



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 60 OF 2018

ELVINA NYEVU GARAMA

PATRICK MATHIAS KOMBO..... APPELLANTS

VERSUS

SAMSON KAHINDI KITSAO AND

SIDI KARISA NGOMBO (Legal representatives of the Estate of

JOHN CHARO KAHINDI (Deceased)..... RESPONDENTS

(Being an Appeal from the Judgment delivered by Hon. Dr. Julie Oseko (CM) in Malindi Chief Magistrates Court Civil suit No. 206 of 2016 on the 27th day of November 2018)

Coram: Hon. Justice R. Nyakundi

C. B. Gor & Gor Advocate for the appellants

Wambui Kilonzo Advocate for the respondents

JUDGMENT

The appeal before me is against the assessment of quantum of damages for loss of dependency, pain and suffering, loss of expectation of life and special damages by the trial Court in the sum of Kshs.1,756,225.00/=. The Judgment was delivered on 27.11.2018. Aggrieved by the Judgment, the appellants filed a memorandum of appeal on the 10.12.2018. The grounds of appeal are that:-

- 1. The Learned Chief Magistrate erred in awarding to the respondents a global sum of Kshs.1,500,000.00/= for loss of dependency under the Fatal Accidents Act which said sum is so excessive as to amount to an erroneous estimate of the damages payable to the respondents.*
- 2. That the Learned Chief Magistrate erred in adopting the wrong principles of Law whilst awarding a global sum of Kshs.1,500,000.00/= to the respondents.*
- 3. That the Learned Chief Magistrate erred in failing to give any or any adequate reason/or reasons of how she computed the global award of Kshs.1,500,000.00/= for loss of dependency.*
- 4. That the Learned Chief Magistrate erred in awarding to the respondents damages for loss of dependency when it was clear that the plaintiff had failed to plead in the Plaint what the deceased was doing for a living prior to his death and failed to adduce any evidence in respect of the deceased's earning.*
- 5. That the Learned Chief Magistrate erred in not holding that there was no or no adequate evidence submitted to show that the deceased was earning any amount and or what he was doing for a living.*
- 6. That the Learned Chief Magistrate erred in awarding to the respondents a sum of Kshs.100,000.00/= for pain and suffering when there was clear evidence before her that the deceased died on the spot. This had also been submitted by the plaintiff's*

advocates in their written submissions dated 8th August 2018.

7. That the Learned Chief Magistrate erred when she held that the deceased must have suffered pain and suffering when it was clear that he died on the spot after the accident.

8. That the Learned Chief Magistrate erred in awarding to the respondents a sum of Kshs.120,000.00/= for loss of expectation of life without giving any or any adequate reasons for doing the same.

9. That the Learned Chief Magistrate erred in Law in making awards under the various heads by failing to take into account that the general damages awarded to the respondents would be invested to earn interest. If the Learned Chief Magistrate had borne the factor in mind it is reasonably possible that she would have awarded a lesser amount to the plaintiff under each head.

10. That the Learned Chief Magistrate erred in Law in awarding interest to the respondents on the sum of Kshs.1,756,225.00 from the date of filing suit until payment in full.

11. That the Learned Chief Magistrate erred in Law in failing:-

a). To appreciate the significance of the various facts that emerged from the evidence of the plaintiffs' witnesses.

b). To consider or properly consider all the evidence before her and/or

c). To make any or any proper findings on the aspect of quantum of damages on the evidence before her.

12. That the Learned Chief Magistrate erred in Law in failing to consider or properly consider the written submissions filed by Counsel for the defendants.

The duty of an appellate Court is well set out in the case of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another C.A. No. 345 of 2000** where the Court held:

“As a first appellate Court we are not bound by the findings of fact made by the superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O’Connor P. stated in Peters v Sunday Post Ltd {1958} EA 424, at Pg. 429:

“It is a strong thing for an appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness.”

This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.” (See **Ephantus Mwangi & Another vs Wambugu {1983} 2 KCA 100.**) or in accordance with the principles and guidelines in **Robert Nsioki Kitavi v Coastal Bottlers Ltd {1982} – 198 IKAR 891 – 895**

“The appellate Court will only interfere with a trial Judge’s assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate.”

Consequently, guided by the above principles of Law stated in the aforementioned case I shall proceed to review the facts and evidence presented in the Trial Court. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. The parties filed written submissions but did not find it necessary to orally highlight. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. (**Selle & Another v Associated Motor Boat Company Ltd & others {1968} EA 123**).

