REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 60 OF 2019

(CORAM: F. GIKONYO J.)

MOSES KOOME MITHIKA.....1ST APPELLANT

MICHEAL MUGO MWENJE.....2ND APPELLANT

-versus-

DOREEN GATWIRI AND SAMUEL MWONGERA M' RUKUNGA

(Suing as the legal representative and Administrator of the Estate of

PHINEAS MURITHI (deceased).....RESPONDENT

(A**n appeal from the judgment of Hon. P.M. Wechuli (SRM) delivered on 14/5/2019**

in TIGANIA CMCC NO. 43 OF 2017)

JUDGMENT

1. The Respondent herein sued the appellants in the trial court for judgment jointly and severally for **General Damages for pain and suffering, special damages as pleaded in the paint, cost and interest in the suit.**

2. The respondent averred that at all material times to the suit the 2nd appellant was the registered owner of motor vehicle Registration Number KCD 179A ISUZU LORRY, which was driven by the 1st Appellant as his agent and/or servant. That on or about 22/1/2017 the deceased was lawfully walking along Meru-Isiolo Road when at KANDERE AREA the 1st appellant so negligently managed and/or drove the motor vehicle that it veered off the road and down the deceased thereby fatally injuring the deceased.

3. The appellants, in a joint statement of defence filed on 5th June 2018 denied the particulars in the plaint in *toto*. They blamed the deceased of wilfully exposing himself to the injury/damage by running across the road without ensuring that there were no oncoming vehicles. They took the view that he failed to adhere to the elementary road safety rules and regulations. They also denied that the deceased was aged 20yrs at the time of his demise, was earning Kshs. 30,000/= or had dependants.

4. The respondent filed a reply to the defence denying the averments made in the defence and further maintaining that the doctrine of *contributory negligence* is not available to the defendants as they were the sole authors of the unfortunate accident. That they had full knowledge of the particulars of special and general damages as pleaded as well as *locus standi* to bring about the proceedings.

5. The trial magistrate found the appellant **100 % liable**. He also found as follows on **quantum;** on pain and suffering the deceased died on the spot and accordingly awarded Kshs. 10,000/=; on loss of expectation of life, he considered the youthful age of the deceased (20yrs) and awarded Kshs. 100,000/=. On loss of dependency it was his determination that a minimum wage shall suffice and a multiplier of 35 years was appropriate, the total therefore was calculated thus, (9,400/=x 12x 35 x2/3=2,632,000/=).

6. Being aggrieved by the aforesaid determination the appellants filed a memorandum of appeal on 14th June 2019 citing six grounds of appeal enumerated as follows;

a. That the learned Magistrate erred in law and in fact in finding the appellant wholly liable for the road traffic accident whereas there was insufficient evidence on this aspect.

b. That the learned trial magistrate erred in law and in fact in awarding Kshs. 2,632,000/= under loss of dependency which was an erroneous and therefore arrived at an inordinately excessive award which was not supported by the evidence on record and the law.

c. That he learned trial magistrate erred in law and in fact by adopting a multiplicand of Kshs. 9,400/= as the minimum wage which was erroneous and excessive without any proper basis in law.

d. That the learned trial magistrate erred in law and in fact in adopting a multiplier of 35 years where the deceased was 20 years old and failing to consider the various vicissitudes and uncertainties of life and the current life expectancy rates in the country.

e. That he trial magistrate erred in law and in fact by failing to consider the award under the law Reform Act while making the award under the fatal accidents Act and therefore ended up at an excessive award that double benefitted the estate of the deceased.

f. That the learned magistrate erred in law and in fact by failing to consider the submissions made by the appellant before him and the authorities cited and further failed to apply the principles of ratio decidendi and stare decisis.

Submissions

7. On 5/12/2019 this court directed the parties to canvass the appeal through written submissions. Both parties filed their written submissions. The appellant submitted that the respondents' witnesses contradicted themselves as to whether there is a designated footpath along the road. The accident was also not clearly elaborated by their witnesses. It was their further submissions that should this court find that the appellants were liable liability ought to be apportioned at the ratio of 50%: 50%. On this, they relied of the cited cases of **Statpack Industries versus James Mbithi Munyao [2005] eklr, Amalgated Saw Mills Ltd vs Stephen Muturinguru HCCA No. 75 of 2005**.

