REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 4 OF 2017

KIZITO NZESYA MUTISIA.....1ST APPELLANT

ERICK OMONDI ODUK.....2ND APPELLANT

RITA ODUK.....3RD APPELLANT

VS

CAO AND CO

(suing as the legal administrators of the estate of BOO...RESPONDENT

(Being and appeal from the Judgment of Hon Kimilu, Ag PM. Delivered

on 13th May, 2014 in Naivasha PMCC No 113 of 2011)

JUDGMENT

Background

1. This appeal arises from the judgment of the lower court in respect of a fatal accident that occurred along Naivasha Nairobi road. The brief facts were that on 6th December, 2010, the deceased was riding his motorcycle Registration No KMCJ 448W when he was knocked down by a motor vehicle Registration No KBK 721C driven by the 1st appellant and owned by the 2nd and 3rd appellants.

2. The estate of the deceased filed suit under both the Law Reform Act and the Fatal Accidents Act, pleading negligence. Liability was arrived at by consent at 70:30% in favour of the respondents. The lower court awarded damages on 13th May, 2014 as follows:

Pain and Suffering	- Kshs.	20,000/=
Loss of expectation of life	- Kshs.	100,000/=
Loss of dependency	- Kshs.	2,248,320/=
		Kshs, 2,368,320/=
Less 30%	Kshs.	710,496/=
		Kshs 1,657,824/=
Special damages	Kshs	50,550/=
		Kshs 1,708,324/=

3. The appeal herein is against quantum, and in particular the amounts awarded for loss of dependency and loss of expectation of life. The

grounds are as follows:

> ***1. That the learned trial Magistrate erred in law in failing to consider the Appellant's submissions.***
>
> ***2. That the learned trial Magistrate erred in law and fact in awarding excessive and unrealistic damages under the head of loss of dependency.***
>
> ***3. The learned trial Magistrate erred in in law and in fact using a multiplier and multiplicand which were inordinately high considering that the deceased had no fixed income.***
>
> ***4. That the learned trial magistrate erred in law and in fact in awarding loss of expectation of life in addition to loss of dependency and yet the same is not awardable in addition.***

4. The appellants argue under grounds 2 and 3 that the amounts awarded on the loss of dependency was excessive and unrealistic as the plaintiff had not produced a marriage certificate and did not prove marriage. Further that the plaintiff did not discharge the burden of proving dependency. In addition, they argued that the multiplicand applied was high and that the Magistrate did not take into consideration external factors including uncertainties of life.

5. Under ground 4 the appellants argue that the trial magistrate erred in awarding loss of expectation of life in addition to loss of dependency and that damages for pain and suffering should not have been awarded as the deceased died on the same day of the accident. Thus, that a deduction of the amount under the loss of expectation of life should have been made.

6. Both parties filed written submissions, with the respondents opposing the appeal. The respondents' main argument was that in **David Kahuruka Gitau & Another v Nancy Ann Wathithi Gitau & Another [2016] eKLR** the court (Mativo, J) took a similar approach as that taken by the trial court.

Analysis and determination

7. It is settled law that the duty of this court as the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not itself have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, **Peters v Sunday Post Ltd (1958) EA 424**. Further, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another v Duncan Mwangi Wambusu [1982 – 1988] IKAR 278).**

On Loss of dependency

8. For the plaintiff's case, only the plaintiff gave evidence and was cross-examined. No evidence was tendered by the defence. The plaintiff also testified that the deceased was her husband, that they lived together and that they had two children, namely; FW and BO'; She produced birth certificates for the children showing that BOO, the deceased was the father..

9. On this issue the Magistrate stated as follows:

> ***"The plaintiff in her testimony produced a pay slip for the deceased which shows that the deceased was working in Naivasha. He was earning a monthly salary of Kshs. 9,368/=. Deceased used to cater for food, monthly rent and clothing. He used to send his mother 2,500/= every month. It is the finding of this court that the plaintiff did establish that she was the deceased dependant even without the production of the marriage certificate."***

10. I agree with the trial court that there was no need for the plaintiff to produce a marriage certificate to prove dependency. The reasons are: Firstly, the evidence tendered by the plaintiff showed she was the mother of the deceased's children and the deceased was the father of the children; secondly that evidence was uncontroverted; and thirdly, there is no legal requirement that dependency can only be proved by a marriage certificate.

