REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL CASE NO. 22 OF 2016

JOEL KIOGORA M'IRINGO.....PLAINTIFF

VERSUS

GABRIEL MEMIA AND NICETA WANJA NJOKA

(Suing as legal representative of ESTHER WAMBETI MEMIA.....RESPONDENTS

JUDGMENT

1. The respondent Gabriel Memia and Niceta Wanja Njoka (suing as the Legal representative of Esther Wambeti Memia) had filed a case against the appellant in the Resident Magistrate's Court at Wang'uru Civil Case No. 28/2015 seeking damages for injuries sustained as a result of a road traffic accident which had occurred on 7/7/2013 along Thika – Sagana road. Judgment on liability was entered by consent and was agreed on in the ration of 85:15% in favour of the respondent. The matter then proceeded for the assessment of damages.

The trial Magistrate proceeded to award the damages as follows:-

a. **Loss of dependency;**

The trial magistrate held that the deceased was aged 28 years and at the time, the retirement age 60 years therefore multiplier of 32 years would suffice. He applied wage of Kshs. 9,000/= and multiplicand of 2/3 since she had 2 dependants.

9,000x2/3x12x32=Kshs. 2,304,000/=.

b. **Loss of expectation of life:** Kshs. 100,000/=.

c. **Pain and suffering:** Kshs. 20,000/= Deceased died immediately at the scene.

Total of Kshs. 2,424,000/= less loss of expectation of life = Kshs. 2,324,000/= less 15% liability = Kshs. 1,975,400/=.

d. **Special damages:** Kshs. 49,500/=.

Kshs. 1,975,400/= plus special damages came to total of =Kshs. 2,024,900/=.

2. The appellant was dissatisfied with Judgment of the trial Magistrate and filed this appeal which raises the following grounds:-

a. The learned Magistrate erred in fact and in law in finding that the respondent was entitled to general damages that were too high and without considering the provision of Cap 405 THE INSURANCE (MOTOR VEHICLE THIRD PARTY RISKS) (AMENDMENT) ACT, which gives a guideline on how compensation ought to be computed.

b. The learned Magistrate erred in law and fact in making a finding and adopting a multiplier of 32 years whereas the Respondent had submitted a multiplier of 30 years.

c. The learned Magistrate erred in law and in fact in misdirecting himself in disregarding an Act of Parliament as above quoted and applying judicial precedent which rank lower than an Act in the hierarchy of the Laws of Kenya as per Section 3 of the Judicature Act, Cap 8 of the Laws of Kenya.

d. The Learned Magistrate erred in law and in fact in failing to consider conventional awards for general damages in similar cases.

3. The appellant has urged this court to allow the appeal, set aside the Judgment of the trial Magistrate and assess the damages afresh. The parties agreed to canvass the appeal by way of written submissions.

4. The brief background of the case is that the suit arose out of a road traffic accident which occurred on 7/7/2013 along Thika Sagana road. The deceased in this case Esther Wambui Memia was involved in the said accident while on board the Motor vehicle registration number KAW 301E when it collided with motor vehicle registration number KBA 845F. The deceased sustained fatal injuries. The respondents filed the suit as the legal representatives of the estate of the deceased claiming damages under both the Law Reform Act and Fatal Accident Act.

5. The trial Magistrate delivered Judgment on 21/3/16 and awarded the plaintiffs Kshs 2,424,900/- less the agreed 15% contribution. It is against this award that the appellant has filed this appeal.

6. Submissions for the appellant were filed by Kairu & McCourt Advocates. They have relied on the submissions which they made before the trial magistrate which are at page 32-35 of the record of Appeal. They have coalesced the four grounds into one namely Quantum.

7. It is submitted that the general principle applicable is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where the trial court in assessing damages took into account an irrelevant factor or left out a relevant factor, or that the award was too high or too low as to amount to an erroneous estimate or is not based on any evidence. The appellant relies on **Kemfro Africa Ltd t/a Meru Express Services (1976) & Another –v- Lubia & Another (No. 2) 1985 eKLR** where the court held:-

> ***"…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."***

8. It is submitted that the award was too high and represents an erroneous assessment that warrants interference and review by this court. That the award was made without due regard to judicial authorities comparable to the injuries and the submissions. It is further submitted that the award was made without proof of loss of dependency.

