REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 70 OF 2017

LEONARD OCHAR OTIENO.....APPELLANT

VERSUS

MATHEWS MWANZA WANGA

(Suing as the legal administrator of the estate

of Kennedy Owino Wanga (deceased).....RESPONDENT

JUDGMENT

1. The appeal arises from the judgment and decree of the trial court in Mumias PMCC No. 81 of 2016, in which damages were awarded as follows: liability at 80:20 in favour of the respondent against the appellant; pain and suffering - Kshs. 40,000.00; loss of expectation of life – Kshs. 100,000.00; loss of dependency – Kshs. 6,000,000.00; and special damages – Kshs. 126,930.00. The total came to Kshs. 6, 266, 930.00, and after deduction of contribution the total came down to Kshs. 5,013,544.00.

2. The appellant was dissatisfied with the award of general damages, and filed this appeal.

3. In his written submissions, the appellant disputes the multiplicand of Kshs. 50,000.00, used in calculating the award for loss of dependency. He argues that the multiplicand adopted by the trial court was too high, and that the same had no basis. He further submits that the same was erroneous, and that court ought to have made a global award of Kshs. 160,000.00. He further argues that there was also double compensation, in that the court awarded damages under both the Law Reform Act, Cap 26, Laws of Kenya, and the Fatal Accidents Act, Cap 32, Laws of Kenya.

4. The respondent opposes the appeal, and submits that the award was sufficient compensation for the deceased. He prays that the appeal be dismissed.

5. Having perused through the record I have identified the following issues for determination. First, is the question as to whether the trial court acted on wrong principles arising at the award of damages, and, if the above is answered in the affirmative, which sum would be sufficient compensation in the circumstances.

6. On the damages for loss of expectation of life the trial court made an award of Kshs. 6,000,000.00, calculated as follows: 50,000 x 12 x 30 x 1/3 =, 6,000,000.00. The appellant contests the multiplicand of Kshs. 50,000.00, and submit that the same had no basis, and that the court ought to have adopted a global amount, and awarded lost years, as the deceased was still in university at the time of his death.

7. As to whether the trial court can be faulted for adopting the multiplier and multiplicand method in assessment of damages, the court in *Ugenya Bus Service vs. Gachiki* (1976-1985) EA 575, said:

> *"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."*

8. In *Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (Suing As Brother And Legal Representative And Administrator of The Estate Of The Late Oscar Onyango Ogecha (Deceased)* [2014] eKLR , the court said:

> *"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 of knowing whether or not*

he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.

The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14 year old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of H. Young & Company EA Ltd. & another -vs- James Gichana Orangi – Kisii HCCA NO.207 of 2009. In the said case, the learned trial magistrate awarded damages totalling Kshs.323, 300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs.323, 300/= and in lieu thereof made a lump sum award of Kshs.300, 000/= subject to 25% contribution."

9. In *Oshivji Kuvenji & Another vs. James Mohammed Ongenge* [2012] eKLR stated:

"In as much as the Appellants in the instant case argue that a global sum would be the best suited to the deceased aged only six (6) years at the time of her death, I have not come across an authority that has overturned a decision of the trial court on account of granting general damages based on expected earnings and tabulated on a multiplier. It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor."

10. From the above, it is clear that the method adopted by the trial court cannot be faulted. The only issue for me to determine is as to whether the award made was inordinately high as argued by the appellant. See generally, *Ponderosa Logistics Limited vs. Wesley Cheptoo Arap Chelagat and Alex Cheptoo (Suing as the Representative in the Estate of Mark Too (Deceased)* [2020] eKLR.

11. The respondent submits that the deceased was, at the time of the accident, aged 21 years and a student at Egerton University, studying to be a high school teacher. The trial court adopted a multiplicand of Kshs. 50,000.00, on the basis that, had the deceased graduated, he would have been employed as a secondary school teacher.

