REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.26 OF 2018

MARY WANJIRU MUGWE.....APPELLANT

VERSUS

PETER GATOTO NG'ANG'A & DAVID MWANGI GATOTO (suing as the administrators

of the estate of CAROLINE MUKUHI GATOTO Deceased).....RESPONDENT

(Appeal against the Judgment of Hon. B.M.Ekhubi-Senior Resident Magistrate in Othaya CMCC No.16 of 2017 of 24th April, 2018.)

JUDGMENT

By a plaint filed on 26th May 2016 the plaintiff's herein sought judgment against the defendant for:-

a) Special damages at Kshs.417,014/-

b) General damages under the Law Reform & Fatal Accidents Act.

c) Costs of the suit

d) Interest on (a) (b) and (c)

e) Any other/further relief the court may deem fit in the circumstances.

The cause of action arose following a Road Traffic Accident on 17th May 2016 when the deceased Caroline Mukuhi Gatoto was travelling as a lawful passenger in motor vehicle Reg.No.KCB 686V Bus/matatu along Othaya-Kiriani Road at Kariki area. It was alleged in the plaint that the accident was caused by the careless and negligence driving, management and/or control of the said motor vehicle by the employee, servant/agent/authorized driver of the defendant who was the registered owner of the said motor vehicle.

As a result the motor vehicle lost control, left its lane and violently hit the road rails, rolled severally causing fatal injuries to the deceased, causing her estate to suffer loss and damage.

The plaintiffs set out the particulars of the claim as follows:-

a) Total special damages Kshs.417,014/-

b) Dependants

Father –Peter Gatoto Ng'ang'a

Mother –Josephine Njeri Gatoto

Daughter- V W, 17 yrs

Son- A M 16yrs.

c) That the deceased was 40 years at the time of death, was a businesswoman earning Kshs. 80,000/- per month and would have lived to 80 years. That she was the sole breadwinner of her family who had lost their sole source of support.

d) Further that the defendant's driver had been charged with the offence of causing death by dangerous driving in Othaya PMCrTR. Case No.15 of 2010.

Annexed to the plaint were witness statements, certificate of death, police abstract, letter from the chief –Menengai location showing that the children had been left to the care of the deceased's parents, Limited grant of ad litem allowing the plaintiffs to file suit, certificate of birth for the children, deceased's certificate from Mwangaza College showing that she had trained in food/beverage production service, documents from Consolata Hospital Mathari where she was admitted from 17th May 2016 to 22nd May 2016, and other receipts for other related expenses.

The defendant filed defence on 22nd August 2017. She denied all the particulars of negligence/loss/damages on that the deceased was a passenger in motor vehicle KCB 686V, and blamed the deceased for failing to take safety precautions while travelling. She put the plaintiffs to strict proof thereof.

The trial

During the trial before Hon. B. M. Ekhubi SRM, the police officer PW1 produced the postmortem report, and the police abstract. He confirmed that there was a Road Traffic Accident, and deceased succumbed to injuries.

PW2 David Mwangi, was brother to the deceased. He reiterated what was in the plaint and produced the documentary evidence as annexed to the plaint to support the claim. In addition he produced a business permit. He said the deceased operated a boutique in Nakuru together with another sister though the deceased's name did not appear in the business permit. That in addition she did cooking business on the side though there was no evidence.

The defence did not call any evidence and parties filed written submissions.

In his judgment delivered on the trial magistrate found the driver of the motor vehicle Reg. No. KCB 686V 100% liable for the accident. The driver had been found guilty of the offence of causing death by dangerous driving in the traffic case. He went on to award the following damages.

a) Pain and suffering – Kshs.70,000/-

Relying on HCCC 2409/1988

David Ngunje Mwangi -Vs- Chairman Board of Governors Njiiri's High School.

b) Loss of Expectation of life –Kshs.100,000/-

Relying on James Gakinya -Vs-Perminus Kariuki Githinji (2015) eKLR

c) Damages under Fatal Accident Act. He found that the plaintiffs sued as dependents as provided for under Section 4(1) of the Fatal Accidents Act.

i) Loss of dependency-

The deceased's earnings at Kshs. 40,000/-

20 years' remainder working life

2/3 dependency ration

40,000 X 20 X 12 X 2/3

ii) Lost years –Kshs. 100,000/- which he deducted from the award for loss of dependency

Kshs. 6,400,000 – Kshs.100, 000/- = Kshs. 6,300,000/-

iii) Special damages – Kshs.417,014/-

Plus, costs.

The defendant was aggrieved by this decision and filed this appeal in which she attacked the trial magistrate's awards for loss of expectation of life at Kshs.100,000/- and Kshs.70,000/- for pain and suffering as being excessive and not supported by any evidence, the award for loss of dependency at 20 years, and Kshs.40,000/- per month income as not supported by any evidence, for not appreciating the submissions on quantum, and for making a double award on loss of dependency.

