REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL CASE NO. 27 OF 2014.

SAMSON MWAURA MBURU.....1ST APPELLANT

GERALD MBURU.....2ND APPELLANT

VERSUS.

REGINANT N. OKOTH

MARGARET N. OTIANGA (Suing on their own behalf and as the Administrator of the

estate of the late JAMES AFULA MASICHE)**.....RESPONDENTS**

[An appeal from the Judgment and decree in original Bungoma CMCC 806/2010 delivered on 27.3.2014 by Hon. I. Maisiba (PM)].

JUDGMENT.

By plaint dated 3rd November 2010, the respondent in this appeal Reginant N. Okoth and Margaret N. Otianga [suing on their behalf and on behalf of the estate of James Wafula Masiche – Deceased] sued the appellant Samson Mwaura Mburu and Gerald Mburu claiming;

> *as at* paragraph 5 of the plaint *at the time of his painful death the deceased was a married man aged 45 years, enjoyed good health and lived a happy life. At the time of his death he was a driver earning approximately Kshs.30,000/= per month. He used to contribute substantially to the maintenance of the aforesaid dependants and by reason of his death they have lost means of support and have suffered loss and damage. The deceased life expectancy was also cut short by the said death.*

The basis of the claim was that on or about the 29th day of January 2010, at 6.00p.m. the deceased was lawfully driving motor vehicle registration number KBH 296N towards Bungoma town from Kanduyi along Bungoma – Kanduyi Road at Cereal Board, when the 1st defendant so carelessly and negligently drove, managed and/or controlled motor vehicle registration number KBH 481R which was pulling Trailer registration number ZC 9488 that he caused and/or permitted the same to violently collide with motor vehicle registration number KAW 859W and consequently collided with motor vehicle registration number KBH 296N in consequence whereof the deceased sustained fatal injuries.

By statement of defence dated 8th January 2011 the appellants denied the claim and any liability or damages. By consent dated 22.11.2013 Judgment on liability was entered for plaintiff against the Respondent in the ratio of 75% in favour of the plaintiff/respondent and the appellant/defendant to bear 25% contribution. The only issue therefore before the trial magistrate was the assessment of damages. By Judgment dated 28.3.2014 the learned trial magistrate assessed the damages as hereunder.

Pain suffering:

The deceased died on the same date of the accident. Under this head I would award a conventional figure of 10,000/=.

Loss of expectation of life:

The deceased died at the age of 45 years. He had many more years to live under this head. I award the plaintiff Kshs.20,000/= as compensation to the plaintiff.

Loss of dependency:

The deceased earned approximately 30,000/= per month. He was the sole bread winner of his family a dependency of 2/3 would be most

appropriate in the circumstances. The retirement age in Kenya is now 60 years and he would have worked another 15 years. The plaintiffs are therefore awarded under this head Kshs.30,000 x 12 x 15 x 2/3 = Kshs.3,600,000/=.

Special damages:

The special damages pleaded and proved were as below;

(i) Letters of Administration	Kshs.925/=
ii) Copy of Records of KBH 481R	Kshs.50/=
iii) Copy of Records for ZC 9488	Kshs.500/=
iv) Coffin	Kshs.10,000/=
Sub Total:	**Kshs.11,925/=**

Aggrieved by the Judgment and decree and appellant present this appeal on the following grounds;

1. THAT the learned trial magistrate erred by law and fact in the assessment of damages.

2. THAT the learned trial magistrate erred in law and fact in failing to take into account relevant factors and the evidence on record in the assessment of damages under the fatal Accident Act.

3. THAT the learned trial magistrate erred in law and fact in adopting a multiplicand of Kshs.30,000/= as per month, when no evidence of the same was adduced.

4. THAT the learned trial magistrate erred in law and fact in adopting a multiplier of 15 years without taking into account relevant factors, in line with the law.

5. THAT the learned trial magistrate erred in law and fact in awarding damages both under the law Reform Act and the fatal accidents Act contrary to the well laid down principles of law.

By consent of Counsel for both parties this appeal was to be disposed of by way of written submissions. Both parties filed their respective submissions.

Mr. Onyinkwa for the appellant submitted that on the assessment of damages, the learned trial magistrate erred in adopting a multiplicand of Kshs.30,000/= per month when no evidence of the same was adduced. Though in their pleading the parties had alleged that the deceased was earning Kshs.30,000/= per month, no evidence was tendered to prove the same and therefore the adoption of the same was mis-apprehension of the law.

Secondly Mr. Onyinkwa Submitted that the trial Magistrate erred in adopting a Multiplier of 15 years without taking into account relevant factors. The trial magistrate adopted a retirement age of 60 years and did not consider the uncertainties and imponderables of life when adopting the Multiplier of 15 years. It was an error for the trial magistrate to fail to consider the vicissitudes, vagrancies and uncertainty of life. He urged the court to set aside the multiplier of 15 years and adopt a Multiplier of 6-7 years.

Finally counsel for the appellant submitted that the trial court ought to have deducted the award under law Reform Act from the Fatal Accident Act as both awards were to be paid to same beneficiary.

Mr. Ngare for the respondents opposed the appeal. He submitted that in the plaint filed, the plaintiff (now Respondent) sued for damages under this Fatal Accident Act and Law Reform Act. He Submitted that award in damages was made as per principles applicable in assessment of damages. Counsel submitted that there was evidence by Pw3 Francis Bitobo that drivers are paid Kshs.1,000/= per day therefore translating to Kshs.30,000/= per month. Further the widow testified that deceased used to give her an average of Kshs.5,000/= per week, which evidence was not disputed or challenged. The multiplicand of Kshs.30,000/= was therefore well grounded in evidence. On the issue of the multiplicand, counsel for the Respondents submits that the adoption of 15 years was well grounded in judicial principles and it was pegged on normal retirement age. He urged this court to find no merit in this appeal and dismiss it with costs.

In this appeal, It is noted that there was consent of liability entered by the advocate on record on 22.11.2013 and therefore the only issue for determination in the trial Court and this court is the quantum of damages awarded.

The first issue raised by the appellants is that the trial magistrate in adopting the multiplicand of Kshs.30,000/= per month was in error as the earning of the deceased must be proved by evidence. Counsel submits that there was no evidence on record that the income of deceased a driver was Kshs.30,000/= and in its absence the trial magistrate should have resorted for guidance to the Minimum Wages Regulations adopted by the Ministry of Labour for drivers or person in the category or occupation of the deceased. He referred this court to the decision in ***Nyamira Tea Farmers Sacco -Vs- Wilfred Nyambai Kerocha & Another [2011] eKLR.*** Counsel for the Respondents in response submits that the earning of Kshs.30,000/= was pleaded; evidence led to that earning by Pw2 and therefore the same was produced.

In paragraph 5 of the plaint the Respondent avered;

> The time of his painful death the deceased was a married man aged 45 years, enjoyed good health and lived a happy life. At the time of his death he was a driver earning approximately Kshs.30,000/= per month. He used to contribute substantially to the maintenance of the aforesaid dependants and by reason of his death they have lost means of support and have suffered loss and damage. The deceased life expectancy was also cut short by the said death.

Pw3 Francis Khaoya Bitobo a conductor in the Matatu testified;

> **the driver is paid Kshs.1,000/= per day. This is as per our driver, conductor revenue rules. I was then a matatu conductor in Reg. No. KAW 859W. The driver of the trailer was the over speeding before the accident. Though I can say he was driving at around 100Kms per hour. I do not have receipts to prove my daily income of Kshs.700/= per day. I was also injured. I was treated.**

Pw1 the widow testified;

> **the deceased used to earn Kshs.1,000/= per day on days when the work was fine. He used to bring Kshs.3,000/= or Kshs.4,000/= or Kshs.5,000/= per week. I used to receive Kshs.20,000/= per month from the deceased. We use to share the money with my co-wife.**

The earning of the deceased in a fatal accident case which is the multiplicand has to be pleaded or at least ascertained from the pleading and must be proved. Proof of earning can be by way of earning records, where available, or all evidence by employer or evidence of earning in the occupation or industry of a person of his skills. While production of records in desirable it is not the only means by which earning can be proved. In this appeal the earning of the deceased was pleaded, evidence led by both the widow and Pw3 on the averse earnings per day. This evidence was not controverted or challenged by the appellant. In my view the trial court had no reason to disregard the earning and resort to the Minimum Wages Regulations as submitted by the appellant.

The appellant further challenged the adoption of multiplier of 15 years. Submitting that the trial court did not take into account the viscitudes and preponderances of life. The trial magistrate in arriving at the multiplier of 15 years stated;

> "The retirement age in Kenya is now 60 years, and he would have worked another 15 years."

It is on the age of the deceased and the official retirement age that the trial magistrate arrived at multiplier of 15 years. The appellant submits that he should discount the same taking into consideration the viscitudes of life. The principle upon which the appellant court can consider in reversing the finding of an award of a lower court are well stated. In ***Butler Vs. Butler C.A. No. 49/1993.*** The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have considered or did not consider matters which ought to have considered or that the award is so excessive or little as would reflect on erroneous application of the principles of assessment of damages.

The trial court based its assessment on the mathematical calculation of active working life. I would not fault this as the premises for calculations are legal retirement age. The fact that he did not discount it does not in my view show an error in principle.

Th e last issue is on failure to deduct award under the Law Reforms Act from the total damages as the amount will be received by the same beneficiaries. The principle is that where the beneficiaries under the Law Reform Act and the Fatal accidents Act are the same; and the court has made awards under the Law Reform Act, the award is reduced as a person cannot benefit twice from same misfortune. In this appeal I note that the trial magistrate allowed awards on both heads to be paid to the respondents. I order that the Award under the Law Reform Act be deducted from this total award, 2,798,943 – 30,000 = Kshs.2,678,943/=

Save on the deduction of the award under Law Reform Act, this appeal is dismissed with costs.

Dated at **Signed** at **Bungoma** this 31st **day of** January, **2019.**

S.N. RIECHI

JUDGE