12. In *Bernard Kinyua Kirimaria vs. Stephen Kamamia Maina* [2018] eKLR**,** the court observed :

"7. As I understand, the appellant's case as submitted by counsel is that the adoption of a multiplicand of Kshs. 36,800/- based on the career of a nurse was speculative given that the deceased was a 21-year-old who had just been admitted to KMTC. Our law reports are awash with cases where the court has inferred the expected income of the deceased from the nature of education and expected career path (see for example Richard Osoro Jindiga v Alex Thangei and Another NRB HCCC No. 42 of 2007[2013] eKLR). The issue really is one of evidence and common sense as the Court of Appeal observed in Kenya Breweries Limited v Saro MSA CA Civil Appeal No. 144 of 1990 [1991] eKLR that;

We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law.

8. That the deceased was a student at KMTC and was well on her path to graduating as a registered nurse was not contested. The income of the nurse was proved by PW 3 and as the trial magistrate pointed out this evidence was not discredited. The appellant submitted before the trial court that PW 3 did not produce any evidence to show that she was a registered nurse and the salary of a nurse. The appellant had an opportunity to verify what was contained in her statement and challenge her statement on oath by providing contrary evidence. Having failed to challenge that evidence, I find that the respondent established a basis for determination of the deceased's future income in her chosen career path.

9. In Steve Tito Mwasya and another (both suing as legal representatives of the estate of S K T (Deceased) v Rosemary Mwasya NRB HCCC No. 221 of 2011 [2015] eKLR the deceased was 19 years old at the time of her death. She was not in employment but was a student at Strathmore University studying accounts and at the University of Nairobi where she studied Bachelor of Commerce. The plaintiff presented documents showing that the deceased undertook studies learning towards the study of accountancy or finance. In determining the multiplicand, the trial judge relied on the appropriate salary of an accountant or finance officer from the extract of the Salary Survey of Kenya. When the matter went to the Court of Appeal in Rosemary Mwasya v Steve Tito Mwasya and Another NBI CA Civil Appeal No. 100 of 2017 [2018] eKLR, the Court of Appeal upheld the trial court's assessment of the multiplicand where the trial court had recourse to other evidence to establish what the deceased would have earned and observed that:

"As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions."

13. In *Daniel Kahiga & Another vs. Janet Jeruto & Michael Chepkwony (suing as the Legal Representative of the Estate Of Maureen Jepkoech Chepkwony, Deceased)* [2019] eKLR, when faced with similar circumstances, the court adopted a multiplicand of Kshs. 38,000.00, which was proved to have been the salary of a secondary school teacher. In the instant suit, there was no proof of the Kshs. 60,000.00 submitted by the respondent as the expected earnings of the deceased as a high school teacher. The trial court also had no basis in, therefore, for adopting Kshs. 50,000.00.as multiplicand

14. The court ought to have considered the salary applicable to teaching profession. In the circumstances, it is my finding that the amount of Kshs. 38,000.00, based on the decision above, would have been the sufficient multiplicand in the circumstance, as the amount of Kshs. 50,000.00 was inordinately high. It is my finding that the appeal, on the multiplicand adopted, succeeds, and the same ought to be worked out as follows: 38,000 x 12 x 30 x 1/3 = 4,560,000.

15. With regard to the issue of double compensation, the Court of Appeal in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (Deceased) Vs. Kiarie Shoe Stores Limited* [2015] eKLR said:

> *"[20] This Court has explained the concept of double compensation in several decisions and it is surprising 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."*

16. The same was reiterated, by the Court of Appeal, in *Daniel Inyangala Ambetsa vs. Moses Sigoria Shauri t/a Multibrand Marketing* [2020] eKLR , where the court said:

> *"In the instant case, the learned Judge interfered with the award of damages made by the trial court. She relied on the alternate proposal by the respondent regarding what the appellant should have received. She further took the view that the correct position in law was that a party claiming should not benefit under both the Fatal Accidents Act and the Law Reform Act. We do not think that that is the correct position in law. We shall revert to the issue later in this Judgment.*
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> *The respondent contends that the appellant did not adduce evidence of proof of dependency and income and therefore he should not have been awarded lost years. In the case of Kenya Breweries Limited Vs. Saro [1991] eKLR this Court stated thus:*
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> *"In our view damages are clearly payable to a parent of a deceased child irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution."*
>
> *This quote puts to rest and settles the submissions by the respondent that the appellant was not entitled to damages for lost years for want of proof of dependency, failure to give particulars of such dependency or that the appellant was bound by his pleadings. Further it also renders authorities relied by the respondent irrelevant. In Sheikh M Hassan v Kamau Transporters [1982-88] I KAR 946, the Court laid down guidelines for assessing damages for lost years under the Law Reform Act. Those guidelines are, inter alia:*
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> *a) "The sum to be awarded is never a conventional one but compensation for a pecuniary loss.*
>
> *b) It must be assessed justly and with moderation,*
>
> *c) Deduct the victims living expenses during the "lost years" for they would not form part of the estate.*
>
> *d) A young child's present or future earnings in most cases would be nil.*
>
> *e) An adolescent would usually be real, assessable and small.*
>
> *f) Calculate the annual gross loss.*
>
> *g) Apply the multiplier (estimated number of "lost working years" accepted as reasonable in each case).*
>
> *h) Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her."*
>
> *The claim herein was for damages for lost years payable to the estate of the deceased whose life was shortened by the tortious acts of the respondent. It was not a claim for loss of dependency by the appellant under the Fatal Accidents Act. Therefore, in determining this appeal on the issue of quantum it is necessary to determine the nature of the appellant's claim. The appellant made claims both under the Fatal Accidents Act and the Law Reform Act which the trial court awarded but on appeal the learned Judge made an award under the Law Reform Act only. I note that claims under these two statutes are distinct. The Fatal Accidents Act was meant to cure a deficiency in the common law where the cause of action did not provide for dependants of a deceased person. Section 4(1) of the Fatal Accidents Act now provides as follows;*
>
> *"Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ….. be brought by and in the name of the executor or administrator of the person deceased]".*
>
> *I agree that if the appellant's claim was considered under the Fatal Accidents Act the deceased's father would not be a dependant and the claim would fail. On the other hand, the Law Reform Act was intended to ensure that causes of action survive the death of the deceased hence Section 2(1) thereof provides:*

"Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

The two statutes exist side by side and are not mutually exclusive. Section 2(5) of the Law Reform Act provides as follows:

2(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependant of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

The only limitation in awarding damages under both Acts is that the court should avoid double compensation or duplication of the award as the claim on behalf of the estate of the deceased is, "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act". In Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR this Court rendered itself thus:

"This Court has explained the concept of double compensation in several decisions and it is surprising 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."

That is to say, if the trial magistrate had considered that the claim for loss of dependency under the Fatal Accidents Act and came to the conclusion that the dependants claiming did not fall within Section 2(1) thereof, and still proceeded to make an award for lost years, this would have amounted to a duplication of awards. However, having awarded lost years, the court could still go ahead award the estate damages under the Law Reform Act as this would not amount to double compensation. Therefore, with due respect to the learned Judge, it was an error in principle on her part to find that the trial court had made an award which amounted to double compensation. In Kenya Breweries v Saro (supra) the court further said:

"…In Kenya society, at least as regards Africans and Asians, the mere presence in a family of child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact."

In Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 the Court held that

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

In the premises, the learned Judge erred in holding that the award by the trial court amounted to double compensation."

17. From the above authority, it is clear that the issue of double compensation does not arise herein.

18. In an upshot, the appeal herein succeeds only on the ground of the multiplicand being inordinately high. The appeal is allowed to that extent, and the damages under loss of dependency shall be reassessed as proposed here above, at paragraph 14. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December, 2020

W MUSYOKA

JUDGE