a global figure of Kshs. 600,000.

29. The appellant has faulted the trial court on two grounds. Firs; that that the trial court did not give due and proper consideration to the pleadings, evidence and submissions on record and therefore made an erroneous decision on quantum of damages. Second; that the trial court did not appreciate the relevant principles and case law in assessing damages and therefore an inordinately low award.

30. I have considered the arguments by parties and the evidence on record as well as the grounds advanced by the appellant in this appeal. On the first ground, whether the trial court considered the evidence on record, there can be no doubt that the trial court was alive to the evidence on record. A perusal of the judgment shows that the trial court considered the evidence by parties and made a determination on the case before it. The fact that the trial court did not cite the decisions relied on by parties could not be taken that it did not consider them.

31. The question to be answered is whether the award of damages was inordinately low. It now a principle of law that an appellate court will not interfere with exercise of discretion by a trial court unless the trial court acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors thus arrived at a wrong decision that caused an injustice.

32. This was aptly put by ***De Lestang***, **Ag. VP.** in ***Mbogo v Shah*** [1968] at page 94:

> ***I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.***

33. Assessment of damages involves exercise of discretion. The trial court exercised discretion when it assessed damages in the case before it. In ***Butt v Khan*** [1981] KLR 349, ***Law. J.A***, stated:

> ***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 so arrived at a figure which was either inordinately high or low.***

34. The same view was expressed in ***Gitobu Imanyara & 2 others v Attorney General*** (supra) thus:

> ***[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to***

justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

35. The trial court considered the matter before it and awarded Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life. these awards were made under the Law Reform Act. The trial court further awarded Kshs. 600,000 for loss of dependency under the Fatal Accidents Act.

36. The appellants argued that the awards on the three heads were inordinately low ad asked this to set them aside. On pain and suffering the appellants urged this court to award Kshs. 50,000 and Kshs. 150,000 for loss of expectation of life. They relied on several decisions which they asked this court to follow. Regarding loss of dependency, they blamed the trial court for applying the global award approach instead of using minimum wage, multiplicand and multiplier which would have given a higher award. According to the appellants the deceased used to earn Kshs. 50000 per month from employment and Kshs. 90,000 from business.

37. On its part, the respondent contended that the award of Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life were on the higher side. It proposed Kshs. 10,000 for pain and suffering and Kshs. 70,000 to 80,000 for loss of expectation of life. Regarding loss of dependency, the respondent supported the method of global award used by the trial court since there was no evidence of earning. The respondent felt a figure of Kshs. 500,000/= as a global sum. It relied on ***M'rarama M'ntherieri v Luke Kiumbe Murithi*** (supra) where a global figure Kshs. 500,000 was awarded.

38. I have considered the arguments by parties on the awards made by the trial court. Regarding Pain and suffering and loss of expectation of life, the trial court exercised its discretion and neither the appellant nor the respondent have shown that he awards were either extremely low or high as to represent an entirely erroneous estimate of the damage the appellant was entitled to or.

39. Regarding loss of dependency, the trial court awarded a global figure of Kshs. 600,000 which the appellants complained was low while the respondent contended was high. The trial court cited binding decisions on it (***Mary Khayesi Awalo & Another v Mwilu Mulungi & Another supra)*** and ***Albert Odawa v Gichimu Gichenji*** (supra) on applying global award.

40. As the court stated, the multiplier approach is just a method of assessing damages and not a principle of law. It can and should be abandoned where the facts of the case do not favour its application. In that regard, I do not find fault on the part of the trial court in adopting the global approach. Similarly, I am not persuaded that the trial court was in any error in awarding Kshs 600,000 for loss of dependency. It was neither low nor high to call for this court's interference.

41. This court is alive to what **Kneller J.A,** stated in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*** [1985] that:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles.

42. In ***Gicheru v Morton & another*** **[2005] 2 KLR 333**, the Court of Appeal again stated that *in order to justify reversing of the trial court's amount of damages, it is generally necessary that the appellate court should be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded is so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.*

43. The Court of Appeal similarly observed in ***Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd*** [2013] eKLR, that:

[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.

44. And ***Lord Morris*** of ***Borthy-Gest*** stated in ***West (H) & Son Ltd v Shepherd*** [1964] A.C. 326 pg. 345:

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

45. Applying the above principles to this appeal, and considering the fact that a life was lost, as well as the decisions parties relied on, I do not find reason to interfere with the trial court's awards. It is always important to remember that an appellate court should only interfere with a trial court's assessment of damages in very clear cases, and should not to impose its own view on what it would have awarded had it tried the matter in the first instance.

46. For the above reasons, this appeal is declined and dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE, 2021.

E. C. MWITA

JUDGE