9. With regard to the award under Law Reform act, the appellant has a change of heart and has submitted that the awards were fair and shall not contest them. These are – Kshs 20,000/- for pain and suffering and Kshs 100,000/- for loss of expectation of life.

10. With that the contention is on the award under Fatal Accidents Act. It is submitted that there was no proof of loss of dependency. It is submitted that the deceased was aged 28 years at the time of her death and the youngest dependent aged Twelve (12) years would not have had a dependency period of 32 years. He has referred the court to **Chania Shuttle –v- Mary Mumbi (2017) eKLR** where it was stated that dependency is a matter of fact and must be proved ---- He has also relied on the decision of the Court of Appeal in **ChuniBhai J. Patel & Another –v- PF Hayes & Others(1957) E. A 748 at 749** on the manner of assessment of damages under the Fatal Accidents Act. It was stated:-

> ***"The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant,the net earnings power of the deceased i.e his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalised by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of live and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum(which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependant."*** **Emphasis ours.**

He also refers the court to **Benedeta Wanjiku Kimani –v- Changwon Cheboi & Another (2013) eKLR.** Where the case of **Beatrice Wangui Thairu –v- Hon. Ezekiel Bargetuny** was quoted with approval for the proposition that –

> ***"there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is aa question of fact to be established in each case."***

11. The appellant submits that since the youngest dependant was 12 years old he would have been dependent on the deceased for Seven to Fourteen years. He proposes that a dependency ratio of Twelve years is adequate. The court was also referred to **FMM & Another –v- Joseph Njuguna Kuria & Another(2016)eKLR** which quoted with approval **Ringera J. in Leonard O. Ekisa & Another –v- Major K. Burgen(2005) eKLR** where it was stated:-

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum then be discounted to allow the legitimate considerations such as the fact that the***

award is being received in a lump sum and would wisely invested yield returns of an income nature."

12. It is submitted that the trial Magistrate erred by adopting 32 years being balance of working years deceased had left instead of the number of years the deceased would have supported the respondents. He submits that since there was no prove that the deceased who was a casual labourer was earning Kshs 400/- per day the minimum wage prevailing at the time which was Kshs 6,000/- ought to have been adopted as the multiplicand. He has also urged the court to in the alternative award a lump sum and referred the Court to **Oyugi Judithi & Another –v- Fredrick Odhiambo Ongong & 3 Others (2014) eKLR.** He urges the court to re-examine and re-evaluate the award and come up with an award being the 1st appellate court. Court was referred to **Oluoch Eric Gogo –vs- Universal Corporation Ltd (2015) eKLR** on the duty of the 1st appellate court. He urges the court to use a dependency period of Twelve years or in the alternative award a global sum of Kshs 700,000/- to 1,000,000/-.

13. For the respondent, submissions were filed by Ms. Khan and Associates. He submits that the trial courts' discretion is unfettered but ought to be exercised judiciously. That the court can reach its own conclusion on a matter upon taking into account relevant matters. That the court considered that the deceased was 28 years at the time of his death and normal retirement age of public servants is 60 years. He submits that the court considered the conventional awards. That the widower dependency cannot be restricted.

On proof of earnings the respondent relies on **Jacob Ayiga Maruja and Another –v- Simeon Obayo 2005 eKLR C. A** where it was stated-

"if there is sufficient material on record on which the trial court can make a finding on earning, it is entitled to draw its own conclusion. We do not subscribe to a view that the only way of proving earnings is by production of documents and proof of profession is production of certificates. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways."

He submits that reliance on **Regulation of Wages (General)(Amendment) Order** was not wrong. He prays that the appeal be dismissed.

14. I have considered the appeal and the submissions. The appellant in his submissions stated that he is contented with the awards under Law Reform Act which the trial court awarded.

15. The issue for determination is whether the award of Kshs 2,304,000.00/- under the **Fatal Accidents Act** was excessive and whether it warrants this court to interfere with it.

16. The principles to be considered by an appellate court is determining whether to interfere with the discretion of the trial court have been well settled. This is because the trial court has discretion in determining the quantum of the award of damages. Therefore the court will not interfere with the exercise of that discretion unless the court took into consideration irrelevant factors or failed to take into account relevant facts, or the award is so low or so high as to be wholly erroneous estimate of damages.