In addition to the Record of Appeal the appellant filed a supplementary record of appeal consisting of the plaintiffs' written submission and

authorities in the lower court.

The submissions

I have perused the submissions by the appellant. The appellant collapsed all the 6 grounds of appeal into *one* ground –under the quantum of damages as awarded is excessive and unsupported by evidence.

The appellant had no issue with the award for loss of expectation of life at Kshs.100,000/- and Kshs. 70,000/- for pain and suffering, on the award of special damages.

The only issue appellant had was the award under the Fatal Accidents Act. The award of Kshs. 40,000/- per month as the deceased's income, and the multiplier of 20 years.

From the record the evidence it is not in dispute that the deceased died at 40 years of age. The evidence of her earnings was given by her brother PW2 who produced before court a business permit in the deceased's sister's name but that the same was co-owned with the deceased. He also produced a diploma certificate for the deceased in food and beverage production to support the evidence that the deceased had a side hustle for catering.

It is noteworthy that both the appellant and respondent relied on the case of **Chunibhai J Patel & Anther -Vs- PF Hayes & others (1957) EA 748 & 749** where the Court of Appeal said:-

> **"The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants"**

In this case the age of the deceased was 40 years. The expectation of the working life of the deceased as a business woman could have been 60 years, even as a Civil servant- she would have ordinarily retired at 60 years hence the finding that she could have worked for another 20 years was not unfounded.

On dependency, the dependents – the children were aged 16 and 17 years old at the time of their mother's death. With the kind of the economy where even graduates remain jobless long after their graduation, they could have relied on their mother through high school, and college, and sometime after say three to five years tarmacking – totaling to 10-15 years.

The net earnings of the deceased – her income and the proportion of the income which would have been made available to the dependent the trial magistrate arrived at Kshs.40,000/- and 2/3 ratio. It is argued by the appellant that this figure and the ratio was not supported by any evidence at all.

The evidence before court is that the deceased ran a boutique together with her sister in Nakuru. She also had a side hustle of catering as she had been trained in beverage and food production.

The trial magistrate relied on the Court of Appeal Case of **Jacob Ayiga Maruja & Another -Vs- Simon Obayo (2005) eKLR** where bench of Omolo, Tunoi and Githinji JJA –dealing with the exact situation had this to say; quoting from the record of the High Court the respondent thereon on cross-examination had stated;

> **"I do not have any document to show that my brother was a carpenter. I do not have any document to support that my brother earned Kshs.5000/- a month. I do not know whether my brother filed income tax returns"**

The court stated that the widow of the deceased also testified that her husband earned Kshs.5000/- per month but she had no records of his earnings. The judges found that

> **"There was more than sufficient material from which the learned Judge could draw the conclusion that the deceased was a carpenter, and that his monthly earnings were Kshs.4000/- per month. We do not subscribe to the view that the only way to prove the professions of a person must be by 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 very many Kenyans who are even illiterate, keep no records and yet earn their livelihoods 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, complied with the production of the school reports was sufficient material to amount to strict proof for the damages claimed Ground one of the grounds of appeal must accordingly fail"**

The evidence before the trial magistrate on the issue of income and dependency on the deceased was given by PW2. It is contained in the statement he adopted, and what he said on oath. Basically that the deceased had 2 children whose school fees was over Kshs. 100,000/- per

annum. However except for the certificates of birth he produced no evidence to support the claim on school fees.

On the issue of the boutique business with her sister, PW2 only produced the business permit which was in the name of Emily Wanjiru Gatoto. This Emily Wanjiru did not testify to confirm indeed she operated the business jointly with her sister. The evidence of PW2 was scanty on this business relationship between the two sisters. The business permit was issued on 14th June 2015 to expire on 31st December 2015.

Going by the ***Jacob Ayiga Maruja case*** this evidence alone was insufficient to support the claim that the deceased co-owned the business with her sister. There ought to have been more evidence even from that sister and say for instance whether it was in equal shares/how much they were making. PW2 testified on 27th February 2018. He could have called his sister to testify.

It was also important to indicate about how much was made from the boutique business, and about how much was made from the catering business. I think the trial magistrate did not properly analyze the evidence herein to support the award of Kshs. 40,000/-.

Looking at the evidence the only business the court could legitimately assign to the deceased was the catering business. She was not employed as a cook and hence it would be inappropriate to make a salaried award. The evidence is that she had training in that area, and made money cooking. Despite the absence of documentation, I find that the case ***Jacob Ayiga Maruja*** applies to these circumstances. Though PW2 did not produce any documents there is no reason to doubt that the 2 children aged 16 and 17 were in high school at the material time and school fees was being paid by their mother who was a widow and had to work to sustain herself and her children.

Leaving out the boutique business as not established, I would therefore assess her income from the catering business at Kshs. 30,000/- relying on the ***Jacob case*** and other persuasive authorities of this court.

