REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 3 OF 2016

JACKSON CHEGE KAMAU.....1ST APPELLANT

NJOROGE MACHARIA.....2ND APPELLANT

VERSUS

JAMES THEURI WACHIRA (Suing as the administrator

Of the estate of John Mwaniki Theuri (deceased).....RESPONDENT

***(Appeal against judgment and decree in Nyeri Chief Magistrate's Court Civil Case No. 236 of 2011 (Hon. J. Onyiego) on 2 December 2015*)**

JUDGMENT

On 4 April 2010 the respondent's son was involved in fatal road traffic accident along Othaya-Nyeri road; the accident involved the appellant's motor car registration number KAJ 355 Q (Toyota Corolla) and motorcycle registration number KMCG 624 L on which the respondent's son was riding pillion. The latter succumbed to injuries he sustained in the accident.

The respondent sued the appellants for negligence alleging that the 2nd appellant who was the 1st appellant's employee or agent and, who was driving the car at the material time, drove or managed it so negligently that he caused it to collide with the motorcycle. He therefore sued for special and general damages.

Although the appellants denied the claim and filed a statement of defence in that regard, the record shows that the parties recorded a consent on liability according to which the appellants acceded to a larger share of responsibility; they admitted they were 80% liable for the accident.

With this consent, the suit was set down for assessment of damages only.

Prior to the hearing, parties entered into a further consent to the effect that the respondent's documents contained in the list filed in court on 8 August 2011 be admitted as exhibits without necessarily having to call witnesses to produce them.

At the hearing, only the respondent testified. It was his evidence that the deceased was his son and at the time of his death he was aged 24. As to whether the deceased was engaged in any gainful employment, he testified that he was in the motorcycle transport business, popularly referred to as 'boda boda' which earned him a daily income of Kshs. 400/=. He was single and had no children but used to support his family members. According to the respondent, the deceased used to give the family Kshs. 9000.00 per month. He testified further that he spent a sum of Kshs. 20,000/= in the wake of the death of his son, apparently as funeral expenses.

In his judgement, the learned magistrate awarded the respondent the sum of Kshs. 1,715,925/= subject, of course, to contribution. Out of this sum, Kshs. 20,000/= was awarded under the head of special damages; Kshs. 100,00c0/= for loss of expectation of life; Kshs. 1,560,000/= for loss of dependency; and, Kshs. 35,925/= as special damages.

The respondent was also awarded the costs of the suit and interest calculated at court rates from the date of the judgement till payment in full.

The appellants were dissatisfied with this decision and so they filed the present appeal; in their memorandum of appeal, they raised the following grounds:

1. That the learned magistrate erred both in law and in fact when he applied a multiplier of ½ instead of 1/3 in assessment of loss of dependency considering that the deceased was unmarried.

2. The learned magistrate erred both in law and in fact when he held that the deceased used to earn the sum of Kshs. 10, 000/= per month yet there was no proof of such earnings; in the absence of the necessary proof, he ought to have adopted the minimum wage applicable instead.

3. The learned magistrate erred both in law and in fact in failing to consider and appreciate the appellant's written submissions and the authorities on which they were anchored.

4. The learned magistrate erred both in law and in fact in failing to follow precedents in awarding general damages.

5. The learning magistrate erred both in law and in fact in considering irrelevant matters in arriving at his decision in favour of the respondent and against the appellants.

The appellants prayed that the appeal be allowed with costs.

In his submissions, the learned counsel for the appellants narrowed his arguments on two issues; the multiplicand and the dependency ratio that the learned magistrate adopted.

As far as the multiplicand is concerned, counsel urged that the multiplicand of Kshs. 10, 000/= which the trial court adopted as the deceased's earnings per month had no factual basis because the respondent himself admitted that he had no idea of his son's monthly earnings. Counsel argued that the adoption of the multiplicand was, in any event, contrary to section 2 of the Insurance (Motor vehicle Third Party Risks) Amendment Act, 2013 which defines earnings as revenue gained from labour or services and includes the income or money received from employment, business for occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007, or the determination of income whichever is higher.

In the absence of proof of earnings, so counsel urged, the trial court was bound to adopt the prevailing minimum wage in the year 2010 which was set at Kshs. 6,673/= per month or, in the alternative, make a global award. For this submission, counsel relied on this court's decision in **Chania Shuttle versus Mary Mumbi (2017) eKLR.** He also impugned the dependency ratio of ½ because there was no evidence to support such a ratio, urging that dependency is a question of fact and that being the case, it ought to have been proved. The deceased, according to him, was unmarried and did not have any children and there was no evidence that he supported his parents or his family in any way. In these circumstances, the only reasonable dependency was ¼ which, in the learned counsel's opinion, was a fair and reasonable ratio of the deceased's earnings that he could probably spend on his father or family.

On his part, the learned counsel for the respondent urged that the deceased's monthly earnings had been proved and that the dependency had been proved as well. He cited **Mombasa High Court Civil Case No. 110 of 1999, Damaris Wanthi Musyoka versus Hussein Dairy Ltd** where this Court applied the sum of Kshs. 12,000/=as the multiplicand in the absence of proof of earnings. In any event, so he urged, parties were in agreement that the deceased earned Kshs.400/= per day, which translated to Kshs. 10, 000/= per month.

Counsel also relied on the **Manuka High Court Civil Appeal No. 2 of 2015, George Nsenga & Another versus Daniel Nyaruai Wachira** where a minor of four and a half years old was awarded Kshs. 800, 000/= as lost years and therefore an award of Kshs. 1,715,925/= for an adult of 24 years old, so he urged, would be reasonable.

