REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 34 OF 2016

BIDII MUIMI.....1ST APPELLANT

BONIFACE KIVUVA.....2ND APPELLANT

VERSUS

PATRICIA MUNANIE MUTEMI.....1ST RESPONDENT

CHARLES KYALO.....2ND RESPONDENT

(Being an Appeal from the Judgment in **Kyuso Principal Magistrate's Court**

Civil Suit No. 33 of 2015 by **Hon. B. M. Kimtai (SRM)** on **16/08/16**)

J U D G M E N T

1. The Respondents herein dependants of **Oliver Ngomango** (Deceased) filed a suit against the Appellants claiming special and general damages arising out of a Road Traffic Accident that occurred on the **25th** day of **December, 2015** involving motor-vehicle Registration Number **KBQ 749D** driven/owned by the Appellants and the Deceased who was riding a motorcycle.

2. By consent of both parties, Judgment on liability was entered at the ratio of **85:15** in favour of the Respondents. The case was canvassed by way of written submissions and Judgment was entered as follows:

Special Damages	**Kshs. 55,000/=**
Pain and Suffering	**Kshs. 100,000/=**
Lost years (20,000/= x 2/3 x 12 x 7)	**Kshs. 1,120,000/=**
Less 15% Contribution	**Kshs. 191,250/=**
	Kshs. 1,083,750/=

Plus costs and interest.

3. Aggrieved, the Appellants appealed on grounds as follows:

- That the learned trial Magistrate erred in law and fact by failing to properly scrutinize and evaluate the pleadings and submissions tendered by the Appellant and correctly relate the same to the case law cited therein and thereby failed to arrive at a fair and reasonable assessment on the issue of compensation to the respondents.
- That the learned trial Magistrate erred in law and fact by adopting **Kshs. 20,000/=** as the multiplicand without any evidence of the Deceased person's earnings and or proof of his employment or engagement at all material time and that the multiplicand was excessive under the circumstances.
- That the trial Magistrate erred in law and fact by adopting a multiplicand of **Kshs. 20,000/=** instead of the minimum wage applicable at the material time as the same was not specifically pleaded and proved and especially when there was no proof

that indeed the Deceased was earning a salary or gainfully at the material time.

- That the learned trial Magistrate erred in law and fact in awarding **Kshs. 100,000/=** for pain and suffering which is manifestly excessive and by failing to take into consideration the fact that the said award would be double compensation if the same is not deducted from the total amount awarded.
- That the learned trial Magistrate erred in law and fact in awarding **Kshs. 1,275,000/=** as general damages which is manifestly excessive and inordinately high.
- That the learned trial Magistrate erred both in law and fact by failing to take into consideration the deceased's age and therefore under the claim for loss of dependency/lost years, the adopted multiplier of 7 years was excessive under the circumstances.
- That the trial Magistrate erred in law and fact in failing to properly take into account the proper legal principles and awards in cases of similar nature regarding quantum of damages while considering the Judgment.
- That the learned trial Magistrate erred both in law and fact in awarding special damages at **Kshs. 55,000/=** as excessive in the circumstances.
- That the learned Magistrate erred both in law and fact in failing to take into account the written submissions and authorities of the Defendant/Appellant's advocates whilst making the award.
- That the learned Magistrate erred in law and fact by making an award on general damages that was inordinately high in favour of the Plaintiff/Respondent amounting to a miscarriage of justice.

4. The Appeal was canvassed by way of written submissions.

5. This being a first Appeal, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility **(See Selle vs. Associated Motor Boat Company Limited (1968) EA 123).**

6. It was urged by the Appellants that the award made in special damages was erroneous. They cited the case of **Maritim & Another vs. Anjere (1990-1994) EA 312** where the Court stated that:

> **"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the Plaint must be disallowed."**

7. The Respondent specifically pleaded the sum of **Kshs. 55,000/=** being special damages. Following a consent recorded by both parties, documents in support of the case were filed alongside submissions. The stated documents were not interrogated by way of cross examination. Therefore, the three receipts that were filed for **Kshs. 55,000/=** were sufficient proof of special damages claimed.