With regard to the multiplier, it was submitted by the appellant that the trial court in deciding on 20 years took into consideration the balance of the deceased's working life instead of the number of years the deceased would have supported the dependants. On this the applicant relied on **Nyeri HCA 24/2015 Anthony Nyaga Njagi -Vs- Mohammed** where Mshila J held that what was important was *" the expected period of dependency"* and not how long the deceased would have worked.

That in **FMM and Another -Vs- Joseph Njuguna Kuria (2016) eKLR** the court pointed out that;

> **"In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lumpsum"**

Clearly the authorities cited recognize that the balance of earning life is one of the factors to be considered.

- In **FMM**, 23 years for a 26-year-old.

-**(Benedetta Wanjiku Kimaru –vs- Changmon Cheboi & Another (2013) eKLR,** 16 years for a 44-year-old

- **(Elizabeth Chelagat Tanui & Another –Vs-Arthur Mwangi Kanyua (2013) eKLR,** 18 years for a 36-year-old

-The appellant also relied on **Roger Dainty -Vs-Mwinyi Haji & Another (2004) eKLR** where the Court of Appeal upheld a multiplier of 10 years for a 27-year-old. The court however did point out the principles on which damages for lost years are assessed under the Law Reform Act – citing from **Gammel Vs Wilson (1983) AII ER 578 and 593.**

> **"…….the multiplier i.e. (14 estimated number of lost working years accepted as reasonable in the case)……The loss to the estate is what the deceased would have been likely to have available to save, spend, distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest was reasonably likely to achieve……the Judge must make the best estimate based on the known facts and his prospects at the time of death"**

The court went on to hold that there was no established practice with regard to the appropriate multiplier to be applied to different age groups of victims of accident.

> **"What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case…..to ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and expectations of working life"**

In this case the appellant sought to introduce in submissions another mode of determining the quantum which was not placed before the trial magistrate; that in the alternative and in the absence of proof of earnings that this court could make a conventional award for loss of dependency – as did Majanja Judge in **Rishi Hauliers Limited -Vs- Josiah Boundi Onyancha (2015) eKLR.** The judge adopted the reasoning in **Mwanzia Vs-Ngalali Mutua & Kenya Bus Services (MSA) Ltd & Another** quoted by Koome J in **Albert Odawa -Vs-Gichimu Gichenji NKU HCCA 15/2003 (2007)eKLR.**

> **"The multiplier approach is just a method of assessing damages. It is not a principle of law or…….it can, and must be abandoned, where the 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 of annual or monthly dependency, and the expected length of dependency are known**

or knowable without undue speculation where that is not possible, to insist on a multiplier approach would be to sacrifice justice on the shelter of methodology something a court of justice should never do".

The appellant urged the court to find that there was no proof of income/earnings and proceed as Judge Majanja did and award a convectional sum in that case – of Kshs.500,000/- for a 50-year-old without any proof of income or earnings, and award the sum of Kshs. 700,000/ - Kshs.100,000/- as loss of dependency.

First, I have considered and do appreciate this alternative proposal by the appellant but it would have been appropriate to raise it before the trial magistrate so that he would have been in a position to express his views on the issue.

Be that as it may, that alternative is not applicable in this case-. The age of the deceased was established, her income is knowable, the ages of her children and being a widow the issue of dependency is not disputable.

The balance of years of earning is knowable from numerous other decisions that are persuasive.

The length of dependency is determinable considering the age of the dependency herein and the youth unemployed rate (one out of five in 2016 according to an ILO estimate) whereby children are graduating from universities but there are no jobs available. This can be deducted from the living realities of Kenyans today. The court is seeking to do justice is called upon to balance these realities as they have repercussions both ways.

There is also the consideration of what the deceased's estate lost due to her untimely death.

In my view there were facts before the trial court which the court considered at arriving at the multiplier. Applying both the principle of period of dependency for the dependents, and what the estate would have lost- I would allow a multiplier of 15 years.

The dependency ratio remains.

So, 30000 X 15 X 12 X 2/3 = Kshs. 3,600,000/-

The appeal succeeds in part. The trial court's judgment is set aside and substituted with the following:

i) Pain and suffering –Ksh. 70,000/-

ii) Loss of dependency- Kshs. 3,600,000/-

The deceased's earnings at Kshs.30,000/-

15 years' remainder working life

2/3 dependency ration

30,000 X 20 X 12 X 2/3

iii) Lost years Kshs.100,000/-

iv) Special damages – Kshs. 417,014/-

Total Kshs. 4,187,014/- plus costs and interest for the date of judgment in the subordinate court.

Dated, delivered and signed at Nyeri this 22nd day of February 2019.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Kinuthia for Muthee for Appellant

Fred Muchina on record for Respondent

Mumbua T.Matheka

Judge

22/2/19