In the celebrated case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia(1982-88) KLR 727** the Court of held:

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 wither 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 be a wholly erroneous estimate of the damage.

Refer to **C. A in Arrow Car Ltd –v- Elijah Shamalah Bimomo(2004) eKLR.**

17. The factors to be considered in awarding the damages are the dependency period, the age of the deceased, age of dependants. Dependency is a matter of fact which must be proved with evidence. There must be evidence to prove that those claiming as dependents under the **Fatal Accident Act** were dependent on the deceased prior to his death. Those claiming must proof that they were dependent on the deceased and have suffered loss.

18. In this case the appellant has raised the issue that the earnings of the deceased were not proved. The respondents are a husband and a child. When the 1st respondent testified as PW-1- in this case before the trial court at Page 42 of the record, he told the court that, ***"My wife was a casual labourer, she would earn roughly Kshs 400/-. I have nothing to prove for that."***

19. The respondent did not prove what the deceased used to earn. It is however expected that as a casual labourer she used to earn some money. So failure to produce such prove does not itself mean there is no evidence that she was a casual labourer which the court must rely on to make a finding on such earnings. Refer to Court of Appeal in **Jacob Ayiga Maruja & Another –v- Simeon Obayo** cited above. The court can rely on minimum wage guidelines and regulations or give a global sum. In this case the parties have learned on assessment based on minimum wages. The only dispute is on the multiplicand. The appellant has proposed Kshs 6,000/- while the respondent proposed Kshs 9,000/-. My view is that the relevant wage regulation Order is the one prevailing at the time the deceased died. From the evidence tendered in July 2013, the applicable Order is the '**Wages (General Amendment) Order 2013'.** It states that – Citation 1 of the Wages (General Amendment) Order 2013. The wages for general labourer in all Municipalities, Mavoko, Ruiru & Limuru Town is Kshs 9,024,15 while in all other areas it is stated to be Kshs 5,218.00/-. Upon perusing the death certificate, the deceased hailed from Gatundu. The Legal Representatives of the deceased have stated that the deceased was buried at her home in Gatundu. This is at Page 27 of the record of Appeal. The trial Magistrate applied Kshs 9,000/- which was proposed by the respondent. She accepted the proposal which was not based on Wages (General Amendment) Order. Where the trial Magistrate relied on the Regulation of Wages Order, she had no choice but to apply the recommended wage. The award by the trial Magistrate was not based on the wage stated on the order and furthermore, she applied the

wage recommended for Municipality when Gatundu where the deceased hailed from was not a Municipality. She ought to have applied the wage for all other places. The award was therefore erroneous as the trial Magistrate failed to consider or ignored relevant factor. The wage applicable was Kshs 5,218/- and not Kshs 9,000/-. As a result of failing to consider the relevant factor, the trial Magistrate arrived at an award which in my view was excessive and erroneous. In **Arrow Car Ltd –v- Elijah Shamalah Bimomo & 2 Others(2004) eKLR C.A** the court stated:-

> ***"The principle to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial Judge are that it must be satisfied that either the trial Judge in assessing damages took into account an irrelevant factor, or left out of account a relevant one or short of this the amount is so inordinately low or high that it must be a wholly erroneous estimate of damages."***

20. The court will therefore interfere with the award of damages. The applicable wage was Kshs 5,218/=. However the appellant has urged the court to apply Kshs 6,000/-. I will therefore apply 6,000/-.

21. On multiplier, the deceased was aged 28 years old and the trial magistrate considered a retirement age of 60 years. I do not agree that there was no proof of dependency. The trial Magistrate held, and correctly so that the husband was a dependant of the deceased who was his wife for the purpose of the Fatal Accidents Act. This was in line with the holding by Justice Makhandia in the case of **Dorcas Kwamboka – v- George M. Ondieki & Another HCCC No.79/02** where he stated that actions brought under the **Fatal Accidents Act** would be for the benefit of the wife, husband, parent, child as provided under the **Act, Section 4 of the Act** refers.

