REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 21 OF 2019

GODWIN MBAKA NJAGI

(Suing as personal representatives of

HARRISON MBAKA - Deceased).....APPELLANT

VERSUS

CAREN MATI.....1ST RESPONDENT

ZABLON NJIRU.....2ND RESPONDENT

(Being an appeal arising from the Judgment/decree of the Honourable J.M. Njoroge (CM) CHUKA PMCC NO. 86B OF 2017 delivered on the 3rd April 2019)

****

J U D G E M E N T

1. This is an appeal lodged by **GODWIN MBAKA NJAGI** (suing as the personal representative and legal administrator of the estate of **HARRISON MBAKA** (deceased). He was dissatisfied with the decision of Hon, Magistrate on 3rd April 2019, in ***Chuka Principal Magistrate's Court No.CMCC 86B of 2017***. The suit in the lower court was about a road traffic accident that saw **HARRISON MBAKA** (deceased) being knocked down by Motor vehicle Registration No. KBX 392 N owned the 2nd Respondent and driven by the 1st Respondent.

2. The Appellant had pleaded that the deceased was a civil engineering student which he claimed was one of the highest paying professions and made the following claims on behalf of his estate;

i) Pain and suffering - Kshs. 50,000/-

ii) Loss of life - Kshs. 100,000/-

iii) Special damages - Kshs. 138,000/-

iv) Loss of dependency - Kshs. 8.5 million

3. The parties in the suit agreed on liability at 70:30% in favour of the Appellant.

4. The trial court recording the consent on liability went on to assess the damages payable as follows:-

a) Pain and suffering - Kshs. 10,000/-

b) Loss of expectation of life - Kshs. 100,000/-

c) Loss of dependency - Kshs. 1,500,000/-

d) Special damages - Kshs. 98,600/-

Less double entitlement - Kshs. 100,000/-

Total amount awarded - Kshs.1,608,600

Less 30% liability conceded

Net amount - Kshs.1,126,020/-

5. The Appellant felt aggrieved by the above award and filed this appeal raising the following grounds namely:-

i) That the learned magistrate erred in law and in fact by finding that the Appellant had not proved that the deceased had a workable multiplicand especially when his academic credentials were proved and tendered in evidence.

ii) That the learned trial magistrate erred by plucking from the air a sum of Kshs.15,000/- as a multiplicand when there was sufficient evidence on record.

6. The Appellant's main ground of appeal is on the amount awarded by the trial court as loss of dependency. According to the Appellant the award of Kshs.12 million would have been fair in the circumstances. He faults the trial court for making an award which in his view was too low.

7. In his written submissions the Appellant contends that he evidence tendered about academic credentials of the deceased but was not considered calculating quantum .He relies on the Court of Appeal decision in **Gitobu Imanyara and 2 others vs AG (2016)eklr** where the court cited the case of **Kemfro Africa Limited t/a Meru Express Service v AM Lubia and Olive Lubia (1982-88) 1 KAR 727** at page 730 where Kneller JA held that an award may be disturbed where the Judge considered an irrelevant factor or left out a relevant factor or that the amount is inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage. The Appellant submits that he is content with the multiplier of 25 years and the dependency ratio of 1/3rd as given by the trial court. He however submits that though the deceased had not started working, he did have a workable or determinable income since his credentials as an engineering student were produced. He avers that the court in the case of **Stella Awinja and another vs AG HCC 915 of 1988 (unreported) (also unattached)** gave clear guidelines on how to assess damages for a person already pursuing a career path. He also relies on the case of **Simon Taveta vs Mercy Mutitu Njeru (2014)eklr** where the court stated that award of general damages is an exercise of judicial discretion based on the injury sustained and comparable awards made in the past for similar injuries. He further relies on the case of **Rosemary Mwasya v Steve Tito Mwasya and another (2018)eklr** where the court stated that a 19 year old deceased had undertaken studies towards accounting or finance and based on a salary survey of Kenya, he would have earned Kshs 118,546/= per month. The court in that case also presumed that the deceased would have started working at 25 years and retired at 55, it years therefore used a multiplicand of 30 years at 1/3rd dependency. The Court stated that the only error the Judge made was not to factor in the element of statutory deductions which would have amounted to 1/3rd of the figure chosen as multiplicand. The Appellant herein therefore states that the award by the Chuka Cm's court was inordinately low and referred the court to the case of **KWS v Geoffrey Gicuru Mwaura (2018)eklr** which held that the minimum wage in Kenya is based on inter alia the occupation of various categories of workers. He has drawn this court's attention to a job advertisement by PSC dated 23/4/2019 where the entry level in basic salary for engineers was set at between Kshs. 35,400/= and Kshs 46,230/=. They also rely on another advert by PSC on 15/6/2017 showing entry level salary for engineers was between Kshs 31,020/= and Kshs 41,490/=. In his view, the adverts indicate provision of allowances for the said positions including housing allowance, commuter allowance, hardship allowance, leave allowance among others. He also contends that career progression as per the advert shows the Senior Superintendent Engineers advert offering starting salary of between Kshs 109,000/=-139,000/=. It avers that assessment at the lower court in this matter was low and unreasonable and the same ought to be disturbed. He submits that the court should apply an average of Kshs 95,000/=per month as loss of dependency.