8. On quantum it was their submission that the award made was high and extravagant. On loss of expectation of life they submitted that the trial magistrate failed to consider the appellants cited decision of **James Gakinya Karienye & Another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) vrs Perminus Kariuki Githinji (2015) eKLR**. They proposed a sum of Kshs. 40,000/=. They argued that as the deceased died instantly, the award on Pain and Suffering ought not to have been awarded. They cited the case of **Put Saravejo Gen. Eng Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (Suing as the legal Representative of the Estate of Sylvester Muhia Gucha (deceased) & 2 Others [2014] eklr**. On Loss of dependency they urged that this court should award a global sum as opposed to using a multiplicand. According to them, the Respondent equally failed to prove that the deceased had children at all by way of birth certificates hence was not entitled to the award. It was also their submissions that the **Regulation of Wages (Agricultural industry) (Amendment) Order 2015** stipulated the monthly pay of an unskilled employee at Kshs. 5,436.90/=. That if the court was to use a multiplier approach a dependency ratio of 1/3 was appropriate. They proposed an award of Kshs. 128,738/=.

9. The Respondent submitted that the death certificate proved the age of the Respondent at the time of death. That the Respondents evidence and that of their witnesses was not controverted in any way. That there was no element of causation since the accident occurred outside the road on the extreme right and outside the white line on the edge of the road. That Pw1 Doreen Gatwiri produced a letter from the chief confirming that the deceased had three children hence the 2/3 ratio was proper and sufficient. That on loss of dependency the **Regulation of Wages (Agricultural Industry Amendment Order)** gives a herdsman minimum wage at Kshs 7,409/= and in using the multiplier of 35 years the trial magistrate considered the retirement ages in Kenya which is at 60 years.

Analysis and Determination

10. This is a first appeal. It is the duty of a first appellate court to re-evaluate the evidence and draw its own conclusions – **See Selter –Vs-Associated Motor Boat Co. Limited 1968 E.A. 123**.

11. **Pw1 Doreen Gatwiri** testified that she was married to the deceased for 5 years prior to his death. That on 22/1/2017 there was an accident involving the deceased. That prior to the death of the deceased he was a farmer, with 15 animals, and used to sell milk. That they had three children with the deceased. The third child was however not hers.

12. She produced the following documents in support of her testimony **i.e Police Abstract-MFI, demand notice Pex2, Grant Pex3, KRA Records Pexh 4, post mortem report Pexh5, death certificate Pexh 6.**

13. In cross examination it was her testimony that he did not have anything to prove her marriage to the deceased nor birth certificates for the minors.

14. **Pw2 Paul M' Igweta** testified that he was with the deceased on the material date of the accident. That the deceased was beside the road on the left side. The deceased didn't go into the road. The vehicle knocked him on the side. The deceased was off the road. And outside the white lane. That the driver did not hoot. The vehicle went ahead. Turn boy saw the bay. They reversed and crushed the deceased. Then they left.

15. **Pw3 Corporal Ali Golale** testified that he arrived at the scene but the vehicle was not there. The body of the deceased was at the edge on the extreme right as one faces Isiolo. That the body was outside the road. The point of impact was possibly outside the road. He blamed the

driver of the motor vehicle. That the owner of the motor vehicle was charged with failing to keep record vide **TR 33/17** and fined kshs. 5,000/=. That there was an inquiry because the driver disappeared and resurfaced later. That according to the police abstract the driver was to be charged with causing death through dangerous driving. That there was no established pedestrian path and no sign of any cows.

16. **Pw4 Geoffrey Karithi** testified that he was with the deceased at the time of his demise. That there was a pedestrian path. That the vehicle was at a high speed and knocked the deceased from behind. The driver did not hoot. The turn boy peeped, the vehicle reversed as the deceased screamed. It then crushed him to death. He stated that the cows were off the road.

17. The appellant did not call any witnesses.

18. I have considered the evidence on record and the submissions of the parties. Both **liability and quantum** are in issue**.**

Of liability

19. I have considered the evidence presented by the Respondent in the trial court. Pw2 and Pw4 were eye witnesses. Their evidence was consistent that the deceased was herding animals near the road but never entered the road; and that the driver of the motor vehicle in question reversed and crushed the deceased outside the road. Their evidence was corroborated by the testimony of Pw3. Pw3 produced the police abstract and according to the police report, the driver of the vehicle was to blame and was to be charged with causing death by dangerous driving but he disappeared after the accident. He stated that the point of impact was off the road. The owner of the motor vehicle was also blamed for not keeping record as required. These pieces of evidence prove on a balance of probabilities that the driver herein was wholly to blame for the accident. There is absolutely no aspect of contributory negligence on the part of the deceased. Accordingly, I do find that the Respondent proved its case in respect to liability. Appeal on liability therefore fails.

Of quantum

20. The appellants argued on several points on quantum. I will tackle first the argument by the appellants that there was no proof of dependency. Dependency is a matter of fact. It must be proved by evidence.