22. I am however in agreement with the counsel for the respondent that for minor dependants it is a relevant factor to consider, that is, they will come of age and be able to fend for themselves. This was the holding in **FMM & Another –v- Joseph Njuguna Kuria & Another(2016) eKLR** where it was stated that apart from considering the balance of earning life, the age of dependant, the life expected, length of dependency and vistitudes of life are other factors to be considered in determining the right multiplier. There are vagaries of life which should be taken into consideration as life is never predictable and that is why when these are taken into account, they determine the life expectancy of the citizens in Kenya. The court has therefore to bear in mind not only the expectation of earning life but also the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents – refer to **Ringera J in Beatrice Wangui Thairu –v- Hon. Ezekiel Bargetuny & Another** quoted above: **Charles Karuru Ndungu V Winfred Wanjiru Gitau (2018) eKLR.**

The High Court held:

> **Regarding the multiplier, it is not disputed that the deceased was 28 years old at the time of her demise. In arriving at the multiplier of 32 years, the learned trial magistrate considered the deceased's age, the fact that she was in good health prior to the accident and the retirement age of 60 years… …...**
>
> **I however agree with the appellant's counsels' submission that the trial learned trial ought to have taken into account the exigencies of life when deciding on the multiplier because if truth be told, life is never predictable. This reality is an important factor which the trial Court ought to have considered in settling for the multiplier to use in the respondent's case but it is a fact which apparently escaped the learned trial magistrate's attention.**
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> **On my part, considering the vicissitudes of life, I find that a multiplier of 30 years would be reasonable in the circumstances of this case. I therefore set aside the multiplier of 32 years adopted by the trial Court and substitute it with a multiplier of 30 years.**

23. In this case the deceased was aged 28 years. The minor dependent was aged Twelve years, the trial Magistrate did not consider the vagaries and vistitudes of life. These were relevant factors which ought to have been considered when determining a reasonable multiplier. I will therefore interfere with the discretion of the trial Magistrate. These matters were argued before the trial Magistrate and did not elicit any finding by the trial Magistrate. Taking all these factors into consideration, I find that the court can adopt a multiplier or adopt a global figure which would be reasonable in the circumstances. The trial Magistrate rightly exercised her discretion by applying a multiplier.

24. On the dependency ration the trial Magistrate stated that the appellant had conceded to dependency ratio of 2/3, see page 57 of the record. In deed in the submissions by the appellants at Page 32 & 34 of the record they proposed a dependency ratio of two thirds. The trial Magistrate was therefore right in adopting a dependency ratio of 2/3 and I would have no reason to interfere with the finding.

25. In conclusion, the trial Magistrate failed to take into account relevant factor that is, the applicable wage and arrived at an award that was inordinately high. This is a reason for setting aside the award. I order that the award of the trial Magistrate on general damages based on a multiplicand of Kshs 9,000/- be set aside and substituted with Kshs 6,000/-.

26. On the issue of multiplier, the trial Magistrate considered the retirement age for employees which she stated to be Sixty (60) years. It was an exercise of discretion which I find was based on a relevant factor. However, considering the vistitudes and the vagaries of life I find that a multiplier of 30 years would be reasonable.

27. I therefore allow the appeal and set aside the Judgment of the trial Magistrate on award of damages under the Fatal Accidents Act. I substitute the award and enter Judgment as follows:-

Loss of dependency – 6000x12x30x2/3 = 1,440.000/-.

Less 15% = 216,000 =1,224,000/-

Less Loss of expectation of life – 100,000/- = 1,124,000/=.

Pain and suffering - Kshs 20,000/-

Special damages 49,500/- less 15% = 7,425/-, 42,075

Total - Kshs 1,186,075/-.

28. It has come to right from the proceedings that one of the dependants was a minor. The court ought to have apportioned the damages to determine the amount to be awarded to each of the dependants. This is as provided under ***Section 4(1) of the Fatal Accidents Act*** which requires the court to divide the award amongst those persons awarded in such shares as the court may direct.

29. No apportionment was done by the trial Magistrate. I am aware that the trial Magistrate is no longer at the station. I direct that the matter shall be mentioned before the Deputy Registrar to apportion the award to the respective beneficiaries.

30. The award shall attract interest from the date of the Judgment of the lower court.

Each party shall bear its own costs.

Dated at Kerugoya this 29th Day of May 2020.

L. W. GITARI

JUDGE