REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 38 OF 2018

BASH HAULIERS LIMITED.....APPELLANT

VERSUS

JUDITH NABWIRE WAMALWA

BENJAMIN EGESA ANDIEGA (suing as the administrators

of the estate of PATRICK BWIRE MUKUDI)...RESPONDENTS

J U D G M E N T

Facts and historical background

1. This is an appeal from the judgement delivered on 14th February 2018 in **CMCC No. 825 of 2015**. The record of appeal shows that the respondents filed CMCC No. 825 of 2015 basing his cause of action on the tort negligence out of a road traffic accident which occurred along mainland- Port Reitz road on or about 6th March 2014. That accident occasioned the death of the deceased herein (the late Patrick Bwire Mukudi). The late Mr. Mukudi was the husband of the 1st respondent and the uncle of the 2nd respondent. In their capacity as personal representatives of the estate of the deceased, the respondents instituted CMCC No. 825 of 2015 seeking, among others, damages under the Law Reform Act and the Fatal Accidents Act.

2. According to the plaint, the deceased was lawfully pedal cycling beside the road when upon reaching near Jolly bar area, the appellant's authorised driver negligently drove motor vehicle registration number KBB 822H/ ZC 3979 and caused it to violently knock down the deceased. The deceased succumbed to his ensuing injuries.

3. The record indicates that the appellant's driver, one Simon Nyale Nyawa was arrested and charged with the offence of causing death by dangerous driving. He pleaded guilty to the offence and was fined Kshs. 100,000 by the Chief Magistrates Court at Mombasa on 16th May 2014.

4. At trial, two witnesses testified in support of the respondents' case. The 2nd respondent testified as PW1 and Corporal Abdulahi Dida testified as PW2. PW1 told the court that the deceased had a wife and four children and produced certificates of birth, a child birth card and a letter from the chief, PortReitz location, showing the dependants. He added that the deceased operated a consumer goods kiosk in Magongo which earned him between Kshs. 1,200- 1,500 per day but did not produce documentation in support of the same. PW 2 testified on how the accident occurred.

5. I note that the appellant on the other hand did not avail any witness despite being given time to do so, and so its case was marked as closed without calling any witnesses in accordance with the provisions of Order 17 Rule 4 of the Civil Procedure Rules.

6. After the close of the appellant's case as explained above, the parties herein entered a consent judgment on liability for the accident in the ratio of 25%: 75% in favour of the respondents. As such, the trial court remained with the question of determination of the quantum of damages to be awarded. The parties filed their written submissions in support of their respective cases. In its the judgement dated 14th February 2018, the trial magistrate awarded damages as follows:

Under the Law Reform Act

a. Pain and suffering…….**Kshs. 20,000.00**

b. Loss of expectation of life……..**Kshs. 100,000.00**

Under the Fatal Accidents Act

c. Loss of dependence……..**Kshs. 1,774, 284.00**

d. Sum Total……..……**Kshs. 1,894,284.00**

e. Less 25%.....**Kshs. 473,571.00**

f. Total Payable…….….**Kshs. 1, 420,713.00**

7. The trial magistrate also awarded costs of the suit to the respondents together with interest at court rates from the date of judgement till payment in full. The appellant is aggrieved by the judgement dated 14th February 2018 hence the instant appeal.

8. The gist of the appellant's case as can be gleaned from the memorandum of appeal dated 14th March 2018 and its submissions is two-pronged. Firstly, that the learned magistrate erred in law and in fact by awarding damages under both the Law Reform Act (hereinafter 'LRA') and the Fatal Accidents Act (hereinafter 'FAA'). It is the appellant's view that the learned magistrate ought to have subtracted the award under the LRA from the award under the FAA. Secondly, that the amount of Kshs. 1, 774, 284.00 awarded under the head of dependency is inordinately high and over exaggerated.

The Parties' submissions on the appeal

9. On 9th October 2018, I gave the parties directions on filing written submissions in support of their respective cases. The Appellant filed its written submissions on 13th December 2018. The court file does not contain the respondents' submissions and Mr Mutubia did not refer to any filed submissions when he addressed the court. The dvocates for the parties attended court on 13th March 2019 and highlighted their submissions. Mr Waweru submitted for the appellant while Mr. Mutubia submitted for the respondents.

10. Mr Waweru began by faulting the trial court for designating the deceased as a shop assistant earning Kshs. 14,785.70 monthly as provided by the Regulation of Wages (General) (Amendment) Order 2015. He submitted that the only material witness herein, PW1, did not tender any documentary evidence to show that the deceased was a small-scale trader operating a kiosk in Magongo. In the absence of evidence of a kiosk, he submitted that the Court ought to have employed the minimum wage of a general labourer which according to him was Kshs. 10,954.70.