Brief facts of the case

The respondents filed suit against the appellants vide plaint dated the 14.09.2016 for general damages under the Law Reform Act and the Fatal Accident Act, special damages and costs of the suit and interest thereof arising from a road traffic accident which was alleged to have occurred on or about the 30.04.2016 while the deceased was a lawfully travelling as a passenger in motor vehicle registration number KCE 439A along Tsavo Road at Lango Baya Area while the 2nd defendant/respondent so negligently drove and/or managed the said motor vehicle that it veered off the road and overturned as a result whereof the deceased suffered fatal injuries.

They alleged that the 1st appellant at all material times was the registered owner of the said motor vehicle registration number KCE 439A while the 2nd appellant was its authorized driver and or agent. The respondents blamed the appellants for the alleged accident and set out particulars of negligence. They sought damages under the Law Reform Act and the Fatal Accident Act, special damages and costs of the suit and interest thereof. They testified and produced exhibits in support of their cases and filed submissions dated 8.08.2018.

The appellants/defendants filed a defence dated 23.01.2017 denying any liability arising from the said accident. They called one witness and filed submissions dated 3.09.2018.

The Evidence

PW1 – Plaintiff, Simon Kahindi Kitsao, stated that he lives in Kibokoni and is a teacher at Kibokoni Primary School. He stated that he knows the 2nd plaintiff, **Sidi Kahindi** and that the deceased, **John Charo** was his 22 year old son who at the time of his passing had just completed education at Usenet computer college. He stated that he was in good health and had died as a result of the accident. He produced the death certificate as PEX1. He also produced letters of administration showing that he together with the 2nd plaintiff were the administrators of the deceased's estate issued in Case No. 46 of 2016, Malindi as PEX2. He further produced the receipt of KShs.35,000.00 issued by the Court as PEX3. He stated that he did not have documentary evidence on proof of education as the deceased was yet to receive the certificate. He further stated that the deceased had also been working as a census officer and that he was to go to form 5 and 6. He also stated that the deceased had dreams of becoming a doctor. He stated that the deceased was going to a funeral when upon reaching Lango Baya area the vehicle lost control and he sustained fatal injuries and died on the spot. He stated that the vehicle was a Toyota Siemo Registration Number KCE 439A and he was a passenger on board. He stated that he reported the accident to Malindi Police Station and that vehicle was driven by Patrick Mathius, the 2nd defendant/appellant. He produced the police abstract as MF15 and the motor vehicle search showing the registered owner of the motor vehicle as one **Chome Garama** as PEX6. He stated that he went to Malindi District Hospital and took the deceased to the mortuary where the body stayed for 6 days after which they buried the deceased at Kibokoni. He stated that he had incurred expenses for post mortem, hospital charges and hiring of vehicle to transport the body. He further stated that he had spent close to KShs.50,000.00/= for the burial but had misplaced some of the receipts but produced the receipts for clothing and food KShs.11,140.00/= and KShs.3,350.00/= as a bundle which was marked as PEX7.

He further stated that he was informed of the accident by one **Baraka Ndolo** who witnessed the occurrence of the accident. He further produced a demand letter dated 28.7.16 as PEX8. He stated that he felt pain for losing his son as he was expecting financial assistance from his son. He stated that he had three other children and was seeking compensation for the loss.

On cross examination, he stated that he did not witness the accident and that the deceased was his first born son but he did not avail the birth certificate. He stated that the deceased had completed Form four at Museny Mwanjunga School in 2015 but he did not avail the school leaving certificate nor the final result slip. He stated that the deceased had done casual jobs and that he had gone for compute training in 2016 where he studied computer packages. He also stated that he did not have the admission letter for Form 5 and 6. He confirmed that the deceased wanted to be a doctor and that he was also set to go to the university. He further stated that the deceased was fully dependent on him before his death. He stated that he had paid his advocate KShs.35,000.00/= for the letters of administration and had also paid KShs.1,225.00/= separately. He stated that the family held a funeral and mourned for 7 days and that they received assistance from other people but they also had to dip into their pockets and used all the money for the funeral.

PW2, 2nd plaintiff, Sidi Karisa, she stated that the 1st plaintiff was her husband and the deceased was her son. She stated that she was from Sabaki area and produced a chief's letter dated 2.6.2016 as PEXH9.

On cross examination she stated that she lives in Kibokoni area and the chief is **Mr. Francis Fondo** and the said letter was collected by Samson. She stated that she gave birth to the deceased in 1994 at Malindi Hospital and that he studied computers and was employed.