8. On the general damages award, the trial Court has been faulted for adopting a multiplicand of **Kshs. 20,000/=** instead of the minimum wage applicable at the material time. In the case of **Kemfro Africa LTD t/a Meru Express Service and Another vs. Lubia & Another (No. 2) (1985) eKLR** it was held that:

> **"… The principles to be observed by an appellate court in deciding whether it is justified in distributing 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 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 wholly erroneous estimate of the damage...''**

9. It behooves a Court to ensure that it does not adopt wrong principles while assessing and awarding damages. With that in mind an Appellate Court must be cautious in considering an award made by a Lower Court. In the case of **Beatrice Wangui Thairu vs. Hon. Ezekiel Bargetuny & Another Nairobi HCC No. 1638 of 1988 (UR) Ringera, J.** (as he then was) stated that:

> **"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 purchase. 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 the dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

10. The Respondents adduced in evidence a payslip which was proof of employment of the Deceased by **H. Young & Co. (EA) LTD Company** as at **January, 2000.** He earned a gross salary of **Kshs. 20,726/=** and a net salary of **Kshs. 11,830/=.** However, there was no proof that fifteen years later, at the time of the accident, as appreciated by the trial Court, he was in gainful employment.

11. Per the Legal Notice No. **116** of the **26th** day of **June, 2015** which was applicable at the time of the accident, the basic minimum consolidated wage for an unskilled labourer (employee) was **Kshs. 5,436.90cts** while a skilled foreman earned **Kshs. 9,808/=.** This is a sum that should have been considered by the trial Court.

12. On the multiplier, a Death Certificate was adduced in evidence and both parties were in agreement that the Deceased was 51 years old at the point of his demise. The Respondent was in agreement that the retirement age in this Country is 60 years but argued that the multiplier of

7 years was reasonable.

13. In the case of **Kiruga vs. Kiruga & Another (1988) KLR 348** the Court of Appeal stated that:

> **"… where it happens that a decision may seem equally open either way, the Appellate Court approach is that the decision of the trial Judge who has enjoyed the advantage not available to the Appellate Court becomes of paramount importance and ought not to be disturbed."**

14. The Respondents' case was considered following evidence that was available to their satisfaction. Therefore, I have absolutely no reason to disturb the finding of the trial Court.

15. On the head of pain and suffering under the Law Reform Act, the Appellants' grievance is that the assessment and subsequent award of **Kshs. 100,000/=** by the trial Court was based on wrong principles. In determining the award under the head, the Court ought to be reasonable. In the case of **Rahima Tayab & Others vs. Anna Mary Kinanu – Civil Appeal No. 29 of 1982 (1983) KLR 114, KAR 90 Potter, JA** had this to say:

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

16. In the case of **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (**Suing as the legal Administrator of the Estate of the late **Mwangi) 2019 eKLR** it was observed that:

> **"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."**

17. This matter was canvassed by way of written submissions. Documents filed that were admitted as evidence showed that the Deceased died on the same date that he sustained the fatal injury. The post mortem report filed indicated the time of death was **9.00 a.m. Patricia Munanie Mutemi,** the 1st Respondent filed a statement. She went to the scene after the accident. None of the witnesses having been cross examined there was no indication as to how long the Deceased suffered in pain prior to passing on. The trial Court considered evidence placed before it and used its discretion to award a sum that was within conventional awards that was indeed reasonable.

18. This Court has also been called upon to find that damages for pain and suffering should be taken into account while computing damages for loss of dependency. The Court of Appeal considered the issue in the case of **Hellen Waruguru Waweru** (Suing as the Legal Representative of **Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited (2015) eKLR** where it held thus:

> **"19. Finally, on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law."**

19. There was therefore, no obligation on the part of the Court to deduct the sum that was awarded under the Law Reform Act from the award that was made under the Fatal Accidents Act.

20. The Deceased had dependants who relied on him as demonstrated and the ratio of dependency applied is not in dispute.

21. From the upshot, the Appeal succeeds partially. Therefore, I set aside the Judgment of the Lower Court which I substitute with the following orders:

1. Judgment be and is hereby entered for the Respondent (Plaintiff) as follows:

i. Special damages **Kshs. 55,000/=**

ii. Pain and suffering **Kshs. 100,000/=**

iii. Loss of dependency **Kshs. 9,800 x 2/3 x 12 x 7 = Kshs. 549,248/=**

Total **Kshs. 704,248/=**

Less 15% contribution **Kshs. 105,637.2**

Award **Kshs. 598,610.8**

Plus costs and interest at the Lower Court.

At the Appellate stage, each party to bear their own costs.

22. It is so ordered.

Dated, Signed and **Delivered** electronically through **Skype** this **26th** day of **May, 2020.**

L. N. MUTENDE

JUDGE