THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 2 OF 2019

BASH HAULIERS.....APPELLANT

VERSUS

DAMA KALUME KARISA

KALUME KARISA KAMOSO (Suing as the Administrator and/or

Legal Representatives of the Estate of the late Katana

Karisa.....RESPONDENTS

(An appeal against the Judgment of D.M. Ndungi, Senior Resident Magistrate, delivered on 19th December, 2018 in Mariakani Senior Principal Magistrate's Court Civil Case No. 7 of 2017)

JUDGMENT

1. On 16th January, 2017 the plaintiffs filed suit on behalf of all the defendants and/or estate of the late Katana Kalume Karisa (deceased) under the Law Reform Act and the Fatal Accidents Act. This followed a fatal road accident. The plaintiffs (respondents) claimed general damages, special damages, costs of and/or incidental to the suit and interest on general damages, special damages and costs, from the appellant whose driver was said to have caused the accident.

2. The defendant (appellant) on 2nd February, 2017 filed a statement of defence and denied having caused the accident at all and blamed it on the negligence of the deceased.

3. In a Judgment delivered on 19th December, 2018, Hon. Ndungi awarded the respondents a net sum of Kshs. 1,261,484.00. The breakdown of the said amount is tabulated in the said Judgment.

4. The appellant was dissatisfied with the said Judgment and on 21st January, 2019 it filed a memorandum of appeal raising the following grounds of appeal:-

> (i) That the Honourable Magistrate erred in law and fact in awarding the sum of Kshs. 1,617,120 for loss of dependency to the respondents which amount was too high;
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> (ii) That the Hon. Magistrate adopted a 20 year multiplier thus erring in law and in fact in arriving at a finding/award of that amount given the deceased's age; and
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> (iii) The Hon. Magistrate erred in law and in fact in otherwise failing to put into consideration the appellant's submissions placed before the court.

5. This appeal proceeded by way of written submissions. The appellant's Counsel filed his on 4th July, 2019 and the respondent's Counsel filed his on 19th July, 2019.

6. It was submitted for the appellant that at the hearing before the lower court, the respondents failed to prove dependency as they did not produce a letter from the chief listing the beneficiaries of the estate of the deceased, including his alleged son for whom no birth certificate was produced. It was further submitted that the award of Kshs. 1,617,120.00 was too high and that the Hon. Magistrate erred by applying a

multiplier of 20 years. It was claimed that the Hon. Magistrate totally disregarded the appellant's written submissions and authorities which were binding on him. It was argued that the 2nd respondent failed to show the circumstances that had changed after the death of the deceased.

7. The appellant's Counsel relied on the case of **Philomena Mutheu Nzyoka** (suing as a legal representative of the Estate of the late TKM) **vs Transpares Kenya Limited** [2016] eKLR where the court relied on a letter from the Chief in the absence of birth certificates and any other documents to ascertain the dependents of the deceased.

8. The appellant's Counsel particularly challenged the failure by the 2nd respondent to produce any documents proving that the young boy appearing on the list of dependents was indeed a dependent of the deceased.

9. This court was urged to set aside the award made for loss of dependency by re-evaluating the evidence adduced before the lower court and come up with its own independent decision.

10. The case of **Tom Oluoch Oloo** (suing as the administrator and legal representative of the estate of **George Ochieng Ngoche** (deceased) **vs African Safari Club** [20119] eKLR was cited where the court found that there was no evidence of dependency.

11. On the issue of the multiplier of 20 years that was adopted by the Trial Court, it was submitted that it was too high because the deceased was 32 years old when he died. It was contended that the Hon. Magistrate failed to take into account life's uncanning and unpredictable circumstances that would lower the chances of survival for the deceased. The appellant's Counsel was of the view that a multiplier of 12 years would have been adequate. He relied on the case of **James Gakinya Karienye & Another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) vs Perminus Kariuki Githinji** [2015] eKLR where a multiplier of 12 years was adopted for a deceased who was aged 27 years.

