REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 558 OF 2018

BENARD KIRUI KIPTOO.....1ST APPELLANT

ATHIANY HOLDINGS LIMITED.....2ND APPELLANT

VERSUS

ESTHER NYAMBURA MWANGI *(Suing as the legal representative of the estate of*

PAUL KIRATU-Deceased).....1ST RESPONDENT

TAZAMA MOTORS LIMITED.....2ND RESPONDENT

(*Being an appeal from the judgment of Hon. P.N. Gesora (Mr.) (CM)*

delivered on 1st November 2018 in MILIMANI CMCC NO. 3584 OF 2014)

JUDGMENT

1. The 1st respondent was the plaintiff in Milimani CMCC No. 3584 of 2014. She had sued the appellants together with the 2nd respondent in her capacity as the legal representative of the estate of her son, the late *Paul Kiratu Mwangi* (the deceased) who died in a fatal road accident along the Mombasa-Nairobi Road on 30th November 2013.

In the suit, the respondent prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* together with costs of the suit and interest.

2. It is evident from the amended plaint filed on 16th December 2014 that the 1st respondent blamed the occurrence of the accident on the negligence on the 1st appellant who was at the material time driving motor vehicle registration number KBQ 752K (the subject vehicle). It was the 1st respondent's case that the 1st appellant caused the accident by *inter alia* driving at an excessive speed and failing to properly control the subject vehicle as a result of which it knocked down the deceased who at the time was lawfully riding a bicycle near Liberty Plaza; that the 2nd respondent was the registered owner of the subject vehicle while the 2nd appellant was its beneficial owner. She averred that the 2nd appellant and the 2nd respondent ought to be held vicariously liable for the negligence of the 1st appellant who was their agent when the accident occurred.

3. The court record reveals that upon service of summons, the appellants filed a joint statement of defence in which they denied the 1st respondent's claim and put her to strict proof thereof. The 2nd respondent did not either enter appearance or file a defence and although the trial proceeded to conclusion on the belief that default judgment had been entered against the 2nd respondent, a perusal of the original record of the trial court shows that an application seeking to have interlocutory judgment entered against the 2nd respondent was declined on grounds that the 2nd respondent had not been properly served with summons to enter appearance. There is therefore no default judgment against the 2nd respondent and it did not participate in the proceedings before the trial court. It is apparent from the record that the main disputants in the suit were the appellants and the 1st respondent.

4. That said, the record shows that after a full trial, the learned trial magistrate *Hon. P. N. Gesora* (CM) delivered his judgment on 1st November 2018 and apportioned liability in the ratio of 70:30 in favour of the 1st respondent against the appellants. On quantum, he awarded the 1st respondent damages as follows:

Pain and suffering	KShs. 30,000
Loss of expectation of life	KShs. 120,000
Loss of dependency	KShs.1,748,000
	KShs.1,898,000
Less 30% contribution	KShs. 569,400
Special damages	KShs. 26,250
Total	KShs. 1,354,850

5. The appellants were aggrieved by the trial court's judgment hence this appeal. In their grounds of appeal encapsulated in their memorandum of appeal filed on 23rd November 2018, the appellants faulted the trial court's decision on both liability and quantum.

6. On liability, the appellants complained that the learned trial magistrate erred in law and fact in apportioning 70% liability against the appellants when the evidence on record proved that the deceased was 100% liable for the accident.

On quantum, the learned trial magistrate was faulted for making awards for pain and suffering and loss of expectation of life without giving any reasons. Regarding the award for loss of dependency, the appellants complained that the trial court erred in adopting a multiplicand of KShs.10,925, a multiplier of 20 years and a dependency ratio of $^2/_3$'s contrary to the pleadings and the evidence on record.

7. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellants' submissions were filed on 4th February 2020 while those of the 1st respondent were filed on 20th February 2020.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully cognizant of the duty the first appellate court which as summarized by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** is to:

> ***"….. re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

9. I have considered the grounds of appeal, the evidence presented before the trial court and the rival submissions filed on behalf of the parties as well as all the authorities cited. I have also read the judgment of the learned trial magistrate.

Having done so, I find that the only issue arising for my determination is whether the learned trial magistrate erred in his finding on liability and in assessing the quantum of damages awarded to the 1st respondent.