On the question of dependency, counsel relied on this Court's decision in **Nairobi Civil Appeal No. 563 of 2015 Stanley Muiru Njuguna versus A N** where the Court noted that dependency ratio is lower where the deceased is unmarried; in arriving at this decision, the Court had relied on **Mary Kerubo Manuka versus Newton Mucheke Mburu & 3 Others (2006) eKLR** where a dependency ratio of ½ was applied for unmarried lady who died at the age of 26. Again in **Douglas Kinyua Wambui versus Elizabeth Njeri Obuong (2015) eKLR** a ratio of ½ was applied where the deceased was an unmarried man aged 30.

In short the respondent supported the learned magistrate's decision.

The general principle on assessment of damages at this stage is that while such assessment is a function of the discretion of the trial court, the appellate court will be called upon to interfere with it if, in the exercise of its discretion, the trial court either took into account an irrelevant factor or left out a relevant factor or that the award it made was too high or too low as to amount to an erroneous estimate, or, that the assessment is based on no evidence, in any event. The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** said of the discretion of the trial court in assessing damages in the following terms: -

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

In his judgement, the learned magistrate proceeded on the understanding that it was common ground between the parties that the deceased earned the sum of Kshs. 400/= per week which, according to what may have been his own calculation, translated into Kshs. 10, 000/= per month. As far as dependency is concerned, he held that the deceased had no children or wife and therefore his responsibility towards his parents was minimal. Accordingly, he held that the deceased would have used half of his salary to support his parents and siblings. It is upon this understanding that he adopted a dependency ratio of 1:2 or1/2.

As for the multiplier, the learned magistrate opined that the deceased would have worked for another 26 years and so he adopted a multiplier of 26.

Taking all these factors into consideration, he arrived at the sum of Kshs. 1,560,000/= for loss of dependency.

When I consider the record, I am persuaded that the learned magistrate either misdirected himself on the facts or misapprehended them on this vital question of the deceased's earnings; he proceeded on the presumption that parties were in agreement that the deceased earned Kshs. 400/= per day or as the learned magistrate himself calculated, Kshs. 10,000/= per month. On the contrary, the deceased's earnings were contested and nowhere was this clearer than in the respondent's own testimony. In answer to questions put to him during cross examination, he stated as follows:

> ***"My son used to earn Kshs. 400/= per day. He used to send us Kshs.9000/= per month. I do not know how much he used to make per month."***

If there was any agreement on the deceased's earnings, there would have been no reason for the respondent to be cross-examined on the same issue; he was cross-examined because the question of his son's earnings was a contested issue and for that reason he was put to strict proof thereof. And, clearly, his answers to questions put to him during cross-examination would suggest that he was not certain of how much his son earned.

It is also worth noting that where parties were in agreement on any issue, a consent on what they agreed upon was clearly entered on record; therefore, if they had agreed on the deceased's earnings, nothing would have stopped them from recording a consent to that effect.

Loss of dependency which, as noted, is the appellants' primary concern, is the only head of damages awarded on a claim based on the Fatal Accidents Act cap. 32; it is usually awarded for the benefit of the deceased's dependants. Its main components are primarily the deceased earnings, which ordinarily constitute the multiplicand; a reasonable estimate of years that the deceased would have probably worked otherwise called the multiplier and the percentage of his earnings he would spend on his family or dependants which is also called the dependency ratio.

The manner of assessment of damages under the Fatal Accidents **Act** was succinctly put in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where Ringera J (as he then was) stated as follows: -

> "***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. 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 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."***

It has been noted that the learned magistrate in the case against the appellants adopted the multiplier approach to assess damages under loss of dependency in the erroneous understanding that it was common ground between the parties that the deceased earned Kshs. 400/= per day or Kshs. 10,000/= per month. I have demonstrated that there was no such agreement nor was there any evidence for such a factual conclusion. In short, there was no basis for a multiplicand and, without a proven multiplicand, questions of how much the deceased would have spent on his family or loss of earnings would not arise.

But lack of proof of earnings does not always mean that the deceased never earned any income or that he was incapable of earning such an income that, for all intents and purposes, would form a sound basis for assessment of damages under the head of loss of dependency. The Court of Appeal reiterated this position in **Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 of 2002 [2005] eKLR** where it observed that: -

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. 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. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

Thus, where a person is engaged in some income generating activity but, for one reason or the other, his income or salary cannot be determined with any measure of certainty, it may be pegged on the government wage guidelines issued from time to time for purposes of assessment of damages for loss of dependency or, in the alternative, the court may award a global sum.

For this proposition, I would rely on Justice Ringera's reasoning in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was quoted with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** where he expressed the following view: -

> "***The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

The same principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., 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 court's 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**."*

I would take cue from these decisions and conclude that, in the absence of any agreement on the deceased's earnings or proof of such earnings, the multiplier approach which the learned magistrate adopted was wholly inappropriate; a lump sum or a global award would have been more acceptable in the circumstances; accordingly, doing the best I can, I would award the dependants a global sum of **Kshs. 1,000,000/=.** This, in my humble view, is a reasonable and moderate award under the head of loss of dependency.

The learned magistrate's judgment will be varied accordingly; for avoidance of doubt, the learned magistrate's judgment is set aside and instead substituted with the order that judgment be entered for the plaintiff against the defendants as follows:

a. Pain and suffering Kshs. 20,000.00

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

c. Loss of Dependency Kshs. 1,000,000.00

d. Special damages Kshs. 35,925.00

The total award is subject to 20% contribution; the appellants will have costs of the appeal but the respondent shall have costs in the lower. The costs shall attract interest at court rates from the dates of the respective judgments. It is so ordered.

Signed, dated and delivered in open court this 22nd day of May 2020.

Ngaah Jairus

JUDGE