8. The Respondents have opposed this appeal through written submissions.

The 1st Respondent filed written submissions on 29/5/2020. She submits that the trial magistrate did not err when he used the multiplicand of Kshs 15,000/= as it was based on the pleadings and the evidence tendered. The 1st respondent states that the statement of the appellant that was filed and adopted at the trial court did not mention the stage of studies of the deceased nor mention his probable income nor did it produce receipt for school fees nor lead any evidence on the likely income of persons pursuing similar courses nor call any person who had pursued the same and been employed after graduation. It is their submission that sections 107 and 112 of the Evidence Act sets burden of proof on the party laying claim and that the appellant did not lay all these issues before the trial court, which then was correct to form its own opinion on the probable income of the deceased.

They submit that the case of **Rosemary Mwasya v Steve Tito (2018)eklr** was distinguishable from the present case as the estate had produced documentary evidence showing the salary of an accountant. Their position is that the appellant failed to lead evidence on the probable income of the deceased and therefore the trial court cannot be faulted for exercising its discretion and adopting 15,000/= as at the time of the of the determination, the 1st respondent had proposed Kshs 15,210 based on Legal Notice No 116 of 26/6/2015 on minimum wage. They contend the said figure was not plucked from the air as contended by the Appellant. They further submit that no basis was laid to support the submission that engineers are the highest paid professionals in Kenya. They fault the introduction of PSC adverts at submission stage contending that it is improper as it is new evidence which the court should not allow. They aver that these documents were not tabled at the lower court during trial. They further submit that it was not uncommon for courts to refer to minimum wage when finding a multiplicand for university students. They rely on the cases of **Priscillah Wambui v Richard Kimani and 2 others(2019)eklr** where the court used the sum of Kshs 20,000/= for a banking and finance student aged 20 years, the case of **Lucy Kanini Irungu v Chege Wahome and 2 others (2017)eklr** where the sum of Kshs 20,000/= was used for a 4th year Bachelor of Commerce and the Judge therein called the proposed figure of Kshs 70,000/= ***"speculative with no legal or factual basis"***. The Respondents lastly state that the appellant has not demonstrated and error of law or fact in the judgment or satisfied the criteria in **Butt v Khan (1981)KLR 349** to warrant interference with the assessment of damages.

9. This court has considered this appeal and the response made. As I have observed above the appeal is only about on the award made by the trial court on loss of dependency. The Appellant feels that the multiplicand of Kshs.15,000/- used was inadequate while the Respondents hold the view that the trial magistrate really had no evidence of any other amount other than the minimum wage of Kshs.15,000/-

10. This court as an appellate court is concerned only not as to how much it could have awarded in the circumstances but whether the trial court in the exercise of its discretion used wrong principles in making an award too low or too high as to represent an erroneous estimate. In the case of ***Bashir Ahmed Butt-vs- Uwais Ahmed Khan (1982-88) KLR*** the Court of Appeal provided the following guiding principle in awarding of damages in running down matters:

> ***'An appellate court will not disturb an award for general 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...'***

11. The above position is replicated in the case of ***Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR*** where the Court of Appeal held as follows:-

> ***"...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.***

12. There is no dispute that the Appellant in the lower court never tendered evidence to show exactly how much the deceased earned or likely to earn and normally in such instances the trial courts have more often resorted to using their discretion by awarding a global figure of what they deem reasonable without using a specific multiplicand. In ***Oyugi & Another -vs- Fredrick Odhiambo Ongong & 3 Others [2014] eKLR*** the court was faced with a similar situation and it stated as follows:-

> ***'Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on "municipal rates." The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J., in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., 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 dependancy, and the expected length of the dependancy 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 courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambla and Collins Ochieng Obambla the sum of Kshs.700,000.00 each."***

13. In the present instance as I have observed, the Appellant did not lay down any evidence to guide the trial court in assessing the multiplicand to be used for lost years. His attempt to introduce the same in this appeal is not only belated but improper. If the Appellant desired to produce new evidence it was not able to table during trials, it ought to have sought leave of this court with notice to the Appellant and this court could have considered whether or not to allow additional evidence to be taken pursuant to **Section 78** of **Civil Procedure Act.** He did not seek such leave having failed to seek the leave this court finds that the Appellant can not fault the trial court for exercising its discretion the way it did .

14. I have perused through the decision of the trial court and noted that this finding;

> ***"the deceased had not started earning. It is difficult to estimate whether he would have succeeded in attaining employment or the level of his prospective earning*****.....**"

It is clear that the trial court had no material before it to decide the appropriate multiplicand to be used other than resorting to guidelines of the minimum wage.

The trial court was not at fault to adopt the minimum wage of Kshs.15,000/- and factored in the number of years the deceased could have worked. As observed in the above decisions the principle of using either a global sum or adopting the minimum wage, as was done by the trial court in this instance, is not cast in stone. It is a discretionary matter and unless an Appellant can pin point the error of principle in the exercise of that discretion, he cannot succeed on appeal.

In the end, for the aforestated reasons, this court finds o merit in this appeal as no sufficient reasons have been advanced for this court to interfere with the lower court's exercise of its judicial discretion. The appeal is disallowed with costs.

Dated, signed and delivered at Chuka this 22nd day of July 2020.

R.K. LIMO

JUDGE

22/7/2020

Judgment signed and dated, delivered via zoom in presence of Omariba for Appellant and Kiplagat for Respondent.

R.K. LIMO

JUDGE

22/7/2020