10. On liability, I find that it was not disputed in the trial court that an accident in which the deceased lost his life occurred on 30 th November 2013 near Liberty Plaza along the Mombasa-Nairobi Road. It was also not disputed that the accident involved motor vehicle registration number KBQ 752K which was being driven by the 1st appellant. It was also not contested that both the 1st appellant and the deceased who was a pedal cyclist were at the time headed in the same direction, that is, towards the Nairobi City Centre. What was seriously disputed was the plaintiff's claim that the 1st appellant caused the accident by negligently driving and managing the subject vehicle.

11. To determine whether or not the learned trial magistrate erred in his finding on liability, it is important to revisit the evidence that was tendered before the trial court.

The 1st respondent testified as PW3 but in her admission, she did not witness the accident. She got to learn about it through a telephone call later in the day. In support of her case, she called two additional witnesses namely, *PC Hussein Mohammed* (PW1) who produced an occurrence book extract and a police abstract as *Pexhibit 1(a)* and *1(b)* and *Mr.Thomas Ndambu* (PW2) who was an eye witness.

12. In his testimony, PW2 adopted his written statement which was filed in court on 23rd June 2014. In his statement, he recalled that on 30th November 2011 at around 7.30 am, he was along the Nairobi-Mombasa Road proceeding to his place of work when he saw the deceased, a person he knew before, riding his bicycle on the road side. He also saw the subject vehicle and noted that it was being driven at a very high speed as a result of which its driver lost control of the vehicle, veered off the road and knocked down the cyclist who died on the spot.

13. In support of the defence case, the 1st appellant testified as DW1. In his written statement filed in court on 5th February 2015 which he adopted as part of his evidence in chief, he admitted occurrence of the accident and that at the time of the accident, he was driving the subject vehicle as an employee of the 2nd appellant. He however denied having negligently caused the accident as alleged and solely blamed the deceased for its occurrence.

14. In his evidence, DW1 claimed that shortly before the accident, he was driving at a speed of 40 Kmph; that it was raining and traffic was heavy. He further claimed that near the scene of the accident, there was a stationary vehicle which had partly blocked the lane he was

lawfully using, that is, the left lane as one faces Nairobi City Centre direction. He alleged that when trying to bypass the stationary vehicle, the deceased suddenly rode into the left lane when his vehicle was a short distance away and though he applied brakes in a bid to stop the vehicle and avoid hitting the pedal cyclist, the vehicle failed to stop and proceeded to knock down the cyclist who died on the spot.

15. After my own independent analysis of the evidence on record, I find that PW1's evidence was not useful or material to the issue of liability considering that he was not the investigating officer and he did not visit the scene of the accident to establish how the accident occurred and the point of impact. His only role was to produce an OB abstract and a police abstract which had been compiled by other police officers. His evidence at best amounted to hearsay which is inadmissible in evidence.

16. The above finding leaves us with the evidence of PW2 and DW1 who are the only witnesses who testified regarding how the accident occurred. Both claimed to have been eyewitness to the accident but gave completely different versions of the circumstances in which the accident occurred.

17. PW2 recalled that DW1 was driving carelessly at very high speed to the extent that he lost control of the vehicle which veered off the road and knocked down the deceased who was riding his bicycle off the road. DW1 on the other hand claimed that he was driving carefully at a speed of 40kmph when the deceased suddenly rode into the road and though he tried to avoid hitting him by trying to stop the vehicle, he was unsuccessful.

18. The appellants in their submissions strongly challenged the credibility of PW2 and urged me to find that he was an unreliable and untrustworthy witness. In dealing with this submission, I can only state that the credibility or otherwise of witnesses is a finding of fact which an appellate court is ill equipped to determine considering that unlike the trial court, it does not have the advantage of seeing or hearing the witnesses.

19. Going back to the evidence on record, when I compare the versions of the story given by the 1st appellant and PW2, I find that even if it is not clear whether the accident occurred off the road as alleged by PW2 or on the left lane as claimed by DW1, it is more probable than not that DW1 greatly contributed to its occurrence by driving at an extremely high speed as can be discerned from the impact of the accident. The impact caused the death of the pedal cyclist on the spot.

