REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 57 OF 2019

FLORENCE AWUOR OWUOTH *(Suing on her own behalf and on behalf of the estate of*

WILLIAM OMONDI NGAW).....APPELLANT

-versus-

PAUL JACKTON OMBAYO.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. Sharon Ouko Resident Magistrate in Migori Magistrate's Civil Case No. 295 of 2017delivered on 3/04/2019

JUDGMENT

1. The Appellant herein, *Florence Awuor Owuoth*, filed Migori Chief Magistrate's Civil Case No. 295 of 2017 (hereinafter referred to as **'the suit'**) against the Respondent herein, *Paul Jackton Ombayo.* The cause of action arose out of a road traffic accident which involved the husband to the Appellant one *William Omondi Ngaw* (hereinafter referred to as '**the deceased'**). The deceased suffered fatal injuries out of the accident.

2. The Appellant instituted the suit as the Administratrix of the estate of the deceased. She sought for General Damages, Special damages, Costs and Interests.

3. The Respondent was sued as the registered and/or beneficial owner of the offending motor vehicle registration number KBZ 228T (hereinafter referred to as '**the vehicle'**). The Respondent did not defend the suit. As a result, an interlocutory judgement was entered against him.

4. The suit was heard on formal proof. The Appellant testified as **PW1.** She called one witness, *Mathews Ouma* who testified as **PW2**. The Appellant then closed her case.

5. In a judgment rendered on 03/04/2019 the trial court found that the suit was not proved. The suit was dismissed with no orders as to costs.

6. The Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment. In a Memorandum of Appeal dated 10/04/2019 and evenly filed the Appellant preferred 12 grounds of appeal.

7. The Respondent was duly served with the appeal proceedings but did not participate just like in the suit. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant filed her written submissions.

8. The Appellant argued the appeal on three main issues. The first issue was that the court erred in dismissing the suit on liability whereas there was on record an interlocutory judgment on liability. It was submitted that the issue of liability was settled by the interlocutory judgment and the court had no business revisiting it. The Court of Appeal decision in **Nairobi Civil Appeal No. 20 of 2014 Paul Muiyoro t/a Spotted Zebra vs. Bulent Gulbahar Remax Realtors (2016) eKLR** and six High Court decisions were cited in support of the submission.

9. The second issue was that the court erred in not allowing the suit. It was argued that since the aspect of liability was settled the court's duty was to assess damages which it failed to do so. The third issue was on costs. It was submitted that the Appellant was entitled to costs of the suit as well as the appeal. The Appellant prayed that the appeal be allowed as prayed.

10. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the

case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga -versus- Kiruga & Another (1988) KLR 348).**

11. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the submissions and the decisions referred thereto.

12. I will start with the issue of the effect of the interlocutory judgment. The suit was filed on 07/06/2017. On 14/12/2017 an interlocutory judgment was entered against the Respondent who failed to enter appearance and file any defence. The suit was thereafter fixed for formal proof hearing. It was during the formal proof hearing where the Appellant and PW2 testified.

13. As said the suit arose from a road accident. In such a suit the claimant is called upon to prove liability and quantum of damages. The aspect of liability will mainly deal with the ownership of the vehicle and how the accident occurred. The aspect of quantum of damages will deal with the compensation.

14. The Appellant pleaded the ownership of the vehicle and how the accident occurred in the suit. The Respondent was duly served with the pleadings but failed to defend the suit. An interlocutory judgment was entered.

15. The effect of the interlocutory judgment in the circumstances of the suit was dealt with by the Court of Appeal in **Paul Muiyoro t/a Spotted Zebra vs. Bulent Gulbahar Remax Realtors** case (supra). The Court held that: -

> ***...The role of the court after entering interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages…***

16. The foregone legal position has been reaffirmed in many decisions of the Court of Appeal and is binding on this Court.

17. The trial court disallowed the suit on the aspect of liability. The court therefore waded into settled waters. As a result of the interlocutory judgment the issue of liability was not for consideration by the trial court. Respectfully, the court erred in law and the judgment must be interfered with.

