REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 130 OF 2016

PONDEROSA LOGISTICS LIMITED.....APPELLANT

VERSUS

WESLEY CHEPTOO ARAP CHELAGAT AND

ALEX CHEPTOO (Suing as the representative in

the estate of MARK TOO (Deceased).....RESPONDENTS

(Being and appeal from the judgment and decree of the Honourable Wendy K. Micheni

Magistrate, delivered on 27th September, 2016 in Molo Chief Magistrate's Civil Case Number 191 of 2014)

J U D G M E N T

On 11th May 2014 an accident involving a motor vehicle Registration number KBL 284 Q/ 2D 3982 and KBA 890 B along Eldoret Nakuru Road. A young man by the name Mike Too was among those who died. He was (twenty-two) 22 years old fourth year student of Economics and Mathematics and would have completed college in August that year.

According to the plaint he applied to be an accountant and his parents and brother, the plaintiff/respondent herein would have enjoyed his support. The Plaint dated 17th July, 2014 sought Judgment against the defendants jointly and severally;

a) Damages under Fatal Accident Act (Cap. 32 of the Laws of Kenya) for the benefit of the Estate of deceased, Damages under Law Reform Act (Cap. 20 of the Laws of Kenya) and special damages.

b) Costs of this suit.

c) Interest on (a) and (b) above at court rates.

After a full trial, the trial court in the Judgment delivered on 27th September 2016 found that the first defendant as liable 100% for the accident and awarded damages in the following terms;

Liability	- 100%- 1st Defendant
Pain and Suffering	- Kshs. 20,000/=
Loss of expectation of life	- Kshs. 150,000/=
Loss of dependency	- Kshs. 4,000,000/=
Special damages	- Kshs. 26,000/=
TOTAL	**- KSHS. 4,196,000/=**

In arriving at the award of loss of dependency the trial court applied the multiplicand of Kshs. of 50,000/= and multiplier of 20 years at 1/3.

The first defendant was aggrieved and filed this appeal on the following grounds;

> *1. THAT learned trial Magistrate erred in law and fact by assessing damages awardable to the Respondent at the sum of Kshs. 4,196,000/- which assessment is inordinately high considering the injuries sustained by the Respondent.*
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> *2. THAT the learned trial Magistrate erred in law and fact by failing to apply the doctrine of stare decisis when assessing the damages awarded to the Respondents.*
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> *3. THAT the learned trial Magistrate erred in law and fact by misappropriating the nature of injuries sustained by the Respondent and thereby arrived at an award that it is inordinately excessive.*
>
> *4. THAT the learned trial Magistrate erred in law and fact in failing to consider the relevant authorities and submissions by the Appellant.*
>
> *5. THAT the judgment of the learned trial Magistrate is against the law and weight of the evidence on record.*

The counsel agreed to dispose of the record of the appeal by way of written submissions.

I have considered the evidence on record, the rival submissions and the authorities cited by each side.

It is evident from the appellant's submissions that the finding on liability is not contested.

The only issue for determination as presented by the appellant is by way of damages, the appellant contends that the trial court departed from well set precedents and awarded an amount of damages that was inordinately high.

The appellant concedes that an award of damages is as outcome of the discretion of the court. There are now well settled principles on the award of damages, and on the basis upon which a court on appeal can interfere with that award.

An appellate court will be slow to interfere with the exercise of discretion of the trial court unless there are justifiable legal reasons, these are the words of the judge in **Tridev Construction vs Charles Wekesa Kasembeli [2005] eKLR** drawn from numerous authorities including the case of **Stanley Maore vs Geoffrey Mwenda Nyeri Civil Appeal Number 147 of 2002.** The gist being that comparable injuries should as far as possible be compensated by comparable damages. As an appellate court the guiding principles are found in **Kemfro Africa Limited t/a Meru Express Service & another vs A. M. Lubia & Another [1985] eKLR**

> ***"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 the judge, in assessing 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 damages."***

Further caution is to be found in the words of the court in;

> In **Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates** stated as follows: -
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> ***"We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled…*** This principle was adopted with approval by this Court in **Butt v Khan [1981] KLR 349** where it was held per Law, JA:
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> ***"... 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..."***

The appellant set out each head of damages and urged the court to find that the same was excessive.

The respondent equally provided authorities to support their position.

I will start with the issue of the loss of dependency.

It is argued for the appellant that the plaintiff pleaded that the deceased aspired to be an accountant but during the trial the story changed. It was testified that he could have become a statistician, and indicated with documentary evidence, that he could have earned a salary between Ksh 100 – 200k per month. It was also argued for the appellant that it was on this evidence that led the trial court to come up with a figure of Kshs. 50,000/=. That by so doing the trail court acted on wrong principle because the issue of being a statistician was not in the pleadings and that without an amendment, the plaintiff was bound by his pleadings.

Clearly that is the legal position a party is bound by his pleadings, and purport to introduce an issue during the trial, and bring evidence to

support it, yet it was not pleaded. The appellant cited **Global Vehicles Kenya Limited vs Lenana Road Motors [2015] eKLR** where the Court of Appeal stated;

> ***"It is for the above reasons that it has been emphasized time and again that except where an issue has been sufficiently raised, succinctly made an issue at the trial, and left to the trial court to decide, parties are bound*** *by their pleadings and that the court should not by its own volition introduce issues to the dispute which do not arise from the pleadings*. Thus in **DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014**, this Court expressed itself thus:
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> *"It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required by either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."*

Following the guidance from the foregoing I am in agreement with the submission that the trial court having relied on the evidence supporting an issue that had not been pleaded acted on the wrong principle and hence there was no basis for the Kshs 50,000/- multiplicand.

On his head the appellant urged the court to make a global award for General Damages of Ksh 600,000due to the paucity of the evidence citing several authorities that have departed from the multiplier approach.

Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others [2014] eKLR,

Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR,

Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007], Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another.

In the alternative the appellant urged the court to apply the minimum wage multiplier of Kshs 18,000/=

The case relied on;

1. **Ireri Moses vs Peter Mutugi Muthike suing as the legal administrator of the estate of Mary Njeri Muthike (deceased) [2019] eKLR** where Ksh 18000 was used as the multiplicand where the deceased was a23 year old university student.

2. **YH Wholesalers Ltd & Another vs Joseph Kimani Kamau & another [2017] eKLR** Ksh 30,000 multiplicand where the deceased was a 21-year-old college student pursuing nursing.

For the respondent it is argued that the trial court followed the case of **George Kanyingi Kabitu vs Samuel Maina Mutungi [2009] eKLR** where the deceased was a university student at a proposal of Kshs. 100,000/- was made. The court applied Kshs. 20,000/=. That the trial court herein was within its discretion to apply Kshs. 50,000/=. It was submitted that this amount was reasonable considering that the plaintiff had proposed Kshs. 100,000/= to 140,000/= as the starting salary of the statistician.

These submissions left me with the choice between the multiplier method and the global award method. It is a discretion that I am obligated to exercise judiciously. In my mind both methods are fraught with misgivings. In the multiplier one the court has to form an opinion based on the facts before it that this person could have lived and worked for this no of years, this person would have earned so much money, and supported them to a certain extent. Similarly, with the global approach the court again is expected to form an opinion as to value placed on the life lost. In each the court has no way of knowing what vicissitudes that life would have been faced with. Neither is better that the other. It all depends on the facts.

Hence in principle there was nothing wrong with the trial court choosing the multiplier approach. The mistake was in relying on the evidence tendered before it with regard to the specific issue as already pointed out herein above.

So what figure would be suitable in the circumstances? The respondent has stuck with Ksh 50,000. The appellant has suggested Ksh.18000. The respondent did not provide any evidence of what an accountant would earn. From the appellant's own submissions, the Ksh 18000 was an award for a university student and the Ksh 30,000 for a student pursuing nursing. If the deceased had finished university and become an accountant the entry job group for graduates in the Public Service in Kenya is Job Group K. The entry salary is about Ksh 37000[1]. There being no other supporting evidence on what the earnings of the deceased would have been. I would not interfere with the trial courts discretion on the multiplier. 37000x12x20x1/3 =2,960,000

Regarding the other awards, Loss of expectation of life, the trial court relied on **Violet Jeptum Rahedi vs Albert Kubai Mbogori [2013] eKLR** where an award of Ksh 150000 was made. The award of Ksh 20,000 for Pain and suffering was not excessive.

Having said the foregoing, the appeal succeeds in part. I set aside the award by the trial court and substitute it with the following award.

a) Loss of dependency ……...Kshs. 2,960,000/=

b) Pain and suffering ……. Kshs. 20,000/=

c) Loss of Expectation of Life …….. Kshs. 150,000/=

d) Special damages …….....Kshs. 26,000/=

total Ksh **3,156,000 plus costs and interest at court rates from the date of the judgment in the lower court.**

Delivered, Dated and Signed at Nakuru this 29th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of: - VIA ZOOM

Edna and Martin Court Assistants

Otieno & Amisi Advocates for appellant N/A

Ms. Kiberenge for Gekonga & Company Advocates for respondent

Order: Judgment be sent to parties via email

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Judge

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[1] PSC/GEN.10/VI of 4th JUNE 2020