20. From the evidence of DW1, it is clear that the collision was so violent and the impact so forceful that it could only have been occasioned by a vehicle which was being driven at a very high speed. DW1 described the impact of the accident as follows:

> ***"…. The pedal cyclist was hit by my vehicle's front portion and thrown on the bonnet smashing the windscreen before he fell down on the hard road surface in front of my vehicle as I almost stopped my vehicle facing the direction I was travelling to . .."***

21. The 1st appellant's claim that he was at the time driving at 40 kmph cannot be true because if this was the case and he was alert and keeping a proper look out for other road users, even if the court were to accept his claim that the pedal cyclist joined the road suddenly when he was a short distance away, he would have seen him and applied emergency brakes and comfortably stopped the vehicle before it hit him. Even if for some reason the 1st appellant was unable to stop the vehicle in good time, if he was doing a speed of 40 kmph, the collision would not have occasioned the deceased fatal injuries.

22. Flowing from the foregoing, I find that there was sufficient evidence before the trial court to establish on a balance of probabilities that the 1st appellant was driving the subject vehicle at the material time without due care and attention to other road users as a result of which he rammed into the deceased. The deceased also owed himself a duty of care which entailed taking reasonable precautions to ensure his own safety especially given his mode of transport. In the circumstances, am unable to fault the learned trial magistrate's apportionment of liability in the ratio of 70:30 in favour of the 1st respondent against the appellants. The trial court's finding on liability is thus upheld.

23. Having resolved the issue of liability, I now proceed to address the appellants' complaints on quantum. I wish to start by pointing out that as a general rule, the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with established legal principles and the peculiar facts of each case.

24. It is now a trite principle of law that an appellate court should be slow to interfere with an award of damages made by a trial court unless it is satisfied that in arriving at its decision, the trial court failed to take into consideration relevant factors or considered irrelevant ones or based the impugned award on the wrong legal principles. An appellate court can also interfere with an award of the trial court if it was satisfied that the award was either inordinately high or low as to lead to an inference that it amounted to an erroneous estimate of the damage suffered. ***See: Butt V Khan (1977) 1 KAR; Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2, [1987] KLR 30.***

25. It is also pertinent to note that it is also an established principle of law that an appellate court should not substitute its own discretion with that of the trial court. ***See: Mariga V Musila, [1984] KLR 251.***

26. This being a fatal accident claim, the 1st respondent sought damages on behalf of the deceased's estate under the *Law Reform Act* and on behalf of his dependants under the *Fatal Accidents Act*.

27. Under the *Law Reform Act*, a deceased's estate is entitled to damages for pain and suffering; loss of expectation of life and reimbursement of funeral expenses. In their submissions on quantum, the appellants did not address the trial court's award for pain and suffering and loss of expectation of life though in their grounds of appeal, they faulted the awards on grounds that the trial court did not give any reason to justify the awards.

28. A reading of the trial court's judgment shows that the deceased's estate was awarded KShs.30,000 for pain and suffering and KShs.120,000 for loss of expectation of life. It is clear from the judgment that before arriving at his decision on the two awards, the learned

trial magistrate considered the proposals made by the parties and the evidence on record. He disclosed that those were the amounts he found sufficient to compensate the deceased's estate for his pain and suffering and loss of expectation of life. Considering that the deceased was 34 years old at the time of the accident, I find an award of KShs.120,000 for loss of expectation of life reasonable and I have no reason to disturb it. The same position holds for the award for pain and suffering considering that in 2013 in the case of ***Alice O. Alukwa V Akamba Public Road Services Limited & 3 Others, [2013] eKLR*** this court awarded the plaintiff KShs.50,000 for pain and suffering where an accident victim had also died on the spot. The awards for pain and suffering and loss of expectation of life made by the trial court are consequently upheld.

29. From the appellant's submissions, it is apparent that the gravamen of their appeal on quantum was the trial court's award for loss of dependency. Dependency and its extent are questions of fact which must be established by evidence. In their submissions, the appellants urged the court to find that the trial court erred in finding that prior to his death, the deceased was working for gain at *Malplast Industries Limited* earning a monthly salary of KShs.10,925 as there was no evidence on record to support that finding. The trial court was also faulted for adopting a dependency ratio of $^{2}/_{3}$ on the basis of PW3's evidence that the deceased was married with one child whereas she had pleaded in her plaint that she was the deceased's only dependant; that the trial court erred in not applying the legal principle that parties are bound by their pleadings. Lastly, the appellants challenged the validity of the multiplier of 20 years used by the trial court arguing that it was excessive.

