REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 156 OF 2016

COAST BUS COMPANY.....APPELLANT

AND

JOSEPH MAUNDU MAKUSU (Suing as next of kin of

JANE PAUL MANG'ENG'E, TABITHA MUTHOKI

MANG'ENG'E and PAUL MANG'ENG'E - DECEASED).....RESPONDENT

(An Appeal from the Judgment and Decree of the Chief Magistrate's Court,

Machakos, Hon L. Mbugua, CM in Machakos CMCC No. 1136 of 1996)

BETWEEN

JOSEPH MAUNDU MAKUSU (Suing as next of kin of

JANE PAUL MANG'ENG'E, TABITHA MUTHOKI

MANG'ENG'E and PAUL MANG'ENG'E - DECEASED).....PLAINTIFF

VERSUS

COAST BUS COMPANY.....DEFENDANT

JUDGEMENT

1. On 7th December, 1992, the deceased who are all family members were travelling in Motor Vehicle Reg. No. KAC 624H registered in the name of the Appellant along Kitui Machakos Road, when the said vehicle was involved in a road accident as a result of which the deceased lost their lives.

2. This suit is brought by the plaintiff in his capacity as the personal representative of the deceased. He is also a brother to **Paul Mang'eng'e** who was the husband to **Jane Paul Mang'eng'e.** On the other hand, **Tabitha Muthoki Mang'eng'e** was a daughter to **Jane** and **Paul**.

3. On 15th June, 1995, a consent order was recorded in which the claim under the ***Law Reform Act*** as withdrawn and judgement on liability entered for the plaintiff against the defendant for the claim under the ***Fatal Accidents Act***. By a consent recorded before the trial court, liability between the appellant and he Respondents was apportioned in the ration of 75% and 25% respectively. However the claim under the ***Law Reform Act*** was withdrawn apparently on the basis that the plaintiff did not have letters of administration at the time the suit was filed. A similar consent withdrawing the claim under the Law Reform Act was entered on 27th October, 1995, the same day another consent entering judgement for the plaintiff on 100% basis was recorded. However on 31st March, 1998, a further consent was recorded between the parties by which judgement was entered for the plaintiff against the defendant on liability at the ration of 75:25. Come 31st March, 1998, the said consent was set aside on the ground that it was entered on the wrong file.

4. It therefore follows that strictly speaking and as the trial court rightly noted, the proper consent would have been the one withdrawing the claim under the Law Reform Act and entering judgement for the plaintiff against the defendant on 100% basis. The parties however proceeded on the basis that the consent order apportioning liability in the ratio of 75:25 was valid and no appeal was filed by the Respondent herein.

5. According to PW1, **Geoffrey Kimani Manyinya**, a son to Jane and Paul and a brother to Tabitha, he was also in the said vehicle at the time of the accident. He was however the only survivor amongst the family members. At the time of the said accident he was aged 7 years while Tabitha was aged 7 years. The mother, Jane was aged 42 years and was carrying on business of curio shop at Gikomba Market in Nairobi, earning Kshs 30,000/- per month. He was however unable to obtain any documents to support his fact. It was however his evidence that the family was staying in a rental house in Langata Estate and had a rural home in Mwala. His father, Paul was at the time of the accident aged 45 years and was similarly engaged in the business of running a curio shop at Narok, in which he was earning Kshs 30,000.00 per month.

6. It was PW1's evidence that all the deceased were in good health at the time of their death. As a result of their death, he testified that he lost dependency and was taken in by his maternal uncle who brought him up.

7. The plaintiff herein, **Joseph Makusu**, testified as PW2. According to him, he was the administrator if the estate of all the deceased. Apart from reiterating the evidence of PW1, he testified that **Paul** and **Jane** had six children in total.

8. In her judgement, the learned trial magistrate based her decision on the consent order apportioning liability in the ratio of 75:25 in favour of the Respondent herein and proceeded to assess damages under the ***Fatal Accidents Act***. According to the trial court, though there was no documentary evidence as regards the earnings of the deceased, since the deceased were residing in Nairobi and running business in Narok and Gikomba Market, the Kshs 30,000.00 claimed in respect of **Paul** and **Jane** was acceptable. As regards the multiplier, 15 years was found reasonable since the deceased were in private sector. Since PW1 was aged 6 years, the court applied dependency ratio of 2/3rd. The court proceeded to award loss of dependency for both Jane and Paul in the sum of Kshs 3,600,000.00 each and dismissed the claim in respect of Tabitha since in its view, no one could have depended on her. As regards special damages, Kshs 27,100 was found reasonable. The learned trial magistrate therefore awarded a total sum of Kshs 5,440,650.00

9. In this appeal the appellant is only appealing against the quantum of damages. According to the appellant the Respondent's case was not supported by any authorities. It was contended that the Plaintiff failed to prove dependency since there was no evidence that the deceased were survived by any dependants. It was submitted that the dependency ratio n of 2/3rds was erroneous and that 1/5th would have been more appropriate. It was further submitted that there was no proof of the deceased's earnings. It was submitted that the court ought to have awarded a lower figure for the Narok business since two business run in different location would most likely not realise the same income.

10. It was submitted that the court failed to factor in the tax and statutory obligations payable by the deceased persons. It was argued that the court ought to have applied the minimum age guidelines or would have adopted an adopted a lumpsum figure as oppose to relying on conjecture. In this respect the appellant relied on **Mwanzia vs. Ngalali Mutus & Another** cited in **Mary Khayesi Awalo & Another vs. Mwilu Malungu & Another [1999] eKLR**.

11. As regards the special damages, it was submitted that there was no evidence that the said sum was spent as burial expenses. In the appellant's view a sum of Kshs 10,000.00 would have been reasonable based on **Albert Odawa vs. Gichimu Gichenji [2007] eKLR**.

12. In opposing the appeal, the Respondent since the deceased left a son aged 6 years, the dependency ratio of 2/3rds cannot be faulted and based the submission on **Chania Shuttle vs. Francis Mungai Karanja [2017] eKLR**, **Benedetta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR** and **Beatrice Wangui Thairu vs. Hon Ezekiel Bargetuny** .

13. As regards the multiplicand of Kshs 30,000.00 it was submitted that the same was reasonable considering the fact that the deceased were running businesses in Gikomba and Narok and reliance was placed on **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR**. As regards the special damages in respect of funeral/burial expenses, the Respondent relied on **Alice O. Olukwe vs. Akamba Public Transporters & 3 Others [2013] KLR**.

14. The court was therefore urged to dismiss this appeal with costs.

Determination

15. In this appal, it is clear from the appellants' submissions that the appellant is only challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

16. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** 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…"

17. 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."

18. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."

19. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which **Ringera J.** as he then was, held at page 248 that:

"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 purchases. 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."

20. In this case, the oral evidence was that the deceased were staying in a rental house at Langata and were in the curio business at Narok and Nairobi. Their son, PW1 was studying in Nairobi. Regarding documentary proof the Court of Appeal in **Wambua vs. Patel & Another [1986] KLR 336** appreciated that in that case the evidence of the deceased earnings was:

"…a very poor account. Although he appeared to be a man of enterprise and somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So all his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 years cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. The figures he gave as his business earnings and expenditure must be considered with great care. Nevertheless, the court is satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him and the defendants ought not to be heard to say that the plaintiff should be denied his earnings because he did not develop more sophisticated business methods. Whereas damages for loss of earnings must be established by satisfactory evidence and the evidence should appreciate that, the court should approach the consideration of the plaintiff's evidence with caution and must not allow him to "pluck a figure from the air", a victim does not lose his remedy in damages merely because its quantification is difficult."

21. I therefore associate myself with the opinion of the Court of Appeal in **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR** that:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the 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 livelihood 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 coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

22. In the circumstances of this case, there is no basis upon which I can fault the uncontroverted evidence that the deceased were making Kshs 30,000/- per month taking into account what was likely their monthly expenditures. Having re-evaluated the evidence, it is my view that the Kshs 60,000/- represented the proper figure for the net monthly income of the deceased and there is no justification to interfere.

23. The appellant also took issue with the dependency ratio. In this case it was submitted that the deceased were in their 40's. Some of their children were very young and by the time the deceased reached 60 years which was the age that the trial court applied as their life expectancy, PW1 would have been in his 20's. Therefore it cannot be rules out that PW1 would have substantially depended on the deceased. It must however be appreciated that Tabitha, PW1's sister would similarly have depended on the parents. In my view the dependency ratio of 2/3rds was on the higher side and that the ratio of ½ would have been reasonable. As was held in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another** (supra):

> **"…constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track."**

24. In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, it was the opinion of the Court of Appeal that:

> **"There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss…"Dependancy" or "dependency" is the relation of a person to that by which he is supported…The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation…But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person…In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."**

25. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held that:

> "In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased… The multiplier approach is just a method of assessing damages and not a principle of law or dogma. 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 the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

26. In this case, it is my view that the award for loss of dependency ought to have been as hereunder:

> ***Kshs 60,000 x 12 x 15 x ½ x 3/4= 4,050,000.00.***

27. As regards the funeral expenses, I am not inclined to interfere with the sum of Kshs 27,000.00. In the premises under this head the total sum would be Kshs 40,500.00.

28. In the premises, the appeal succeeds to the extent of the dependency ratio only. Consequently, I substitute the sum of Kshs with Kshs 4,090,500.00. While the general damages of Kshs 4,050,000.00 will accrue interest at the court rate of 12% per annum till payment in full, the special damages of Kshs 40,500.00 will accrue interest at the same rate from the date of filing suit till payment in full.

29. Each party will bear own costs of this appeal while the costs of the lower court are awarded to the Respondent.

30. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 19th day of February, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Langalanga for Miss Kavita for the Respondent

CA Geoffrey