PW3, Barack Ngoro Mwangilo, an eye witness, stated that he knew the deceased who was his friend. He stated that the deceased who was a computer college student, died on 30.4.16 after he sustained fatal injuries from a road accident at around 4 pm along Lango Baya area. He stated that he was in the said motor vehicle registration number KCE 439A together with the deceased, which vehicle was driven by **Patrick Kombo**, and that the deceased was seated next to the driver. He stated that they were 7 passengers and that it had been a bright day with no rain. He stated that the road was dug up and had murram and they had come from a wedding at Majivuni. He further stated that they were travelling at a high speed when vehicle lost control as they were moving downhill and moved in a zigzag manner for approximately 50 meters as the driver tried to control the vehicle. They landed on the left side of the road. It was also his testimony that the vehicle had the accident due to the over speeding and blamed the driver. He stated that they had their seatbelts on and had told the driver to slow down.

On cross examination PW3 testified that he did not know the owner of the motor vehicle as the vehicle, as they had contributed KShs.1,000/= each to the deceased to hire the said motor vehicle. He confirmed that he was seated in the back row seat in the middle between Baraka and Antony while the deceased was seated at the front next to the driver but he was not the one driving. He testified that the accident happened at Umenja Lango Baya they were heading to a dowry negotiation. He stated that the road was in good condition with no potholes and there were 10 other vehicles ahead of them but the driver of the subject motor vehicle was over speeding and moving in a zigzag manner. He also stated that the vehicle did not have a tyre burst but it appeared the driver was not a very good driver. He confirmed that he knew the deceased and that after exiting the car he saw the left tyre had a puncture.

On re-examination PW3 stated that the accident occurred in the evening.

PW4, CI, George Nairobi, B/C Malindi No. 231406, produced a police abstract marked as MFI 5 relating to the accident. He testified that the accident occurred at 6.00 pm on 30.04.2016 at Makombelo area along Lango Baya Tsavo Road. He stated that the accident involved motor vehicle registration number KCE 439A Toyota Creta and the driver of the said motor vehicle was Mathias Kombo Patrick and the owner was **Nyevu Garacha Elniha**. He stated that the vehicle was carrying six passengers and that the driver hit a pothole along the road as the vehicle was descending which caused it to roll severally causing the death of one **John Charo** was among the passengers who died on the spot. He testified that the accident was reported at the police station. He blamed the driver for the accident and testified that the vehicle had been inspected and that there was no prior accident defect noted, it was in good condition before the accident.

On cross examination, he testified that the investigating officer was **PC David Cheruiyot**, who was currently out of the office on other police business, but he had visited the scene but had not recorded any statement. He however confirmed that the police had done a sketch of the crime scene which showed that the vehicle was on the right side of the road heading towards Malindi and that there were no zig zag marks on the road, no tyre marks are shown on the sketch. He testified that the vehicle was inspected and found to be free from any defects before the accident and that after the accident the front bumper, grill, bonnet panel, roof panel, windscreen pulled, front wheels, left door, rear wing were destroyed and glass shattered from the doors. He testified that the driver did not record a statement and that there was an eye

witness and that the criminal case was pending as it was still under investigation. The matter was to be referred to the insurance. He stated that he did not know why the investigating officer had indicate so but the driver of the motor vehicle was not charged.

Upon re-examination he testified that no one had been charged but according to the police file the driver was to blame.

At the close of the plaintiff's case defence called one witness, **DW1 – Mathias Kombo** who testified that he lives in Kibokoni and was driving motor vehicle registration number KCB 439A to **Bishimwanga** and that there was no accident. He testified that he had recorded a statement dated 12.10.2016 which he adopted as his evidence. He stated that he has a driving license and produced a copy as DEXH1. He testified that he knew (**PW3**), he was in the case and that he drove at 35 kph to 40 kph. He stated that the vehicle had a tyre burst of the rear tyres.

On cross-examination, he admitted that he caused the accident, the road was rough, the tyre burst, he failed to control the car it overturned and people were injured while some died. He testified that the time of the accident was between 1pm and 2pm after they had left Ocean Hotel. He stated that they were late for lunch and were heading 120 kms away. He however stated that he was not speeding to ensure they ate, and that contrary to his statement he was not driving at 120 kph but driving 120 kms to his destination. He stated that the vehicle lay on its side and the deceased had been seated next to him and he had a safety belt on and that he too lost consciousness when the vehicle was rolling.

Parties' submissions at trial

The plaintiff filed written submissions dated 08.08.2018 while the defence filed submissions dated 3.09.2018.

The Trial Court's judgment

Judgment was delivered by the trial Court on 25.11.2018. The Learned trial Magistrate entered liability in favour of the plaintiffs at 100% and awarded general and special damages as follows:

A. General damages

(1). Fatal Accidents Act, (Loss of Dependency) of Kshs.1,500,000.00/=.

B. Law Reform Act

(a). Pain and suffering Kshs. 100,000.00/=

(b). Loss of expectation of life Kshs. 120,000.00/=

(c). Special damages Kshs. 36,225.00/=

TOTAL Kshs.1,756,225.00/=

The Learned Chief Magistrate also awarded costs of the suit and interest thereon from the date of filing suit until payment in full.

The Appellant's Submissions

Counsel for the appellant, **C. B. Gor & Gor**, in their submissions dated 12.06.2020, stated that the appeal was against the trial court's assessment of quantum of damages for loss of dependency, pain and suffering, loss of expectation of life and special damages. counsel submitted on all the grounds of appeal cumulatively.

They submitted that Kshs.10,000.00 was sufficient compensation as general damages for pain and suffering, a sum of Kshs.100,000.00 for loss of expectation of life, and a sum in the region of only Kshs.450,000.00/= to Kshs.500,000.00/= for loss of dependency and only the sum of special damages proved by documentary evidence to be awarded.

On pain and suffering they submitted that the general damages awarded under this heading are awarded on the basis of the time the deceased suffered pain before his death and that since the deceased died immediately after the accident, according to (**PW1**) and (**PW3**) who was an eyewitness who testified for the plaintiffs/respondents stated that the deceased had died on the spot and since there was no reason to doubt the two witnesses who testified so and as such an award of Kshs.100,000.00/= would suffice as reasonable compensation under this head. For this submission they relied on the case of **James Gakinya Karienyé & another (suing as the legal representative of the estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji {2015} eKLR.**

On loss of expectation of life, counsel submitted that Kshs.100,000.00 would be sufficient compensation under this head as the deceased died at 22 years old. They relied on the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & another {2013} eKLR** for this submission.

On loss of dependency, counsel submitted that in determining the reasonable award under this head the Court is required to apply the facts before it and that it is trite Law that dependency is a matter of fact and must be proved. They submitted that it must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependent on a deceased prior to his death. They submitted that no evidence had been placed before the Court to show that the deceased was employed or that his parents depended on him

prior to his death. They submitted that (PW1) had testified at trial that he fully supported the deceased as such they urged this Court to find that dependency was not proved at all as required by Law. They submitted that the Learned trial Magistrate failed to give adequate reasons for awarding the sum of Kshs.1,500,000.00/= as general damages, misdirected herself and failed to take into account the defendants submissions and/or took into account irrelevant factor he ought not to have taken. They reiterated that a sum in the region of Kshs.450,000.00 to Kshs.500,000.00 would suffice as compensation under this head. They relied on the cases of **Bernard Odhiambo Ogecha (Suing as brother and legal representative and administrator of the estate of the Late Oscar Onyango Ogecha) {2014} KLR and Chen Wembo & 2 others VIKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased) {2017} eKLR** for this submission.

On interest awarded by the trial Court, they submitted that the Learned trial Magistrate erred in Law when she awarded interest on the total award contained in the Judgment from the date of filing of the suit until payment in full instead awarding the said interest from the date of Judgment. They submitted that the award of interest is a matter of judicial discretion the said discretion ought to be exercised judiciously. They relied on the case of **Shariff Salim & another v Malundu Kikava {1989} eKLR** for this submission. They submitted that it is trite Law that interest should be awarded from the date of the Judgment until payment in full and not from the date of filing the suit and the Court should give reasons for doing so, which the Learned trial Magistrate failed to do. As such they submitted that the Learned trial Magistrate wrongly exercised her discretion in awarding interest from the date of filing suit.

They submitted that the Court be guided by the decision in **Cecilia W. Mwangi & another v Ruth Mwangi {1977} eKLR** where the Court cited with approval **Lord Denning MR in Lim Pho Choo v Camden & Islington Area Health Authority {1979} 1 ALL ER 332**.