30. On her part, the 1st respondent supported the trial court's award contending that the deceased's monthly earnings of KShs.10,925 had been proved through a letter from his employer; that there was evidence that the deceased was married with one child which justified use of the dependency ratio of $^{2}/_{3}$ and that the multiplier of 20 years was reasonable given that the deceased died at the prime age of 34 years and would have worked till he reached the retirement age of 60 years had his life not been cut short by the accident.

31. I have carefully perused the bundle of documents produced in evidence by the 1st respondent. I agree with the appellants that the documents did not include a letter or any evidence from the deceased's alleged employer proving that the deceased was earning a monthly salary of KShs.10,925 prior to his death.

32. The 1st respondent in her evidence claimed that she used to receive monthly financial support from the deceased in the sum of KShs.7,000. This claim was not contested by the appellants during cross examination and even in their submissions. In the premises, it is safe to conclude that even though there was no evidence of the deceased's actual earnings or nature of employment, he used to earn some income part of which he used to support his mother, the 1st respondent. I make this finding guided by the Court of Appeal's decision in ***Jacob Ayiga Maruja & Another V Simeon Obayo, [2005] eKLR*** where the court expressed itself as follows:

> ***"…. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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."***

33. In this case, I agree with the appellants that the learned trial magistrate erred in basing his award for loss of dependancy on the deceased's alleged monthly salary from *Malpast Industries Limited* when there was no evidence to that effect.

34. Given the unavailability of evidence proving the deceased's exact income otherwise referred to as the multiplicand, it is my view that the multiplier approach in assessing damages for loss of dependency was not appropriate in this case. The trial court should have appreciated this fact and adopted the lump sum principle which was more suitable given the facts in this case.

35. The multiplier approach is not the only method that courts can use to calculate or assess damages for loss of dependancy. In ***Albert Odawa V Gichimu Githenji, [2007] eKLR*** *Koome, J* (as she then was) quoting *Ringera, J* in ***Mwanzia V Ngalali Mutua V Kenya Bus Services (Msa) Ltd & Another*** stated as follows:

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of law or 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 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."***

36. I agree and entirely associate myself with the holding of *Ngaah, J* in ***Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR*** who, quoting with approval the persuasive English authority of ***Gammel V Wilson, [1981] 1 ALL ER 578*** stated as follows:

> ***"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."***

37. In this case, it is not disputed that the deceased was 34 years at the time of his untimely demise. The 1st respondent testified that besides herself, the deceased had other dependants, namely, a wife and a child but she did not adduce any evidence to substantiate that claim. She did not also disclose in her pleadings that the deceased was survived by a wife and a child. In the premises and as parties are bound by their pleadings, I find as a fact that the 1st respondent was the deceased's only dependant. In assessing damages for loss of depedancy in this case,

I find guidance in the case of ***Ann Kanja Kithinji (suing as the legal representative of the Estate of Patrick Koome [Deceased]) & 2 Others V Jacob Kirari & Another, [2018] eKLR*** where the court awarded a global sum of KShs.800,000 to dependants of a deceased who died at the age of 36 years. I note that the case was decided about two years ago and taking into account inflationary trends, I find an award of KShs.1,000,000 to be sufficient recompense for the 1st respondent's loss of dependency.

38. In the result, it is my conclusion that the trial court's award of KShs.1,748,000 for loss of dependency was erroneous. The same is thus set aside and is substituted with an award of KShs.1,000,000.

39. As the award of special damages in the sum of 26,250 was not contested on appeal, the same shall remain undisturbed.

40. The upshot is that this appeal partially succeeds to the extent that the award of KShs.1,748,000 for loss of dependency is set aside and is substituted with an award of KShs.1,000,000. Consequently, the judgment of the trial court is set aside and is substituted with a judgment of this court in favour of the 1st respondent against the appellants jointly and severally in the total sum of KSh.1,176,250 which shall be subject to the deceased's contribution of 30%.

41. The award of special damages in the sum of KShs.26,250 shall attract interest at court rates from date of filing of the suit until payment in full while the award of general damages will earn interest from the date of judgment of the trial court until full payment .

42. Since the appeal has partially succeeded, the order that best commends itself to me on costs is that each party shall bear its own costs of the appeal but the 1st respondent is awarded costs of the suit in the lower court.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Ngala for the appellants

No appearance for the respondents

Ms Mwinzi: Court Assistant