11. Mr. Waweru then submitted that the learned magistrate ought to have subtracted the award under the LRA from the award under the FAA. He conceded that this appeal would not have been preferred had the trial magistrate made a global award of damages. That the trial magistrate erred by employing a wage not supported by evidence. Mr. Waweru urged the Court to allow the appeal, interfere with the trial magistrate's decision and make a reasonable assessment on quantum.

12. Mr. Mutubia's oral submissions were brief. He submitted that where there is no evidence as to earnings, the court awards a global sum as damages, and that this Court has that discretion. Regarding the appellant's reservations with the trial court's calculation of loss of dependency, Mr. Mutubia simply submitted that "taking into consideration is not the same as arithmetic deduction."

Issues Analysis and Determination

13. From the record availed and submissions of the parties, it is abundantly clear that the appellant is contesting only the quantum of damages awarded by the trial court. More specifically, the appellant firstly opposes the wage that the trial court used to calculate the award for loss of dependency. Secondly, it is the appellant's contention that the award under the LRA ought to have been subtracted from the award under the FAA. Based on the foregoing, I frame the issue for determination to be whether the trial court committed any error of principle as to warrant correction by this court interfering with an award of damages. In answering that question, I will consider the following components:

i. Whether the learned trial magistrate applied the right wage when calculating the award for loss of dependency?

ii. Whether the learned trial magistrate ought to have deducted the award under the Law Reform Act from the award under the Fatal Accidents Act?

14. In its written submissions at Paragraph 1, part c the appellant conceded that for pains and suffering and loss of expectation of life are not challenged. The submissions read:

> **"Your lordship, the awards of Kshs. 20,000 and Kshs. 100,000 made in respect of the heads of pain and suffering and loss of expectation of life, respectively, are in order and not excessive".**

Did the trial magistrate apply the right wage when calculating loss of dependency?

15. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

16. The duty of the court in a first appeal such as this one was stated in ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** as follows:

> **This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -**
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> **"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".**

17. It is the appellant's argument that the trial magistrate did not apply the right wage when calculating the award for loss of dependency. For the benefit of the analysis herein, I reproduce the trial magistrate's reasoning and finding in verbatim as below:

> **"PW1 stated that the deceased was a seller of consumer goods at Magongo where he operated a kiosk. He added that the deceased earned between Kshs. 1,200- Kshs. 1,500 per day. No document in support was produced. In cases where no evidence of earnings is produced, it is trite that Courts will award damages either based on the applicable basic minimum wage or award a lump sum amount as compensation. In this case, the deceased was operating as a kiosk attendant which I presume to be a shop assistant earning Kshs. 14,785.70 monthly as provided for by the Regulation of Wages (General) (Amendment) Order 2015."**

18. I have looked at the record of appeal and it is indeed true that the respondents did not produce any evidence that the deceased operated a kiosk. In fact, the 2nd respondent (PW 1) in cross-examination admitted that he did not have any evidence that the deceased was engaged in any business. It appears therefore that the trial magistrate relied on the 2nd respondent's oral testimony to conclude that the deceased was a shop assistant earning Kshs. 14,785.70. The question then begs: was the testimony of the 2nd respondent enough to lead the trial magistrate to conclude that the deceased was a shop assistant earning Kshs. 14,785.70?

19. It is true that the production of documents is not the only way to prove earnings or indeed any other fact. However it is important to appreciate that documents and records not only go a long way to assist in the assessment of earnings but also make the claimant's case watertight. And these documents and/or records do not have to be complicated and out of reach of the ordinary trader in Magongo. It is my view that these documents can include simple, routine and easily accessible documents such as Mpesa and/ or bank statements and receipts for 'chama' or saving society contributions.

20. In the instant case for example, I dare say that even one single business permit from the county government would be more than conclusive evidence that the deceased indeed operated a kiosk. The respondents could even have called one of the deceased's colleagues, chama or merry go round members or business acquaintances in Magongo to come and testify that the respondent indeed ran a kiosk. But they did not do so. As such, the evidence of the 2nd respondent was not to this court sufficient. Neither was it supported by any documentary evidence. In the circumstances, it is my inevitable finding that the trial court erred by relying solely on the evidence of the 2 nd respondent to conclude that the deceased was a shop assistant earning Kshs. 14,785.70.

21. I have found that the 2nd respondent's oral testimony was not conclusive of the deceased's earnings. What is the law in cases such as the present one where there is no evidence as to earnings? In ***Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR*** Nambuye J (as she then was) stated that:-

> "**As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion, that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books**."

22. The same reasoning was adopted in ***Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR*** where Ngaah J while quoting with approval the case of ***Gammel versus Wilson (1981) 1 ALL ER 578*** stated as follows:

> **"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."**

23. I associate myself with the decisions quoted above and now pose the question if the award of Kshs. 1, 774, 284.00 for loss of dependency is so inordinately low or high to have been a wholly erroneous estimate of the damages?

24. The general rule is that an appellate court should be slow to interfere with the discretion of the trial court in the award of damages. The appellate court will interfere only where it is shown that the trial court acted on wrong principles of the law, that is to say, it took into account

an irrelevant factor or failed to take into account a relevant factor, or where the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. In making such determination I am reminded of the law an award is not interfered with merely because I would have awarded a different sum had I sat. it is not open for an appellate court to substitute its own discretion for that of the trial court. I also give regard to the law that the multiplier formula, even though helpful, is not the only formula. A trial court is entitled to make a global award when the multiplicand is not accurate or just unsuitable.

25. The respondents produced uncontroverted evidence to show that the deceased was married with 4 children and was 45 years when he met his death. Taking into account all the circumstances of this case, I find the sum of Kshs. 1, 774, 284.00 for loss of dependency to be not so high as to amount to an erroneous estimate of the damages. In the circumstances and evidence availed I decline to interfere with the discretion of the trial court in awarding damages.

Whether the award under the Law Reform Act ought to have been deducted from the award under the

Fatal Accidents Act?

26. The appellant argued that the award under the Law Reform Act ought to have been deducted from the award under the Fatal Accidents Act. To support his argument, he referred the Court to the High Court decision of **JOSEPH WACHIRA MAINA & another v MOHAMMED HASSAN [2006] eKLR.** The respondent on the other hand argued that the award under the Law Reform Act is to be "taken into account" and not "arithmetically deducted."

27. I have considered the parties submissions. I have also read and considered past judicial pronouncements on the issue. From the onset, it is clear that there are two schools of thought on the same issue. Some Judges have deducted the damages under the Law Reform Act while others have held that damages under the Law Reform Act should not be deducted but instead should be "taken into account." Even though I have in the past expressed myself , while following the decisions of the court of appeal that the expression ' *take into* account' used in the statute does not demand mathematical subtraction[1], this judgement provides another opportunity for me to express my views on the same debate.

28. In the current Kenyan jurisprudence, the awards for pain and suffering and loss of expectation of life are due and awarded under the Law Reform Act while Loss of dependence is awarded under the Fatal Accidents Act. My understanding of both Acts is that a claim under the Law Reform Act is for the benefit of the estate of the deceased while a claim under the Fatal Accidents Act is brought on behalf of the dependants of the deceased. In my view, there is a clear distinction between the estate of the deceased and the dependants of the deceased. As such, an award under the Law Reform Act is made to the estate of the deceased while an award under the Fatal Accidents Act is made to the dependants of the deceased. Since the awards are made to different entities at law, I do not see why one award should be deducted from the other. The argument in this long paragraph is my first reason for opposing deduction.

29. Secondly, it is important to acknowledge that awards under both Acts are made for different purposes. For example, damages for pain and suffering are awarded to compensate for the tribulations that the deceased suffered from the time of injury to the point of death. Loss of dependency on the other hand will compensate the dependants for the income of the deceased that they have now forgone as a result of the accident. My point is that all these damages awarded under the respective acts serve different purposes, hence it cannot be said that the estate of the deceased is benefitting twice. For this second reason, I do not see why damages under the LRA should be deducted from damages under the FAA.

30. Thirdly, Section 2(5) of the Law Reform Act provides that "***The rights 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 conferred on the dependants of deceased persons by the Fatal Accidents Act."*** This provision of law contains two pertinent implications that build on my argument. The first implication is that the Law Reform Act is for "the benefit of the estates of deceased persons" while the Fatal Accidents Act confers rights on the dependants of deceased persons. Secondly, Section 2(5) is saying that the benefits under the Law Reform Act are in addition to the rights under the Fatal Accidents Act. For this third reason, I do not see why damages under the LRA should be deducted from damages under the FAA.

31. Based on the foregoing arguments, it is evident that I have joined the faction of Judges that do not deduct damages under the LRA, albeit for different reasons which I have already explained above. The result of the foregoing analysis is that I find that the trial court did not err by failing to deduct the damages under the Law Reform Act from the damages under the Fatal Accidents Act.

32. Based on the foregoing, it is irresistible that the appeal cannot succeed. It fails and I dismiss it with costs. It has failed because I have found that the trial court did not err in assessment of damages by the award made and by failing to deduct the damages under the Law Reform Act from the damages under the Fatal Accidents Act.

Dated, **signed** and **delivered** at **Mombasa** this **29th** day of **May, 2020**.

P J O OTIENO

JUDGE

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[1] Hussein Ahmed Hanshi another v Peter Gichuru Njoroge & 2 others [2016] eKLR