For these submissions counsel also relied on the cases of **Henry Hiday Ilanga v Manyema Manyoka {1961} 1 EA 705 (CAD)**, **Cecilia W. Mwangi & another v Ruth Mwangi {1977} eKLR**, **Tayab v Kinanu {1982 – 88} 1 KAR 90**, **Sammy Kipkorir Kosgei v Edina Musikoye Mulinya & Another {2017} eKLR**, **Shabani v City Council of Nairobi {1985} KLR 516**, **Benedeta Wanjiku Kimani v Changwon Cheboi & Another {2013} eKLR**, **James Gakinya Karieny & another (Suing as the legal representative of the estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji {2015} eKLR**, **Bernard Odhiambo Ogecha (Suing as brother and legal representative and administrator of the estate of the Late Oscar Onyango Ogecha) 2014 KLR**, **Chen Wembo & 2 others VIKK & another (Suing as the Legal representatives and administrators of the estate of CRK (deceased) {2017} eKLR** and **Shariff Salim & Another v Malundu Kikava {1989} eKLR**.

The respondents' submissions

The respondents through their advocate on record **Wambua Kilonzo & Company Advocates** in their submissions dated 22.06.2020, submitted on all the issues cumulatively. They submitted that this being a first appeal the Court has the duty to evaluate the evidence on record and reach its own conclusion taking into consideration that it did not have the opportunity of seeing and hearing the witnesses first hand. They also submitted that the first appellate Court has to act cautiously when interfering with the findings of fact of the trial Court and should not interfere simply because it would have reached a different conclusion if it were hearing the matter for the first time. They submitted that an appellate Court should only interfere if there is no evidence to support a particular claim and that only if the conclusion emanates from a misapprehension of evidence and if the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he/she did. They submitted that the impugned trial Court's findings were based on proper appreciation of the evidence before the Court and other principles of Law as such the same cannot be faulted and this Court ought to resist the appellants' invitation to interfere with the same as there is no basis for it to do so.

They argued that there should be uniformity in awarding damages and the Courts must have regard to recent comparable awards. They submitted that there were eye witnesses called to testify, the evidence tendered proved the time of death, injuries suffered and the circumstances of the death, clearly showing that the deceased had suffered a lot of unimaginable pain as a result of the accident, consequently the respondents are entitled to damages for pain and suffering. **(PW3)** testified that the deceased hit the vehicle's roof several times as the vehicle rolled three times before landing on the left side of the road and that it was that head injury that led to death, as such they submitted that the sum of Kshs.100,000.00/= awarded was fair and reasonable and not in any way excessive with regard to the pain and suffering incurred by the deceased at the point of death as he had suffered pain long before the motor vehicle came to a stop.

On the issue of the loss of expectation of life, counsel submitted that there was proof of high prospects of life/success that the deceased had based on his educational background or other training despite the appellants claiming otherwise. It was their submission that the same should matter the least in determining the award as the deceased was 22 years old at the time of his death and as per life expectancy one would be in active production even after the statutory age of retirement. They submitted that the Learned Magistrate did not error in awarding Kshs.120,000.00 under this head.

On the matter of the loss of dependency, counsel submitted that the respondents had entered evidence to support their claim as the deceased had completed Form four in 2015 and joined computer training in 2016. They submitted that the Learned trial Magistrate had adhered to the principles set under this head where the deceased was of young age and not yet employed. They submitted that the Learned trial Magistrate gave reasoning behind the award of Kshs.1,500,000.00/= under this head. They submitted that the principles which ought to guide the Court in awarding damages under this heading were set out as that; parents cannot insure the life of their children, the death of a victim of negligence does not increase or reduce the award for lost years, the sum to be awarded is never a conventional one but compensation for pecuniary loss, it must be assessed justly with moderation, complaints of insurance companies at the awards should be ignored, disregard remote inscrutable speculative claims, deduct the victim's living expenses during 'the lost years' for that would not be part of the estate, a young child's present or future earnings would be nil, an adolescent's would be real assessable and small, the amount would vary from the case to case as it depends on the facts of each case including the victim's station in life, calculate the annual gross loss, apply the multiplier (the estimate number of the lost years accepted as reasonable in each case), deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her, and living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth. They thus prayed that this Court upholds the Learned trial Magistrate's award.

On the issue of the interest and costs

Counsel submitted that the trial Magistrate did not err in awarding the interest on cost from date of filing of the suit as the same discretion is derived and anchored on Section 26 (1) of the Civil Procedure Act 2010. Finally, they submitted that the appellants appeal lacked merit and should be dismissed with costs to the respondents.

For these submissions counsel relied on the cases of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another {2004} eKLR, I.G. Transporters Limited & another v Moses Theuri Ndumia {2018} eKLR, Civil Appeal Number 17 of 2015 & 18 of 2015, Malindi Moses Akumba & Another v Hellen Karisa Thoya {2017} eKLR, Kenya Power Limited v James Matata & 2 others (Suing as the legal representatives of the estate of Nyange Masaga (Deceased) {2016} eKLR, Twokay Chemicals Limited v Patrick Makau Mutisya & Another {2019} eKLR in Jane Chelagat Bor v Andrew Otieno Onduu {1988 – 92} 2 KAR 288; {1990-1994} EA 47 and DMM (Suing as the administrator and legal representative of the Estate of LKM) v Stephen Johana Njue & Another {2016} eKLR**

Issues for determination

The duty of an appellate Court is well set out in the case of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another CA No. 345 of 2000** where the Court held:

“As a first appellate Court we are not bound by the findings of fact made by the superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O’Connor P. stated in Peters v Sunday Post Ltd {1958} EA 424, at Pg. 429:

“It is a strong thing for an appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness.” This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.” (See Ephantus Mwangi & another v Wambugu {1983} 2 KCA 100.) or in accordance with the principles and guidelines in Robert Nsioki Kitavi v Coastal Bottlers Ltd {1982} – 198 IKAR 891 – 895

“The appellate Court will only interfere with a trial Judge’s assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate.”

It is now settled Law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of Law and facts and come up with its findings and conclusions. (**Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424**) The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- (i). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
- (ii). In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
- (iii). It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.*

These three principles are well settled and are derived from various binding and persuasive authorities including;

- (a). Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);**
- (b). Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); Virani T/a Kisumu Beach Resort v Phoenix of East**
- (c). Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)**

I stand by the **Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424** where **Sir Kenneth O’Connor** stated as follows:

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1) {1947} A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a

particular conclusion (and this is really a question of Law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

A perusal of the abstract submitted in the trial Court is clear that the document is an abstract of the records of the police on the accident. It is also expressed that it is the record that gives the salient facts of the occurrence of an accident as ascertained by the police from their own observation. It follows that, in the absence of any contrary evidence, the abstract was sufficient enough to prove, at least on a balance of probability, that indeed a road traffic accident involving the said motor vehicle registration occurred as pleaded by the respondents and consequently is enough to prove that the deceased was a passenger in the accident vehicle and that the appellants were its owner and driver.

Consequently, I find that the said accident did occur and that the motor vehicle was indeed the appellants. With this in mind, I have analyzed the evidence as this Court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this Court in my view:

1. Liability

2. Quantum

3. Award of interest

Liability

In all probability, the accident in the present case was self-involved the burden was on the appellants to prove that the accident occurred other than as alleged by the respondents and, in any event, it was not as a result of negligence on their part. The appellants however did not call any evidence to controvert this assertion and therefore did not discharge this burden. There only witness DW1 also confirmed that the accident was self-involving and the police sketch map propounded this assertion. Further, I do take note that the appellant's submissions did not seem to address the issue of liability but rather the main focus was on quantum. Consequently, I find no reason to interfere with the Learned Magistrate's decision on this matter with respect to the question of who might have been responsible for the accident. As such I am in agreement with the Learned Magistrate's finding on 100% liability against the appellants as there was no evidence adduced to the contrary.

Quantum

The appellants' case is that the approach taken by the Learned trial Magistrate was erroneous and against the well laid down principles on lost years, loss of expectation of life and other expenses. According to the appellants, there is need to interfere with the Judgment to indicate what was factored in exercising discretion to award damages under the various items. In this appeal, the appellants are essentially seeking a review on the award of general damages as stated in the Judgment of the trial Court.

Loss of Expectation of Life and Loss of Dependency

There are very clear principles on the sums recoverable against the defendant who caused the fatal injuries which caused the death of the deceased is provided for under **the Law Reform Act Miscellaneous Provisions (Section 2) and the Fatal Accident Act under Section 4 and 5 of the Act**. As provided for in the Fatal Accident Act the claim by the respondents against the appellants was brought as legal personal representative and on behalf of the estate of the deceased for the benefit of the dependents.

It is general principle of Law that when assessing damages recoverable on both the Law Reform Act and Fatal Accidents Act the amount recoverable under the Law Reform Act shall be taken into account but deducted in the final assessment of damages so as to avoid double payment to the same beneficiary. It is imperative to conceptualize the exercise of discretion in assessment of damages under the Law Reform Act and Fatal Accidents Act. The determination of damages will involve the principles laid down in various judicial decisions such as in the case of **Yorkshire Electricity Board v Naylor {1968} AC 52G** where the Court held that:

“It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L. C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a ‘positive measure of happiness’ or of a ‘predominantly happy life.’”

I have considered the rival submissions on the quantum of damages, the authorities cited by the appellants and respondents in their submissions. Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan {1982-88} KAR 5** where the Court held that:

“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.”

In the case of **Savanna Saw Mills Ltd v Gorge Mwale Mudomo {2005} eKLR** the Court stated as follows:

“It is the Law that the assessment of damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court simply because it would have awarded a different figure if it had tried the case at the first instance”

For this I shall rely on the Court of Appeal’s decision in the case of **Gitabu Imanyara & 2 others v Attorney General {2016} eKLR**, where the Court of Appeal held that:

“... 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.* It was echoed with approval by this Court in *Butt v Khan {1981} KLR 349* when it held as per Law, J. A. that:

“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.” (Emphasis my own)

On the issue of the award for pain and suffering, it is evident that the deceased died on the spot, at the scene of the accident. All the witnesses concurred that the deceased died at the scene, albeit after a lot of pain and suffering as the car was rolling. I also note that the deceased was seated at the front seat next to the driver meaning that he had the front row seat to a horrible death. On pain and suffering the deceased died the same day, there was no evidence of life and expectance before his last breath. From the evidence adduced at trial (**PW1**), (**PW3**) and (**PW4**) all confirmed that the deceased died on the spot, consequently I find that award of Kshs.100,000/= as being excessive and do substitute it with Kshs.50,000/=.

On the issue of loss of expectation of life, I further draw from a comparative decision in **Gammel v Wilson & others and Furness & another v B & S Massey Ltd {1982} AC**. The Court shall consider the following principles as held in by **Lord Scarman** thus:

“the correct approach in law to the assessment of damages in these cases on loss of expectation of life and lost years. In these cases presents my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his life line. The loss is pecuniary as such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the Court to award the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters But in all cases it is a matter of evidence and a reasonable estimate based on it.” (emphasis underlined mine)

This mechanism and legal approach taken by the English courts and its primacy in assessment of damages in lost years is the interpretation applied in our courts as can be seen from the decision by the Court of Appeal in **Sheikh M. Hassan v Kamau Transporters {1982-88} IKAR 946** where it was held that:

- “(i). the sum to be awarded is never a conventional one but compensation for pecuniary loss.**
- (ii). It must be assessed justly**
- (iii). Deduct the victims living expenses during the lost years for they would not form part of the estate.**
- (iv). A young child’s present or future earnings in most cases would be nil.**
- (v). An adolescent would usually be real, assessable and small.**
- (vi). Calculate the annual gross loss.**
- (vii). Apply the multiplier estimated number of lost working years accepted as reasonable in each case.**
- (viii). Deduct the victims probable living expenses of a reasonably satisfying enjoyable life for him or her.”**

I concur with the Learned Judge in the case of **Civil Appeal Number 17 of 2015 & 18 of 2015 Malindi Moses Akumba & Another v Hellen Karisa Thoya {2017} eKLR** that:

“..... Each life is important and equal and that there should be no distinction between a poor man and a rich one, no distinction between one who is working and an unemployed person.”

The deceased was a young 22-year-old man who was also healthy. He was a student at a computer college and the normal expectation was

that he was going to live for about 60 years, whether he was formally employed or not should not be a major issue here as this was a young man's life that had been cut short. (PW1) stated that the deceased was a student at a computer college and that he had worked as a censor clerk and was set to go to Form 5 and 6. However, the veracity of that evidence cannot be confirmed as nothing was tabled by the plaintiffs, there was no school leaving certificate, no K.C.S.E result slip and nothing to show whether he had attended college or was poised to attend Form 5 and 6. That said, it is for me to determine whether the award was consistent with comparable awards made. The appellant's submissions propose the sum of Kshs.100,000.00/= for the award on loss of expectation of life and rely on the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & Another {2013} eKLR** for this submission. The respondents in turn propose that the Learned trial Magistrate's award of Kshs.120,000.00/= was appropriate. I take note that the case relied upon by the appellants is at least 7 years old and although the amount quoted is termed as the conventional sum the same should be subject to inflation. It is as such my considered opinion that a sum of Kshs.120,000.00/= would be appropriate in this case.

On loss of dependency, first and foremost the Court of Appeal has reaffirmed the various variables to be taken into account on proof of income and employment when it comes to the question whether one has to produce bank statements, books of accounts, receipts, and testimonials as the safest way to determine the parameters that one was in active employment or his income earnings. That position has been made clear in the case of **Jacob Ayigo v Simon Obayo {2005} eKLR** where it was expressly stated 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 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

I consider the Court's obitum in the case of **Wangai Thairu v Hon Burngetuny & Another (supra)** the court on this powers stated as follows:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are too clear the Court must in the first instance find out the value of the annual dependency such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase.

In choosing the said figure usually called the multiplier the Court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature.”

In the cases of **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Court of Appeal sitting at Nyeri in Civil Appeal No. 35 of 2014 eKLR** pronounced itself as follows:

“The choice of a multiplier is a matter of the Courts discretion which discretion has to be exercised judiciously with a reason.”

In reference to the decision in the case of **Kwanzia v Ngalah Rubia & Another Ringera J** as he then was read as follows:

“The multiplier approach is just a method of assessing damages. It is not a principle of Law or a dogma. Can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or 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.”

What amounts to proof on the above factors depends on the circumstances and character of each particular case. This is the position taken and articulated in the case of **Charles Ouma & another v Bennard Odhiambo Ogeche 2014 eKLR** where the Court held:

“I am of the considered view that the Learned trial Magistrate fell into error in making awards under separate heads. As it were the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full nor how much he would earn, nor was there any way knowing whether or not he would be able to support his brother, the respondent herein.”

I take judicial notice that from the latest World Bank data life expectancy in Kenya is between 64 and 69 years. I also take judicial notice that the minimum wage in Kenya is based on the region and occupation of various categories of workers. For this reason the trial Court ought to be availed cogent evidence from the plaintiffs on the prospective nature of work anticipated the deceased would have undertaken after college to come up with the minimum wage under the Employment Act. However, having said that I am inclined to concur with the Learned trial Magistrate that a global sum would be the best approach in the circumstances of this case. The appellants propose an award of the sum in the region of Kshs.450,000.00 to 500,000.00 while the respondents argued that an award of Kshs.1,500,000.00/=. The appellants cited the case of **Chen Wembo & 2 Others VIKK & Another (Suing as the Legal representatives and administrators of the estate of CRK (Deceased) {2017} eKLR** as their most recent case while the respondents cited the case of

I note that the case cited by the appellants is at least three years old and in this regard is fundamentally different as the deceased was a minor of 12 years old and there was no evidence that he was in school nor evidence as to the level of his abilities. Further, the case cited by the respondents is at least four years old and is fundamentally different from this case as the deceased therein was a minor aged 16 years old.

I should hasten to add that there is no golden rule in the assessment of damages, as what is beyond doubt is that irrespective of the age of the deceased and whether or not there is evidence of his pecuniary contribution damages are payable to the parents or dependents, as the heads, global or mixed approaches have been applied in superior Courts as was seen in the Court of Appeal's decision in the case of **Kenya Breweries Limited v Saro {1999} KLR 408**.

Consequently, I find that the global sum would be sufficient in this case, however, from the foregoing I find that the Learned trial Magistrate's award was inordinately high while the amount proposed by the appellants was too low. I therefore award a sum of Kshs.1,000,000.00/= under this head.

Special Damages

The test to be applied in this award of damages is clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the respondent had clearly proven the amount pleaded as special damages and as such I find no reason to vary the Learned Magistrate's decision on that.

The award on interest

It is important to note that the award on interest is discretionary, however I find no basis for the Learned trial Courts award from the time of filing of the application as such I award interest from the date of Judgment.

Determination

The discretionary jurisdiction of the first appellate Court being judicial is to be exercised on the basis of evidence and sound legal principles. **(See the case of Shah (supra), Paul v E.A. Cargo Handling Services Ltd {1974} EA 75.)** There is no legal requirement for the Court to deduct the amount awarded under the Law Reform Act from the award made under the Fatal Accidents Act. For the above reasons, the appellants appeal partially succeeds and the following orders abide the decision of this Court:

A. General Damages

(1). Fatal Accidents Act, (Loss of Dependency) of Kshs.1,000,000.00/=

B. Law Reform Act

(a). Pain and Suffering Kshs. 20,000.00/=

(b). Loss of expectation of life Kshs. 120,000.00/=

(c). Special damages Kshs. 36,225.00/=

Interest shall abide from the date of Judgment until payment in full

TOTAL Kshs.1,136,225.00/=

The net award therefore remains to be Kshs.1,136,225.00/= . The result therefore is that this appeal on issue of damages partially succeeds and the same is allowed as herein above stated. There will be Judgment for the appellant against the respondent with interest thereon at Court rates plus costs of the appeal to be shared equally .

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF NOVEMBER 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Kiponda holding brief for Wambua Kilonzo advocate for the respondent