21. In **Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR the court held that;**

> **"The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same…"**

22. What evidence was offered in this case? Pw1's testified that she was the wife of the deceased and that they had sired two children with the deceased. She also stated that the deceased also had a third child born out of wedlock. She produced a letter from the chief (Pexh7) to support her claims. The letter from the chief dated 13/3/2018 states that the deceased had sired three children; **Melvin Mwereria, Brian Kaume and Frank Kobia.** It also stated that the deceased was married to Pw1 and left behind his father; **Francis M. Rukunga M' Marimba and mother Rebeca Kauma.** The statement of the Respondent which was adopted as her evidence in chief places the age of the minor at 5yrs, 3yrs and 2yrs respectively.

23. It has been established in law that marriage or the fact of being ones' child may be proved through other acceptable evidence other than certificates. See **Joyce Medza Mangale & another v Eden Transporters and Logistics Limited & another [2020] eKLR.** Accordingly, lack of certificate of marriage or certificate of birth does not necessarily deprive a person the identity or right of a dependant. In this case, the letter by the chief and the evidence of Pw1 was not controverted and is sufficient proof that PW1 was the wife of the deceased. Similarly, she proved that her two children and another born out of wedlock were children of the deceased. These individuals are entitled to make a claim under loss of dependency and more specifically under **Section 4(1) of the Fatal Accidents Act** which states that

> **"Every action brought under the act shall be for the benefit of the wife, husband, parents and children of the deceased whose death was so caused."**

24. I therefore reject the arguments by the appellants that the respondent did not prove dependency.

25. Was the award excessive or did the trial magistrate adopt wrong principle in assessing damages?

26. An appellate court will not interfere with an award of damages unless the award is so inordinately high or low as to represent an erroneous estimate of damages. Or, if the trial court took into consideration an irrelevant material or failed to consider a relevant matter. See **Butt v Khan [1982-88] KAR 5.**

27. The Appellant seems to be saying that the trial court adopted a multiplier approach where it was not feasible. They therefore urged this court to adopt a global award as opposed to using multiplier approach. The argument throws me back to what Ringera J (as he then was) stated in the case of **Kwanzia Vs Ngalali Mutua & another** that:

> **"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 facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as 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."

28. The trial court agreed with the Respondents Submissions and adopted a minimum wage of Kshs, 9,400/=. There is however no clear evidence how the trial court arrived at the aforesaid minimum sum. The evidence on record was to the effect that the deceased was a herdsman. This is attested to by the evidence of Pw1 who stated that the deceased had 15 animals at the time of his demise. No evidence was produced as to the income the deceased used to generate during his lifetime. In the absence of some credible evidence thereof, it was speculative to attempt to use a multiplier. This was an error in principle which warrants interference with trial court's discretion.

29. The foregoing notwithstanding, the **Regulation of Wages (Agricultural Industry) (Amendment) Order**, **2017** is about the pay of a Stockman, herdsman, watchman and was at 7,409.00/= per month. These regulations will only be used in a multiplier where there is evidence to support its application. Even if these regulations were a proper guide in this case, the appropriate figure to have been used by the trial magistrate would therefore have been Kshs. 7,409.00/=.

30. In the circumstances of the case, use of a multiplier was too speculative. A global award is most appropriate. I therefore set aside the award on dependency by the trial court in so far as it was based on a multiplier. I will award a global sum.

31. In awarding the global sum, these facts are relevant: The deceased was only aged 20 years at the time of his death. He had a wife, three young children and parents to take care of. He had prospects of providing support to his family for up to the age of 60 years. Therefore, deprivation of dependency for such young family and elderly parents would attract a figure of Kshs. 1,000,000. I therefore award Kshs. 1,000,000 for loss of dependency.

32. As for pain and suffering and loss of expectation of life, the deceased herein died on the spot and the trial magistrate awarded Kshs. 10,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life. In the case of **Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. splendidly captured the spirit of and the law on the issue and stated that:

> "[**5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."**

33. In **Mercy Muriuki & Another –Vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** the Court 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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death**
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> See also; **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR**

34. I am properly grounded and guided in law. In the circumstances of the death, I do not find the awards made by the trial magistrate on pain and suffering, and loss of expectation of life to be unreasonable. Nothing is out of sync with the broad dimensions provided in law. I reject arguments by the appellants on the contrary.

35. The upshot is that this appeal succeeds only on loss of dependency. Accordingly, I enter judgment as follows;

Liability 100%

Pain and Suffering.....Kshs 10,000/=

Loss of expectation of life.....Kshs. 100,000/=

Loss of Dependency…….Kshs. 1,000,000/=

Total.....Kshs. 1,110,000/=

Costs and interest of the suit in the lower court.

36. Given the result of the appeal, each party shall bear their own costs of the appeal. It is so ordered.

Dated, signed and delivered at Meru this 30th day of June 2020

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F. GIKONYO

JUDGE

Representation: -

1. **Mithega & Kariuki Advocates for the Appellant,**

2. J.O. Ondieki & Co. Advocates for the Respondent.