12. The case of **Wangai Thairu vs Hon. Barngetuny & Another**, HCCC 1638 of 1988 was cited to illustrate the factors a court needs to consider in the assessment of damages under the Fatal Accidents Act.

13. In concluding his arguments, Counsel for the appellant submitted that damages under the Fatal Accidents Act should have been computed under one head with those under the Law Reform Act. In so stating, he cited the case of **Charles Ouma & Another vs Bernard Odhiambo Ogeche** [2014] eKLR.

14. The Counsel for the appellant added that the Hon. Magistrate failed to take into account circumstances of the case and sentimentally decided the case in favour of the respondents resulting in great miscarriage of justice against the appellant. He prayed for the appeal to be allowed.

15. In his written submissions, the respondents' Counsel stated that the appeal herein raises no arguable issue *vis a vis* the Hon. Magistrate's Judgment and decree on loss of dependency. The case of **Mwangi vs Wambugu** [1984] KLR 453 was cited where the Court of Appeal held that an appellate court should only interfere with a finding of a fact by the Trial Court only when it is based on no evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding.

16. The case of **Kemfro Africa Limited T/A Meru Express Services & Another vs A.M. Lubia & Another** [1982-1988] 1 KLR 7827 was cited to illustrate the circumstances in which an appellate court can interfere with an award for quantum of damages.

17. On the issue of dependency, the respondents' Counsel's submission was that the 2nd respondent testified that the deceased was the sole provider upon whom he depended. It was stated that it would have been unreasonable to expect the respondents to produce receipts on pay slips as proof of income due to informal employment in Kenya. The respondents' Counsel submitted that the Hon. Magistrate could not be faulted for having awarded the respondents the sum of Kshs. 1,617,120/= for the loss of dependency for being too high. It was stated that the death certificate, police abstract and grant of letters of administration relied on at the lower court indicated that the deceased sustained fatal injuries due to an accident involving the appellant's motor vehicle.

18. The case of **Leonard O. Ekisa & Another vs Major K. Birgen** [2005] eKLR was cited to demonstrate that dependency is a matter of fact which needs not to be proved by documentary evidence and expenses on children do not need to be proved by documents. The case of **Nancy Muguru Gakinya** (suing as the legal representative of the estate of **David Kelvin Gakinya (deceased) vs Perminus Kariuki Githinji** [2015] eKLR on the same issue of dependency, was also relied on.

19. It was emphasized by the respondents' Counsel that what the appellant did was to allege lack of dependency but called no evidence to prove it. The provisions of Section 119 of the Evidence Act were relied on by the respondents. He relied on the case of **Central Microfilm Operators Film [1990] Ltd vs Teachers Service Commission** [2015] eKLR, where it was stated that failure by a party to call as a witness any person whom he might reasonably be expected to give evidence favourable to him may prompt a court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case.

20. Counsel for the respondents urged this court to affirm the multiplier used by the Hon. Magistrate as there was no evidence to suggest that the deceased was sick or lived a risky life that would have entitled the Trial Magistrate to substantially reduce the multiplier as submitted by the appellant. Counsel further stated that the award of damages is discretionary and the Hon. Magistrate exercised his discretion judiciously. Further, the said Magistrate took into account that the official retirement age is 60 years and applied a multiplier of 20 years which was to the disadvantage of the respondents' dependents. He prayed for the appeal to be dismissed.

Analysis and Determination

21. The duty of the first appellate court is to subject the entire evidence adduced in the lower court to scrutiny and draw its own conclusion

while bearing in mind that it did not see or hear the witness(es) testify. In **Selle & Another vs Associated Motor Boat Co. Limited & Others** [1968] EA 123 the court expressed itself thus on the duty of the 1st appellate court:-

> ***"I accept Counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally Abdul Hammed Saif vs Ali Mohamed Scholan [1955] 22 EA 270."***

22. The evidence adduced before the lower court was by Kalume Karisa , the 2nd respondent, who testified as PW1. He was the deceased's father. His evidence was that he, the deceased's wife and the deceased's child of 4 years used to depend on the deceased. He stated that the deseased used to earn Kshs. 1,000/= per day at a construction site where he worked as a foreman. His monthly earnings came to an average of Kshs. 30,000/=.

23. PW1 testified that the deceased's son now depends on him and the only work he does is that of herding his goats. He incurred expenses of Kshs. 50,000/= to obtain a grant. On being cross- examined PW1 said he is also a farmer. He stated that he had given to his Advocate a letter from the Chief. He said the deceased was about 30 years old. He indicated that he paid mortuary fees and the receipt was with his advocate. He admitted that he did not produce proof to show that the deceased had a son. He stated that the son was in Nursery School.

24. The appellant did not call any witness to adduce evidence.

25. The issues for determination are:-

> **(i) If the multiplier of 20 years adopted by the Hon. Magistrate was too high; and**
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> **(ii) If the award of loss of dependency in the sum of Kshs. 1,617,120.00/- which was awarded to the respondents was too high; and**
>
> **(iii) If Magistrate considered the submissions made by the appellant's Counsel.**

If the multiplier of 20 years adopted by the Hon. Magistrate was too high.

26. The deceased at the time of his death was 32 years old. It was not said that he was sick or suffering from any infirmity. In this Court's view, were it not for the accident, he would have lived a full life performing the work he was doing upto the age of 60 years or even above the said age as he was in the informal sector. Contrary to the appellant's Counsel's submissions, the Hon. Magistrate in his Judgment did consider the vascitudes of life and by so doing adopted a multiplier of 20 years. In reaching the decision on the multiplier, the Hon. Magistrate exercised his discretion, he did not necessarily have to go by the authorities cited by any of the Advocates which were meant for guidance.

27. In the event that he found the said authorities off the mark, he was at liberty not to be persuaded by them. Although Counsel for the appellant submitted that the authorities he cited on the issue of multiplier were binding on the Hon. Magistrate. They were not as what the Magistrate was obliged to do was to exercise his discretion judiciously as each case depends on its own special circumstances. In settling for a multiplier of 20 years the Hon. Magistrate stated as follows:-

> *"The deceased was aged 32 (thirty two) years when he died. He could have lived to beyond (sixty) years. There is no retirement age in the informal sector. The deceased could have worked for 28 (twenty eight) years or even beyond. However, there are many uncertainties and contingencies of life. He could as well have died or been incapacitated before reaching 60 (sixty) years. Considering the contingencies of life, I adopt a multiplier of 20 (twenty) years. <u>The multiplier of 12 (twelve) years which the defendant proposes in his submissions is too low and unreasonable</u>."* (emphasis added).

28. From the foregoing reasoning, it is clear that the Hon. Magistrate went through the submissions that had been filed in the lower court but was not persuaded to adopt the multiplier of 12 years that was proposed by the appellant's Counsel. The respondent's Counsel in the lower court did not make any proposal on a multiplier to be adopted by the court.

29. The Counsel for the appellant in his submissions to this court maintained that a multiplier of 12 years would have been adequate and in so doing relied on the case of **Bonface Ndega vs Honourable Attorney General** HCCC 4598/92 Nairobi where a multiplier of 12 years was adopted for a 27 year old man, on 23rd March, 2006. The mandatory retirement age in the public sector was changed on 1st April, 2009 from 55 years to 60 years. It therefore follows that as at the time the decision relied on by Counsel for the appellant was made, in the year 2006, the retirement age was 50 years and the Judge who made the decision thereon must have been guided by the said fact.

