REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 38 OF 2015

PETER KARANJA MUNGAI.....1ST APPELLANT

CITY HOPPA LTD.....2ND RESPONDENT

KENNETH CHEGE.....3RD APPELLANT

VERSUS

GRACE WANJIKU KUNGU.....1ST RESPONDENT

HANNAH MERIKABUE (Suing as the legal representative of the estate of

Josephat Kiburi Ndungu Aka Ndung Kiburi Mubinga (deceased)...2ND RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's court Kajiado (Hon. Okuche, PM)

dated 24th September, 2015 in CMCC NO. 40 OF 2011)

JUDGMENT

1. This is an appeal from the judgment and decree of **Hon. Okuche (PM),** delivered on 24th September 2015. In that judgment, the trial court entered judgment in favour of the respondent against the appellants on both liability and quantum. The court awarded damages of **Kshs 1,163,000,** made up of loss of dependency of **Kshs. 1, 200,000;** pain and suffering **Kshs. 20,000;** loss of expectation of life **Kshs. 80, 000** and special damages of **Kshs. 23,700.**

2. The respondents had sued the appellants for damages arising from a road traffic accident that occurred on 10th February, 2009 involving motor vehicle registration No. KAV 005Q registered in the 2nd appellant and Synergy Industrial Credit Ltd, the 3rd defendant before the trial court but not a party in this appeal which the deceased was travelling in and motor vehicle registration No. KAB 574J, belonging to the 1st appellant.

3. The appellants were aggrieved by that judgment and decree and lodged a memorandum of appeal dated 12th day of October, 2015 and filed on 14th October, 2015 and raised the following grounds of appeal, namely that;

> ***1. The learned Magistrate erred in law and fact in holding the appellants 100% liable despite the overwhelming evidence by the plaintiff's witnesses in particular PW2 and defence evidence from any liability (sic) as far as the subject matter was concerned.***
>
> ***2. The learned Magistrate erred in law and fact in relying on the evidence of PW1 in assessing damages under loss of dependency that income of the deceased was Kshs. 20,000/- and yet there was no actual proof adduced on the same. No book of records or financial statements that proved how much deceased was earning as income.***
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> ***3. The Learned Magistrate erred in law and fact in failing to use the minimum wage applicable for the year the alleged accident occurred as the law provided where proof of income has not been furnished and proved before court in assessing the damages under loss of dependency.***
>
> ***4. The learned Magistrate erred in law and fact in assessing damages under both the Fatal Accident Act and the Law Reform Act***

contrary to the provisions of Section 2(5) of the Law Reform Act by failing to deduct the double award where the beneficiaries were the same.

5. The learned Magistrate's decision on liability and assessment of quantum of damages was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and occasioned a miscarriage of justice.

4. The appellants prayed that the appeal be allowed, judgment of the trial court set aside and the suit in the lower court dismissed with costs.

Submissions

5. This appeal was disposed of through written submissions and oral highlights. During the hearing, Mr. Kalama, learned counsel for the appellants submitted highlighting their written submissions dated 3rd October, 2019 and filed on 7th October, 2019, that the trial court did not consider the appellants' submissions before it decided the issue on liability and quantum. According to counsel, the 2nd respondent had testified that the 2nd and 3rd appellants were not to blame for the accident.

6. Learned counsel submitted that the respondents produced a police abstract that did not blame anyone and indicated that the matter was under investigation. Counsel relied on a number of decisions to support their appeal and urged the court to allow the appeal. They included ***Kenya Power and Lighting Company Ltd v Nathan Karanja Gachoka & another*** [2016] eKLR; ***Isaac Nichael Okenyae v Lacheka Lubricants Limited & another*** [2017] KLR; ***W.K(Minor suing through next Friend and Mother) L.K v Ghalib Khan & another*** [2011] among others.

7. Miss Wambua, learned counsel for the respondents opposed the appeal and submitted, also highlighting their written submissions dated 25th October, 2019 and filed on 28th October, 2019, that the respondents adduced evidence to prove liability. According to learned counsel, the respondents produced a police sketch map, PEX 9 which showed how the accident occurred and that the appellants' vehicle was adjudged to have been on the wrong because it was overtaking.

8. Counsel further submitted that the respondents had filed a suit against four defendants but the suit against the 4th defendant was withdrawn on 18th April, 2013 by way of an oral application and a ruling was made on 3rd November, 2014, leaving three defendants in the suit. According to counsel, the 1st and 2nd appellants introduced another person, **Kennedy Chege,** the 3rd appellant who was not party in the suit before the trial court.

9. On liability, counsel submitted that they proved liability to the required standard and that the trial court held that it found no blame against motor vehicle KBJ 574J belonging to the 1st appellant. Counsel submitted that the trial court found motor vehicle KAV 005Q owned by the 2nd appellant and Synergy Industrial Credit Ltd wholly liable and, therefore, liability was proved.

10. Regarding loss on dependency, counsel submitted that the issue was also proved. She argued that the deceased used to work as a butcher earning Kshs, 20,000/- per month as shown by PEX 5 which the court accepted as the deceased's monthly earnings. Counsel further argued that there was no double award given that the trial court did not award damages under both the Law Reform Act and the Fatal Accidents Act. Counsel relied on ***Mahenzo Kathengi & another v Magunadu Company Limited,*** CA No. 151 of 2o18 and urged that the appeal be dismissed with costs.

Determination

11. I have considered this appeal; submissions and the authorities relied on. I have also perused the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court to reconsider, reanalyze and reassess the evidence that was adduced before the trial court and come to its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

12. In ***Selle and another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

13. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the same court held that:

"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

14. **Further,** in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR, the Court of Appeal stated;

"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"

15. And in ***Nkube v Nyamiro*** [1983] KLR 403, the Court of Appeal 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."***

16. PW1 Grace Wanjiku Kungu, widow to the deceased, and the legal representative of the deceased's estate, testified that her husband died in a fatal road traffic accident on 10th February, 2009 due to multiple injuries sustained in that accident involving motor vehicle KAV 005Q, owned by the 2nd appellant and Synergy Industrial Credit Ltd. She got information about the accident and when she went to the police station, she found out that her husband was already dead.

17. The witness testified that a lorry registration No. KAB 574 J owned by the 1st appellant was also involved in the accident; that she had 5 children and the 2nd respondent had 7 children all who depended on the deceased. According to the witness, the deceased used to pay for college and other private schools fees for the children; that they used to do business selling maize and meat and that the deceased was 55 years old and in good health. In cross-examination the witness told the court that the deceased was earning Kshs. 20,000/- per month and produced a letter for Keekonyokie Butchers Ltd to confirm this.

18. PW2, No. 68301 PC Zakayo Bundotich based at Ongata Rongai police station performing traffic duties, testified that he visited the scene with the investigating officer, who had since been transferred and made records of the scene. He testified that on 10th February, 2009 at 6.30 p.m. an accident occurred involving motor vehicle Registration No. KAV 005Q, Citi Hoppa bus and a lorry registration No. KAB 574J. According to the witness the deceased was a passenger in M/v KAV 005Q which was from Ongata Rongai towards Magadi while KAB 574J, a lorry, was from the opposite direction.

19. When the bus approached a bend, it encroached on to the lane of the oncoming lorry and hit the lorry's trailer. The bus veered off the road to the right while the lorry went off the road and the cabin crossed to the right side. The bus stopped about 90.3 meters away which showed that it was over speeding. The damage was further evidence that it was at a high speed.

20. According to the witness, the debris at the scene assisted to show the possible point of impact. The deceased body was in the bus and therefore the deceased could not have contributed to the accident. He had his seat belt fastened. It was his evidence that if the deceased had not fastened the seat belt, he would have been thrown out of the bus on impact. He told the court that the driver of the bus was to blame for the accident. They however could not blame the driver of the lorry for the accident.

21. In cross-examination, the witness told court that he arrived at accident scene 15 minutes after the accident; that they found the head rights broken and therefore he could not tell whether they were working prior to the accident. He also told the court that they found debris on the side of the lorry and that the accident occurred at a blind corner. The witness further told the court that they blamed the driver of the bus who was on the wrong side and was driving at high speed. He produced the police abstract and sketch map as PEX 9 and 10 respectively.

22. DW1 No. 84861 PC Racheal Oklol also from Ongata Rongai Police station testified that she had OB No. 9/10/2/2019 relating to a fatal accident along Magadi Road at Kandisi and that the accident involved motor vehicle Nos. KAV 005Q, a Nissan Bus and KAB 574J Isuzu Lorry. According to the witness, motor vehicle KAV 005Q was heading towards Magadi while KAB 574J was heading in the opposite direction. The passengers who were fatally injured were Joseph Kaburi and the driver of motor vehicle KAV 005Q. She further told the court that nobody was charged with the accident and that it was still pending under investigations. According to the witness, both drivers were to blame for the accident.

23. In cross-examination, the witness testified that she never went to the scene and that she was not the investigating officer. She however told the court that the extract of the OB showed that the two vehicles collided. She admitted that PW2 was at the scene of the accident and that there was nothing in the OB to show that the vehicles collided. She however maintained that one vehicle overtook the other. The witness further admitted that she did not know how the accident occurred; that the OB did not say which vehicle was on the wrong; that the OB was not conclusive since it was written after the accident and that does not show what caused the accident. She also admitted that she did not see the sketch plan.

24. After considering the above evidence, and exhibits including the sketch map, the trial court stated on liability:

> ***"The point (of impact) is on the lane of the lorry, which was motor vehicle KAB 574J. The motor vehicles collided head-on. The question to answer therefore, what was motor vehicle registration KAV 005Q doing on the lane of Motor Vehicle registration No. KAB 574J while it was travelling on the opposite direction. It ought to have been on the opposite lane. The conclusion made therefore is simply that the said vehicle registration No. KAV 005Q had encroached to the lane of the said motor vehicle KAB 574J."***

25. The trial court was of the view that, that evidence had been corroborated by PW2 that motor vehicle KAV 005Q left its lane and moved to the lane of motor vehicle KAB 574J. The trial court found as a fact that the driver of motor vehicle KAV 005Q was to blame for the accident.

26. The appellants were not satisfied with this finding and blamed the trial court for holding the driver of Motor vehicle KAV 005Q to blame for the accident and was, therefore, wholly liable. They argued that this finding was against the evidence on record and, in their view; liability should have gone to the other motor vehicle as well. That is, liability should have been apportioned. The respondents did not agree with the appellants' contention and argued that evidence on record placed blame entirely on the driver of motor vehicle KAV 005Q.

27. I have considered the rival arguments and perused the record of the trial court and the evidence placed it. The issues that arise in this

appeal are whether the driver of Motor vehicle KAV 005Q was to blame for the accident; whether the deceased earning were proved and whether the court made double awards under the Law Reforms Act and Fatal Accidents Act.

Liability

28. The trial court found that the driver of motor vehicle KAV 005Q liable for the accident. Liability was decided on the basis of the evidence of PW2 and that of DW1, both police officers. PW2 visited the scene of the accident and was present when the sketch map was drawn regarding the occurrence of the accident. They were the only two police officers at the scene at the time. PW2 told the court what they observed at the scene and based on that, they concluded that motor vehicle KAV 005 Q was on the wrong.

29. On the other hand, DW1 testified according to what she observed from the OB. She could not tell who was to blame for the accident. Apart from what this witness saw in the OB, she did not visit the scene and did not know how the accident occurred. The witness however confirmed that PW2 was at the scene and, therefore, was privy to the sketch map. DW1 further confirmed that she had not seen the sketch map or plan of the accident scene. The appellants did not call any other witness at the trial and therefore their case was wholly based on the evidence of DW1.

30. I have carefully considered the evident on record and analysed it myself. Weighing the evidence of two witnesses, I am satisfied that PW2 was a key witness whose evidence was more believable than that of DW1. Dw1 was not helpful to the trial court and her evidence is not helpful to this court either in determining this appeal. The appellants did not have any other evidence to contradict that of PW2 on how the accident occurred.

31. From my own reevaluation of the evidence on record, I am satisfied that the trial court reached the right conclusion based on the evidence before it. For my part, I agree with the trial court that the driver of motor vehicle KAV 005Q was to blame for the accident based on the evidence of PW2, the police officer who attended the scene of the accident. I see no reason to interfere with the trial court's finding of fact on liability.

Damages

32. Turning to the question of damages, the appellants have argued that the trial court was wrong in making double awards. They contended that the trial court awarded damages under both the Law Reform Act and the Fatal Accidents Act which is not allowed by section 2(5) of the Law Reform Act. The respondents on their part argued that the court did not make double awards and therefore, the appellants' argument is misplaced.

33. The trial court considered the awards payable and appreciated that the suit had been brought under both the Fatal Accidents Act and the Law Reform Act. The court accepted the letter that showed that the deceased was earning Kshs. 20,000/- per month but rejected the assertion that he also made extra earnings of Kshs. 15,000/- per month, holding that there was no evidence to support that assertion. The trial court stated that once computation is done under both Acts, there would have to be an offset, meaning an award under one Act subtracted from the award under the other Act.

34. I have gone through the impugned awards. The trial court made an award on Loss of dependency which is under the Fatal Accidents Act. The deceased was 55 year when he died. The respondents argue that as a butcher, he would have worked up to 80 years. They wanted a multiplier of 25 years. They also submitted that the deceased earned Kshs 20,000 monthly. The trial court accepted that the appellant earned Kshs 20,000 per month and using a multiplier of 15 years rejecting the respondents' argument that the deceased would have worked up to 80 years.

35. The court took it that the decease would have worked for 70 and applied a multiplier of 15 which worked to **20,000 x 12 x 15 x13** and came to **Kshs. 1,200,000.** The trial court awarded this amount under the head of **loss of dependency**. Under **pain and suffering**, the trial court awarded **Kshs, 20,000.** The court then awarded **Kshs, 80,000** for loss of expectation of life. The total award for general damages was **Kshs. 1,300,000.**

Whether earning was proved

36. The appellants have questioned the trial court's decision to accept Kshs 20,000 as the deceased's monthly earning arguing that there was no evidence to support this fact. According to the appellants, the trial court should have applied the minimum wage rate in determining the deceased's earning. The respondents on their part relied on the letter from Keekonyokie Butchers Company Ltd which stated that showed that the deceased worked as a casual earning Kshs. 20,000.

37. It is trite law that where one does not tender evidence of employment to prove monthly earnings, the Regulation on Wages General Order should be the court's point of reference. The respondents stated that the deceased was a butcher. The letter produced stated that the deceased was working as a casual labourer in a team of 5 people and were earning Kshs. 100, 000 which translated to Kshs. 20,000 each per month. The trial court accepted that letter as evidence of the deceased's monthly earning.

38. The appellants did not question this document and did not cross-examine PW1 on it. There is no Kenyan who does not work. The difference is on the work he/she does. In the case of the deceased, the letter confirms that he was working and earning. There are people who work in butcheries and may not have formal letters to conform their employment and earning.

39. The appellants did not expect the deceased to have a pay sleep given the nature of the work he was doing. I am unable to fault the trial court for accepting Kshs.20,000 as the deceased's monthly earnings. I therefore find that the deceased's earning Kshs. 20, 000, was proved under the circumstances.

Whether the court made double wards

40. The appellants argued that the trial court awarded damages under both the Law Reform Act and the Fatal Accidents Act, which is not allowed under section 2(5) of the Law Reform Act. I have considered the awards made by the trial court. It is clear that the trial court awarded damages for **loss of dependency** which is under the Fatal Accidents Act and **loss of expectation of life** which falls under the Law Reform Act. The court did not deduct the latter award from the award for loss of dependency. That amounted to double awards.

41. P.S Atryah on **Accident Compensation and the Law, 2nd Edition** at P.88 opines that:

> ***"[T]he law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from an award under the Fatal Accident's Act on the legal justification pretext that the inheritance is a 'gain' from the death which must be set off against the loss."***

42. **In** **Kemfro v C A M Lubra and Olive Lubia (1982-1988) KAR 727** the court held that:

> ***"[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damage awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former act."***

43. **Section 2(5) of the Law Reform Act provides**:

> ***"The right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conformed on dependants by the Fatal Accident's Act or the carriage by Air Act 1932 of the United Kingdom"***

44. From the authorities and the law, awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estates. These awards are therefore capped at a minimum so that an estate does not benefit twice from the same death namely; under the **Fatal Accident Act** and the **Law Reform Act**.

45. Taking into account the above legal position, it was prudent for the trial court to deduct the amount Kshs. 80,000 awarded under the **Law Reform Act** because the respondents who are entitled to the deceased's estate are the same persons for whose benefit the award under the **Fatal Accident Act** was made brought. I agree with the appellants that the award for loss of expectation to life is deductible from the award for loss of dependency.

46. The trial court further used a multiplier of 15 years in calculating loss of dependency. The deceased was 55 years at the time of his death and was a casual work. There was no evidence that he could have worked as a casual worker up to seventy years. Taking into account the vagaries and unpredictable nature of life, a multiplier of 15 years was on the higher side. I find a multiplier of 5 years would be reasonable in this case. The deceased was not a professional who would carry on his profession beyond the normal retirement age of public servants. There was also no evidence that he would continue to be engaged as a casual worker up to seventy years.

47. Having come to the conclusions I have above, they affect the overall award made by the trial court. In that regard, applying the monthly income of Kshs. 20,000 and the multiplier of 5 years, the result will be as follows:

a) Loss of dependency:

20,000x12x5x1/3=400,000

b) Loss of expectation of life:

Kshs 80,000

c) Pain and suffering:

Kshs.20,000

Total award Kshs. 500,000

48. From the total award the amount under loss of expectation of life is deductible. That leaves the balance of **Kshs. 420,000. Add special damages of Kshs. 23,700** which brings general damages and special damages to **Kshs. 443,700**

49. In the premise, the appeal on liability is dismissed. While appeal against quantum partially succeeds. The final orders are therefore as follows;

a. The Judgment of the trial court on liability is hereby upheld.

b. The judgment on awards is hereby set aside and in place therefor judgment is entered against the 2nd and 3rd defendants in the

lower court for Kshs. 443,700.

c. The respondents shall also have cost and interest before lower court.

d. Since the appeal has partially succeeded, each party shall bear own costs on the appeal.

Dated, signed and delivered at Kajiado this 13th day of March 2020.

E.C. MWITA

JUDGE