11. I am also unable to agree with the appellants that the trial magistrate did not analyse the evidence on record and submissions by both parties. I note that the trial court indeed even took into account and considered the uncertainties of life in determining loss of dependency when she found as follows:

> ***"I am satisfied from the evidence before the court that the deceased's wife (1st plaintiff and their 2 children (all minors) were fully dependent upon him. The deceased was also assisting his mother. In these circumstances then could not have used less than two-thirds of his net income on his dependants. I will award a dependency ratio of two-thirds (2/3). The deceased was aged 24 years when he died. Everything being equal, he would have worked to the official retirement age of 60 years. But due allowance must be given to the vagaries, vicissitudes and uncertainties of life. I have looked at the comparable authorities from each side. I will award a multiplier of 30 years…"***

Double payment

12. On the issue of alleged double payment under loss of dependency pursuant to the Fatal Accidents Act and payment for loss of expectation of life, Courts have different approaches in dealing with these claims. Some courts are inclined to the formulae proposed by

Ringera J (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR).** Other courts prefer global awards, frequently following the parties' pleadings.

13. In the case of **Kenya Wildlife Services v Geoffrey Gichuru Mwaura [2018] eKLR** the court relied on the **Ezekiel Barngetuny case** where Ringera J had stated:

> ***"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 dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

14. In ***Kwanzia v Ngalah Rubia and Another*** *referred to without citation* by Nyakundi J, *in the* **Kenya Wildlife Services** it is pointed out that **Ringera** J. stated as follows:

> **"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can and must be abandoned where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency 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"**

15. Similarly, in ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku [2014] eKLR*** the *Court of Appeal sitting at Nyeri* held:

> **"The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason"**

16. In this case, the age of the deceased, the amount or annual or monthly independency and the expected length of the dependency are known or are knowable without undue speculation. Thus the trial court appears to have used an approach founded upon on a multiplier and multiplicand basis. Given the sentiments in the decision in the **Kwanzia case** above, therefore, I am of the considered view that the trial Magistrate did not err in any way. It is also clear that in the **Kenya Wildlife Services case,** above, on appeal the court still awarded pain and suffering, loss of expectation of life and loss of dependency.

Pain and suffering

17. In the lower court, the appellants relied on a 1991 case that awarded Kshs. 8,000/= for pain and suffering for a deceased person who died on the date of the accident. They suggested that Kshs 8,000/= would suffice. On the other hand, the plaintiffs proposed an amount of Kshs. 50,000/=. The trial court noted that the authority relied on by the defendants was 23 years at the time of writing the judgment and therefore Kshs 8,000/= would not be reasonable due to the rate of inflation. Accordingly, she awarded Kshs. 20,000/=.

18. On the issue of loss of expectation of life the appellants relied on a 1989 case which awarded Kshs. 70,000/= under that head and suggested that that amount would suffice. The case relied on is also a very old case. On their part, the plaintiffs proposed an amount of Kshs. 100,000/=. In her judgment, the Magistrate noted that the deceased died at the age of 24 years, was married, and had two children who were dependants. She also indicated that the deceased died in good health pursuant to the evidence of PW1 and that it was evident that the deceased died even before he had fully established his family, and had left behind a very young family. He thus awarded Kshs. 100,000/= for loss of life expectation.

19. On both issues I agree with the lower court and do not think that there is any basis to interfere with the lower court's determination on any aspect which is the subject of the appeal.

Disposition

20. Accordingly, the appeal fails and is dismissed with costs. The judgment of the lower court is hereby confirmed.

21. Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of February, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for the Appellants

2. Ngunjiri holding brief for Owuor or the Respondent

3. Court Clerk - Quinter Ogutu