30. In this case, the decision by the lower court was delivered on 19th December, 2018, it is clear that the deceased died on 8th February, 2015 when the retirement age was 60 years. The Hon. Magistrate properly directed himself on the parameters to consider with regard to the retirement age. The authority cited by Counsel for the appellant with regard to the multiplier he sought to be adopted is therefore not applicable in the circumstances of this case.

31. In the case of **Paul Ouma vs Rosemary Atieno Onyango & Peter Juma Amolo** (suing as the legal representative in the estate of **Joseph Onyango Amolo** (deceased) [2018] eKLR, Judge J.A. Makau affirmed a multiplier of 20 years which had been adopted by the Trial Magistrate for a deceased who was 38 years old. In the case of **Elizabeth Chelagat Tanui & Another vs Arthur Mwangi Kanyua** [2013] eKLR, H.P.G Waweru J adopted a multiplier of 18 years where the deceased was 36 years old. In the case of **Pleasant View school Limited vs Rose Mutheu Kithopi & Another** [2017] eKLR, Judge J. Kamau affirmed a multiplier of 20 years which had been adopted by the Trial Court, for a 36 year old man.

32. In the case of **Nancy Marigu Gabriel (suing as legal representative of the estate of Linus Njeru Marigu (deceased) vs David Kimani** [2015] eKLR, Judge F. Muchemi substituted a multiplier of 15 years that had been adopted by the Trial Court with one of 22 years for a 33 year old man.

33. Having referred to the above authorities in considering if the multiplier of 20 years adopted in this case was reasonable, this Court has no basis to interfere with the discretion exercised by the Hon. Magistrate in adopting a multiplier of 20 years for the deceased who was 32 years old. I uphold the decision of the Hon. Magistrate in that regard.

If the amount awarded for loss of dependency was too high

34. The appellant's submission on the above was that the respondents had failed to prove dependency. Counsel for the appellant urged this court to be persuaded by the decision of **Tom Oluoch Oloo** (suing as the administrator and legal representative of the estate of **George Ochieng Ngoche (deceased) vs African Safari Club**, where Judge P.J. Otieno found that there was no evidence of dependency. The said case is distinguishable from the instant case. In the case referred to above, the deceased was waiting to join college and although it was claimed that he was a shopkeeper and was a benefactor to his parents, the Judge found that there was no pleading to that effect. Further, no evidence of a trade licence or records of business were produced to support the claim.

35. In the present case, the pleading by the respondents was that the deceased was in gainful employment. The 1st respondent testified that he, the deceased's wife and the deceased's child used to depend on him. As a result of the said evidence, it cannot be doubled that the respondents indeed used to be supported by the deceased to some extent

36. The appellant's Counsel brought up the issue of non-production of a birth certificate of the deceased's son and asserted that there was no proof of dependency. Paragraph 8 of the plaint contains a list of the deceased's dependants. Suleiman Charo Katana was listed as a son of the deceased. He is said to have been in Nursery School at the time the deceased died as per the evidence of his grandfather, PW1.

37. Although no birth certificate was produced to show that the deceased was the father of Suleiman Charo Katana, no evidence was called to controvert the said assertion. This court takes judicial notice of the fact that not every child of 4 years of age has a birth certificate as some Kenyan parents do not obtain birth certificates immediately following the birth of their children. This Court therefore finds nothing extraordinary in the said child not having a birth certificate. The burden of proof in this case was on a balance of probabilities and not proof beyond reasonable doubt.

38. The parents of the deceased obtained letters of administration to file suit and there was no evidence called to prove that they were the not the deceased's parents. Further, if the existence of PW1's son had been introduced at the time PW1 was testifying, this court's decision would have been different. I therefore hold that that Suleiman Charo Katana was the deceased's son and his dependent.

39. This court was urged by the appellant's Counsel to set aside the award of loss of dependency for lack of proof. In the case of **Leonard O. Ekisa & Another vs Major K. Birgen** [2005] eKLR, Judge Dulu had the following to state on the issue of proof of dependency:-

> ***"Dependency is a matter of fact. It need not be provided by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances".***

40. This court adopts the reasoning by Judge Dulu in the above case that a parent or child of a deceased in the Kenyan set up does not need to produce evidence of such support as it is commonplace for most of the parents who are earning to support their children up to a certain age.

41. This court notes that as at the time the accident happened, the Government's social security for senior citizens aged 70 years and above was not in place. Even if it had been, the amount is Kshs. 2,000/= per month which is adequate to cater for a few basic items. The Trial Magistrate in this case was therefore correct in holding that documentary evidence was not necessary to prove dependence of deceased's son.

42. Further, if the appellant had any evidence to the contrary on the respondents and the deceased's son not being dependants, it failed to call a witness to adduce the same. The authority of **Central Microfilm Operators Film [1990] Ltd. Vs Teachers Service Commission** [2015] eKLR, which was cited by the appellant's Counsel is applicable. In the said decision Judge Odunga stated thus:-

> ***"The failure by a party to call as a witness any person whom he might reasonably be expected to give evidence favourable to him may prompt the court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination."***

43. If the appellant had any intention of calling witnesses, it closed its case before it did so and thereby to controvert the evidence adduced by the 2nd respondent in support of their case.

44. The Court of Appeal in the case of **George Kirianki Laichena vs Michael Mutwiri**, Civil Appeal No. 162 of 2011 expressed itself thus on the issue of assessment of damages:-

> ***"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. west & Son Ltd vs Shepherd [1964] AC 326 at page 353:-***
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> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. 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.***
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> ***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 however not proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."***

45. In the pleadings, it was claimed that the deceased was earning Kshs. 18,000/= monthly. In his evidence, PW1 stated that the deceased was earning Kshs. 30,000/= per month. The Hon. Magistrate considered the facts before him and resorted to the guidelines on the minimum wages as no documentary evidence of income was produced in evidence. The said Magistrate in the Judgment considered that the appellant had proposed the minimum wage approach and the applicable rate as at the time of the accident on 8th February, 2015 was applied at the rate of Kshs. 10,107.10 which was rounded off to Kshs. 10,107.00 as the multiplicand. This court has no justifiable reason to depart from the said decision of the Hon. Magistrate. The dependency ratio of 2/3 is also reasonable. This court concurs with the submissions of the respondents' Counsel that the award made for loss of dependency was reasonable. It is the finding of this court that the Hon. Magistrate exercised his discretion judiciously in a well-reasoned judgment, which cannot be faulted.

46. In **Butt vs Khan** [1981] 1 KLR, 349, Law J.A. at page 356 stated as follows:-

> ***"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

47. Having analyzed the pleadings, the evidence adduced as well as the authorities relied on, it is my finding that the Hon. Magistrate understood the case that was before him and directed his mind properly to the facts and applied the relevant law accordingly. This court therefore upholds the award of Kshs. 1,617,120.00 made to the respondents for loss of dependency.

If the appellant's submissions were considered by the Trial Court.

48. The analysis this court has made of the lower court proceedings and the Judgment delivered on 19th December, 2018 is illustrative of a Trial Court which considered the submissions and authorities that were cited by Counsel for the parties to the suit. In his Judgment, the Trial Magistrate indicated that he had considered the said submissions. This court has no reason to doubt the said fact. The Trial Court did not have to write a synopsis of all the authorities cited by the Counsel for the parties, which were quite many. It was sufficient for the Hon. Magistrate to peruse the same and conclude if they were applicable to the case or not. That is exactly what he did.

49. It is this court's finding that the appeal herein is without merit. It is hereby dismissed. The costs of the lower court case and this appeal are awarded to the respondents. Interest is also awarded at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MALINDI on this 28th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of

Mr. Matini holding brief for Ms Ngue for the……Appellant

N/A……. Respondent

Mr. Samuel Kabue…… Court Assistant