18. Even in instances where the trial court would have rightly disallowed the suit, it was duty-bound to assess the damages it would have awarded had it allowed the suit. The court did not do so. The Court of Appeal in **Nyeri Civil Appeal No. 181 of 2011 Andrew Mwori Kasaya vs. Kenya Bus Service (2016) eKLR** revisited the issue as follows: -

> ***Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No. 124 of 1993 (UR). The court made the following observations on this issue:***
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> > *The judge was clearly under a legal to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment".*
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> ***This principle has religiously been followed by the courts below. We highlight a few of such decisions on the point by way of illustration. In Pamela Misiga Okelo versus Odero O. Alfred [2011] eKLR the following observation were made:***
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> > *"With regard to grounds 3 this court is satisfied that although the plaintiff's claim had been dismissed it was imperative on the trial magistrate to make an assessment of damages the appellant would have been awarded had she succeeded."*
>
> ***In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR it was observed thus:***
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> > *There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issues of damages in this case is a serious indictment on the part of the trial court.*
> >
> > *Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know theview by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."*
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> ***See also Gladys Wanjiru Njaramba versus Globe Pharmacy and another [2014]EKLR for the observations that:-***
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> > *"It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissal of the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa versus Bhogals garage CA No. 124 of [1993](UR)Where the court held that the that damages be assessed even if the case is*

dismissed does not imply writing an alternative judgment."

And in the case of Mayiya Byaba Loma & Another versus Uganda Transport Co Ltd. Uganda Supreme Court Appeal No. 10 of 1993IV KALR 138 where the court held that:-

> *"The judge erred in not assessing the damage (sic) he would have awarded had the appeal court been successful in her claim."*

Lastly in Masinga Ndonga Ndonge versus Kualam Limited [2016]EKLR, in which the High Court reviewed the above decisions and reiterated the principle enunciated above.

The above case law is sufficient demonstration that the appellant was genuinely aggrieved and the respondent rightly conceded ground 2 of the appeal that both courts below fell into error when they abandoned their role to assess damages payable to the appellant had he succeeded in his claim.

19. In line with the foregone I will now assess damages. The Appellant sought for damages under the **Fatal Accidents Act, Cap. 32** of the Laws of Kenya and under the **Law Reform Act, Cap. 26** of the Laws of Kenya. She also sought special damages.

20. It is indeed correct that the Appellant was entitled to damages under the two legal regimes. **Section 2(5)** of the **Law Reform Act** states that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the **Fatal Accidents Act**. (See **Pleasant View School Limited vs, Rose Mutheu Kithoi & Another (2017) eKLR** and **David Kahuruka Gitau & Another vs. Nancy Ann Wathithi Gitau & Another (2016) eKLR**).

21. The damages under the **Law Reform Act** are in respect of loss of expectation of life and pain and suffering. The damages under the **Fatal Accidents Act** are in respect of Loss of dependency or also referred to as lost years.

22. In **Kakamega High Court Civil Appeal No. 58 of 2017 Easy Coach Bus Service & Another vs. Henry Charles Tsuma & Another (suing as the administrators and personal representatives of the estate of Josephine Wenyanga Tsuma – Deceased (2019) eKLR** Musyoka, J discussed the manner in which a Court ought to assess damages in fatal claims in great detail. He stated that: -

16. Ordinarily, an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards made in the past for comparable injuries. In Simon Taveta vs. Mercy Mutitu Njeru [2014]eKLR the Court of Appeal observed that-

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

In Rosemary Mwasya vs. Steve Tito Mwasya & Another [2018]EKLR, the Court of Appeal held that-

> *With regard to the choice of a multiplier, and a multiplicand, the trial court was guided by the holding in Haniel Mugo Muriuki versus Marris Min Njeramba HCCC No. 24 of 2005 referred to by the respondent wherein the deceased was a university student aged 24 years old and in which the court therein assessed damages for lost years using a multiplier of 25 years; Betty Ngatia versus Samwel Kinuthiua Thuita HCC No. 339 of 1998 relied upon by the appellant wherein, the deceased was aged 19 years and pursuing a secretarial course. Also referred to was the case of Hassan versus Nathan Mwangi Kamau Transporters & 4 others [1986] KLR 457 for the holding that loss of earnings to be considered in the assessment of damages should be loss of earnings for the profession the deceased was pursuing or would have pursued had death not occurred. In the light of the above, the learned |Judge made findings as follows:- "It is now an established principle that the estate of the deceased is entitled to lost years, for the income that would have been earned by the deceased, less the living expenses, assuming that one lived and worked up to the age of retirement. It has been suggested that a salary of Kshs. 123,750 per month be used with multiplicand of 30 years less living expenses of 1/3 . The plaintiff did not tender any documentary evidence to establish this point. However, the plaintiff has presented documents showing that the deceased undertook studies leaning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an appropriate monthly salary of Kshs. 118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she began to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the deceased and the defendant agree that the dependency ratio should be 1/3. On the head of lost years, I make the award as follows: 118,564 x 30 x 1/3x12=14,227,680. As for the multiplicand, he only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we not the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand.*

20. In Chunibhai J Patel and Another vs. PF Hayes and others (1957) EA 748, 749 where the Court of Appeal stated in the manner of assessment of damages under the Fatal Accident's Act that-

> *"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 capitalized 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 life and dependency of the widow and children. The capital sum so reached should 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 dependants….. It has also been submitted by the defendant that the deceased would retire at age 55 and that there was no guarantee that he would remain in active employment in the private sector. It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire. In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes f life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire a from work. The deceased was described as having lived a healthy and happy life…. In Benedita Wanjiku Kimani(supra) Emukule J awarded a multiplier if 16 years to + a deceased aged 44 years at the time of his death. In Simon Kiplimo Murey & 3 Others vs. Kenya Bus Service management Services Ltd & 4 others (2014)eKLR where the deceased died aged 28 years working for Kenya Power and Lighting Co Ltd and earning Kshs. 40,000/= per month the court awarded a multiplier of 25 years.

21. In Gicheru (supra) it was said that 'In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See also Jabane vs. Olenja(1986)KLR 1. In Mohamed Juma vs. Kenya Glass Works Ltd, CA No. 1 of 1986 (unreported) Madan, JA again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award.. In the same judgment, he addressed an argument similar to the one before us, tying the quantum of damages to an appellant's station in life:

It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.

On damages for pain and suffering before death, the evidence of PW2 is to the effect that the deceased died instantly. I will award Kshs. 10,000/= as damages.

23. On loss of expectation of life, the general trend over time has been a figure between Kshs. 50,000/= and Kshs. 100,000/=. I will award Kshs. 80,000/=.

24. On loss of dependency, the deceased was 27 years old at death. He was married to the Appellant. He was employed as an Accountant by Unbound Kenya in Kisumu. He earned a gross salary of Kshs. 21,000/= monthly. According to the salary slip produced as an exhibit the deceased earned a net salary of around Kshs. 17,000/=.

25. The deceased did not have his own children. However, according to the Appellant the deceased took care of his three siblings. However, apart from the Appellant being the wife of the deceased the dependency on the three siblings was not proved.

26. In **Chanibhai J. Patel and Another vs. PF Hayes and Others (1957) EA 748** the Court of Appeal affirmed the position taken by the High Court that the multiplier is generally the remainder of the years upto retirement. In Kenya the official retirement age is 60 years save in cases where the law provides otherwise.

27. The deceased was described as a healthy young man. He lived a happy and vigorous life. There was no evidence that he suffered from any life threatening ailment or condition. In that case I will adopt a multiplier of 33 years. Given that the deceased had no children and only supported his wife he would have spent most of his earnings on himself. I adopt a dependency ratio of 1/3.

28. As stated, the deceased earned a net salary of Kshs. 17,000/= monthly. In coming up with the award on the loss of dependency I have taken into account the award on loss of expectation of life under the **Law Reform Act.** The loss of dependency shall be 33 x 17,000/= x 12 x 1/3 = Kshs. 2,244,000/=.

29. The Appellant also prayed for special damages. I have seen the receipts produced as exhibits. Save for the expenses on the post mortem examination the other expenses were duly proved. I award Kshs. 112, 660/=.

30. I hereby enter judgment for the Appellant as against the Respondent as follows: -

(a) The appeal succeeds and the order dismissing Migori Chief Magistrate's Civil Case No. 295 of 2017 be and is hereby set-aside.

(b) Liability in favour of the Appellant at 100%.

(c) General damages as follows: -

(i) Pain and suffering - Kshs. 10,000/=;

(ii) Loss of expectation of life - Kshs. 80,000/=;

(iii) Loss of dependency - Kshs. 2,244,000/=.

(d) Special damages - Kshs. 112, 660/=

(e) The sums in (c) shall attract interest at court rates from the date of this judgment whereas the sum in (d) shall attract interest from the date of filing of the suit.

(f) Costs of the suit as well as of the appeal be borne by the Respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Order delivered electronically through: -

1. **roabisai@yahoo.com** for the firm of Messrs. Abisai & Company Advocates for the Appellant.

2. No appearance for the Respondent.

3. Parties are at liberty to obtain hard copies of the Judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE