REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 4 OF 2016

NGUGI ALOICE T/A SILOAM HIDE & SKIN LTD.....APPELLANT

VERSUS

ESTHER KANINI NJERU & SIMON MUCHIRA

(Suing as Legal Representative of DANIEL GITONGA NJERU- Deceased).....RESPONDENT

(Being an Appeal from the whole of the judgment delivered by the Honourable M. Gicheru

Chief Magistrate on the 21st December, 2015 in CMCC No. 207 of 2015)

J U D G M E N T

A. Introduction

1. This is an appeal from the judgment of the Chief Magistrate Embu delivered on 21/12/2015 in CMCC No. 207 of 2015 wherein general and special damages amounting to Kshs.2,170,500/= all inclusive and less 10% contribution were awarded to the respondent.

2. The appellant was dissatisfied with the judgment and especially the quantum of damages and lodged this appeal

relying on several grounds as follows:-

(a) *That the learned trial magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high and without considering the provisions of Cap 405- The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act which gives a guideline on how compensation ought to be computed.*

(b) *That the learned trial magistrate erred in law and in fact in failing to deduct the award under the law Reform Act being pain and suffering and loss of expectation of life from the award for Loss of Dependency under Fatal Accident Act yet it was clear in the facts of the case that the beneficiaries under both Acts were the same.*

(c) *That the learned trial magistrate erred in law and in fact in adopting a multiplier of 25 years whereas there was no evidence of dependency and its period thereof.*

(d) *That the learned trial magistrate erred in law and in fact in assuming that the deceased family would have depended on the deceased for 25 years.*

(e) *That the learned trial magistrate erred in adopting a dependency ratio of 2/3 a finding that was not supported by evidence that the deceased was burdened to raise his siblings and provide for his mother.*

(f) *That the learned trial magistrate erred in law and in fact in misdirecting himself in disregarding the Parliament insurance Act and applying judicial precedents which ranks lower than an Act in the hierarchy of the Laws of Kenya as per Section 3 of the Judicature Act Cap 8 of the Laws of Kenya.*

(g) *That the learned magistrate erred in fact and in law in failing to apply the jurisprudence on double awards as was developed in* ***Kemfro Africa Ltd –vs- A.M Lubia (1982-88)1KAR 727***

(h) *That the learned magistrate erred in fact and in law and in fact in failing to consider conventional awards for general damages in similar cases.*

3. The appellant thus urged the court to allow the appeal and to set aside the judgment as well as assess the damages afresh.

B. Submissions by the parties

4. The appellants submitted that the award of Kshs. 20,000/= for pain and suffering was high and prayed that the same be substituted with Kshs. 10,000/= as the deceased died on the spot and relied on **Michimikuru Tea Factory –vs- Charles Lautani Imunya [2013] eKLR** and **James Gakinya Karienya & Anor –vs- Perminus Kariuki Githinji**. Further that the award in both heads ought to be deducted from any award made under Fatal Accidents Act since compensation under the two Acts would amount to double compensation and reliance was made on **Transpares Kemya Ltd & Anor –vs- S.M.M (suing as the Legal Representative for and on behalf of the Estate of E.M.M (deceased) [2015] eKLR**. The appellant said that it was not opposed to the award for loss of expectation of life. On the award under the Fatal Accident Act, the appellant submitted that the award was too high in that the multiplier of 25 years and multiplicand of Kshs. 10,000/= with a ratio of 2/3 was too high and unreasonable and the trial magistrate did not explain the basis of applying the said multiplier, multiplicand and the ratio. Further that the Respondent did not prove dependency and that the plaintiff was not a dependant of the deceased. Reliance was made on the case of **Chania Shuttle –vs- Mary Mumbi [2017] eKLR.** The appellant further submitted that the trial court erred in finding that the deceased was earning a monthly income of Kshs. 30,000/= without production of any evidence and relying on various authorities, the appellants submitted prayed that the multiplicand of Kshs. 10,000/= be set aside and substituted with Kshs. 9,780/= which was the minimum wage in 2015 when the deceased died. The appellant further submitted that the multiplier of 25 years was not merited and urged the court to use multiplier of 15-20 years and that the ratio of 2/3 to be substituted with that of 1/3. Reliance was made on **Michimikuru Tea Factory –vs- Charles Lautani Imunya (supra)**. The appellant in the circumstances invited the court to interfere with the award by the trial court as was high and erroneous considering the comparable awards for similar claims as the same was too high. The appellant invited the court to exercise its role in disturbing the award as was established in **Daniel Mwangi Kimemi& 2 Others –vs- JGM & Anor (2016) eKLR** and find that the awardable loss of dependency ought to be calculated as follows: -

Ø Loss of dependency -

Kshs. 9,780.95 x20 x1/3 x12 = Kshs. 782,476

Ø Less loss of expectation of life -

Kshs. 100,000 = Kshs. 682,476.

The appellant did not challenge the award of special damages.

5. On their part the respondents submitted that the multiplicand of Kshs. 10,000/= and the dependency ratio was not inordinately high and urged the court to dismiss the appeal.

C. Re-evaluation of evidence

6. It is now established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof and taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect (See **Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123).** The appellate **court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See Ephantus Mwangi and Another –vs- Duncan Mwangi Wambugu (1982) – 88) IKAR 278). Further under section 78 (2)** of the **Civil Procedure Act** *the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein.*

7. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. I am guided by the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).** Further what is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. (See **John K. Malembi v Trufosa**

Cheredi Mudembei & 2 others [2019] eKLR).

8. The brief facts of the case herein are that the deceased was involved in a fatal road traffic accident on 1/01/2015 while on board motor vehicle registration number KBW 227S which was under the control of the appellant's driver, agent, servant, assignee and or employee and which accident was blamed on the negligence on the part of the said agent. It was as a result of which the respondent sought for general damages and special damages amongst other reliefs. The claims were denied by the appellant who blamed the respondent for contributing to the accident and further blamed the driver of MV KAV 354M.

9. At the hearing, the parties agreed as to liability and which was apportioned at the ratio of 90%:10%. The respondent witness testified in support of their case and produced exhibits to *wit* death certificate, limited grant ad litem in Embu HC Succ. Cause 82 of 2015, police abstract, copy of records, receipt dated 31.3.2015 and demand letter dated 13.02.2015 as PExbt 1, 2, 3, 4(a), 4(b) and 5 respectively. The appellant did not call any evidence to controvert the evidence of the respondent.

D. Issues for determination

10. I have considered and analyzed the pleadings and the evidence tendered before the trial court by the respondent and the submissions of the parties. The parties recorded a consent on liability at 90:10 in favour of the respondent. The appellant was aggrieved by the quantum of damages in several aspects. The main issue for determination is whether the quantum awarded by the trial court was inordinately high.

E. Determination of the issue

11. The principles on which an appellate court will interfere with the trial court findings on award of damages has been clearly discussed in a number of cases. In the case of **Butt v Khan 1982 -1988 1 KAR** the court pronounced itself as follows: -

> ***"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 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***

12. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that: -

> ***"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."*** (See also **P.A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR**).

13. As regards damages awarded under the Law Reform Act, the Appellants submitted that they were contented with Kshs. 100,000/= awarded for loss of expectations of life. However, the appellant submitted that the award of Kshs. 20,000/= for pain and suffering was high and ought to be substituted with Kshs. 10,000/= as the deceased died on the spot. The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.

14. The Appellants cited **Michimikuru Tea Factory –vs- Charles Lautani Imunya (2013) eKLR** and **James Gakinya Karienya & Anor –vs- Perminus Kariuki Githinji** to justify their proposal for Kshs. 10,000/= and which authorities were decided in 2015. However, in **Sukari Industries Limited V Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] EKLR** where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000/= for pain and suffering, Majanja J. in upholding the trial court's award held that: -

> ***"On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death….."***

15. In my view the award of Kshs. 20,000/= for pain and suffering was not manifestly excessive and is within conventional awards. I find no reason to interfere with this item of damages and the award of Kshs. 20,000/= is hereby upheld.

16. For the award under the Fatal Accident Act, it was submitted that the multiplier of 25 years, the multiplicand of Kshs. 10,000/= and the ratio of 2/3 was extremely high and unreasonable for an unmarried adult who was aged 23 years at the time of death. The applicable principles under the Fatal Accident Act were well stated in the case of In **Ezekiel Barng'entuny –vs-Beatrice Thairu HCC No. 1638 of 1988 Ringera** where Justice Ringera (as he then was) he held as thus: -

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all 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 dependents' and the chances of life of the deceased and the 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 a lump sum and award if wisely invested yield returns of an income nature."***

17. The trial court in determining the loss of dependency held as thus: -

> ***"I find that since the deceased was the first born and the father died when he was young, he had a big role to play in supporting his mother who was widowed earlier. For this reason, I find the dependency ratio to be 2/3. On the multiplicand, the evidence that the deceased was a hardworking and promising young man is uncontroverted. I agree that the multiplicand of Kshs. 10,000/= is reasonable if not on the lower side. On the multiplier, there is no doubt the mother would eventually have depended on the deceased after her other children matured and entered the job market. I find a multiplier of 25 years to be fair…."***

18. It is my considered opinion that the trial court well and properly the principles as were expounded in **Ezekiel Barng'entuny's case (supra)**. Despite the appellants herein having filed their defence, they never tendered evidence in support of their averments and so as to controvert the Respondent's testimony but proceeded to file submissions in the matter. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**: -

> ***"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."*** **(**See also **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**.).

19. Thus failure to call evidence in my opinion means that the respondent's evidence in the trial court was uncontroverted. The trial court thus applied the said evidence to the law and arrived at the correct finding as to the award under the Fatal Accident Act.

20. The deceased in this appeal was aged 23 years and given the retirement age of most workforce in this country including civil service who retire at 60 years, I am of the considered opinion that the deceased would have worked for another 28 years had he lived. A multiplier of 25 years was therefore reasonable and it is hereby upheld.

21. As for the multiplicand, the 2nd respondent testified that the deceased was a contractor and earned his living in building roads and houses in small contracts whereas he earned Kshs. 30,000/= a month. However, no documentary evidence was adduced to show the work the deceased did and how much he earned. In such a scenario, the court will normally rely on the gazetted wages for unskilled workers as at the time of the deceased's death. In this case, the deceased died in January 2015 and the gazetted minimum monthly wage for unskilled workers in Regulation of Wages (General) Amendment Order, 2013 was Kshs. 9,780/=.

> **22.** I find that the multiplicand of Kshs. 10,000/= adopted by the magistrate was reasonable and within the law bearing in mind that the gazettements of unskilled workers wages done every year must have increased the minimum monthly wage gazetted in 2014 to Kshs. 10,000/= or above.

23. Evidence was adduced that the deceased was not married and that he was the first born in the family who included his mother and four (4) siblings. I take judicial notice that first borns in a family bear greater responsibility over their parents and siblings. I am of the considered opinion that the ratio of 2/3 was reasonable and not inordinate in the circumstances.

24. The trial court in my considered view did not err in adopting the ratio of 2/3 which I hereby uphold.

25. Consequently, I am of the considered opinion that the trial court did not err in applying the multiplier of 25 years, the multiplicand of Kshs. 10,000/=. The correct principles were duly applied by the court and it arrived at a reasonable award for loss of dependency.

26. The applicant raised an issue to the effect that the learned magistrate erred in fact and in law in failing to apply the jurisprudence on double awards as was developed in **Kemfro Africa Ltd –vs- A.M Lubia (1982-88)1KAR 727**. In their submissions, it was submitted that the trial court failed to deduct the amount awarded under the law Reform Act for loss of expectation of life and pain and suffering from the award under the Fatal Accident Act. As such it was submitted that the trial court ought to have deducted Kshs. 120,000/= from the total sum of damages. However, the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR,** in explaining the issue on double awards had this to say: -

"This Court has explained the concept of double compensation in several decisions and it is that some courts continue to get it wrong. The principle is logical enough, duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise……

An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act, it appears the legislation intended that it should be considered.

The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estate of deceased persons shall be in addition to and not derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law reform Act in respect of the same death.

The words 'to be taken into account' and ' to be deducted' are two different things. The words in Section 4(2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgement of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction……..."

27. From the above authority and which is binding on this court, it is clear that there is no legal requirement that awards made under the Law Reform Act must be deducted from those made under the Fatal Accidents Act. The award made under the Law Reform Act is in addition to what is awarded under the Fatal Accidents Act. Although Section 2(5) of the Law Reform Act provides for the ***"rights***" conferred to the estate, such rights lead to the award under the Law Reform Act which awards are in addition and not in derogation to those rights or awards made under the Fatal Accidents Act. As such, it is my considered opinion that this ground of appeal has no merit. Indeed find that the trial magistrate did not err for failure to subtract the amount awarded under the Law Reform Act.

F. <u>Conclusion</u>

28. I reach a finding that the trial court applied the correct legal principles in regard to assessment of quantum and arrived at the right award. The trial court therefore did not act on wrong principles of law and neither did it misapprehended the fact or made a wholly erroneous estimate of the damages so as to warrant the same to be interfered by this court.

29. I find no merit in this appeal and it is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

DELIIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE