REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 33 OF 2018

KARA COMMODITIES LTD…….....APPELLANT

VERSUS

HARON MWIKYA MUNGUTI &

CATHERINE MUTINDA DAVID

(Suing as the legal representatives of the estate of) **BONIFACE MWIKYA…....…..RESPONDENTS**

(Being an Appeal from the Judgment of Hon. E.M Muiru (SRM) in the Senior Resident Magistrate's Court at Kilungu Civil Case No. 38 of 2017, delivered on 29th March 2018)

JUDGEMENT

Introduction

1. The respondents filed a suit in the lower Court seeking general damages under the Law Reform Act *(LRA)* and the Fatal Accidents Act *(FAA)* on behalf of the Estate of *Boniface Mwikya* and his dependants following a fatal road accident on 07/11/2016 along the Nairobi-Mombasa road. They also prayed for special damages, costs of the suit and interest.

2. The appellant filed his statement of defence and after the preliminaries; the suit was slated for hearing. Before the matter could proceed, the parties recorded a consent in the following terms;

a) Judgment on liability be entered in favour of the plaintiff against the defendant at ratio of 90:10.

b) The dependency ratio to be applied at 2/3.

c) The age of the deceased to be agreed at 30 years.

d) The deceased's monthly income is agreed at kshs 7,500/=.

e) Parties to submit on quantum on the issue of multiplier.

3. Judgment was eventually delivered and the total award was kshs 1,416,250/= being kshs 50,000/= for pain and suffering, kshs 100,000/= for loss of expectation of life and kshs 1,200,000/= for loss of dependency. The figure subjected to 10% contribution.

4. Being aggrieved by the said judgment, the appellant filed this appeal and raised 5 grounds as follows;

a) The learned Magistrate erred in law and fact by awarding damages under both the Fatal Accidents Act and the Law Reform Act which decision amounts to a misapprehension of the law and a miscarriage of justice.

b) The learned magistrate erred in law and fact by disregarding the case law that she was bound to follow thereby arriving at a highly erroneous decision on quantum.

c) The learned magistrate erred in law and fact by disregarding the terms of the consent recorded by the parties thereby arriving at an erroneous decision on quantum.

d) The learned magistrate erred in law and fact by applying a multiplier of twenty (20) years thereby arriving at an award on quantum that was inordinately high.

5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, they filed their respective submissions.

6. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this case, there is no missed benefit as there were no witnesses.

7. I have adopted the following two issues for determination as per the submissions of the parties;

a) Whether damages can be awarded under both the Fatal Accidents Act and Law Reform Act.

b) Whether the multiplier of twenty years applied by the trial magistrate was excessive.

8. I will proceed to deal with the issues under the distinct heads.

Award under both the Fatal Accidents Act and Law Reform Act

9. The appellant submits that where the beneficiaries of the deceased's estate are the same persons for whose benefit the action under the Fatal Accidents Act is brought, the award under the Law Reform Act is deductible. He relies *inter alia* on **Nairobi Civil Appeal No. 49 of 2000; Dilip Asal –vs- Herma Muge & Anor** where the Court of Appeal stated;

"The learned judge awarded to the dependants of Bishop Muge Kshs 2,592,000/= for loss of dependency and this was obviously under the Fatal Accidents Act. Then the learned judge, proceeded to award to the estate of the late Bishop Kshs 525,600/= as damages for lost years, obviously under the Law Reform Act. This latter sum would obviously go to the same dependants who were the beneficiaries of the estate. Whether one designates it as failing to take into account the fact that Kshs 2,592,000/= had been awarded to the dependants or whether one designates it as a failure to apply the correct principle by the learned judge, it is a matter which certainly entitles the Court to interfere with the award made by the learned judge. We accordingly interfere and set aside in its entirety the award of Kshs 525,600/= given by the trial judge as damages for lost years, with the result that the total award of KShs 3,217,750/= given by the learned judge is reduced by Kshs 525,600 to Kshs 2,592,150/=.."

10. He also submits that the learned magistrate erred by disregarding the decisions of the Court of Appeal and purporting to rely on a High Court decision.

11. On the other hand, the respondents submit according to section 2(5) of the Law Reform Act, the benefits conferred on the estates of deceased persons under the Law Reform Act shall be in addition to and not in derogation of any rights conferred by the Fatal Accidents Act. They contend that it was okay for the trial Court to make an award under both Acts. They also submit that the above section was explained in the celebrated case of **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor (No.2) 1985 eKLR** as follows;

"In my view, what section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death…

The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

12. In this case, there is no dispute that the beneficiaries of the estate were the same under both Acts. In the plaint, they were listed as the deceased's wife and two minors.

13. The award under the Fatal Accidents Act was pretty much pre-determined by the parties due to the consent. The only thing that the trial magistrate was being called upon to determine was the multiplier. That being the case, I am of the view that the award made under the Law Reform Act was minimal, reasonable and in line with precedent. It's not a must that the same be deducted.

Whether the multiplier of twenty years applied by the trial magistrate was excessive.

14. The appellant relies on **Nairobi HCCC No. 237 of 2013; Lucy Wambui Kihoro –vs- Elizabeth Njeri Obwong'** where the deceased a finance manager died at the age of 30 years and the Court adopted a multiplier of 16 years. He submits that in our case, the deceased was engaged in a more risky job as a turnboy.

15. The appellant also relies on **Dainty –vs- Haji & Anor (2005)1 EA** 43 where the deceased died at 27 years and the Court of Appeal upheld a multiplier of 10 years. He submits that the deceased in that matter was a BA (Hons) university graduate and was employed by a shipping company as a graduate trainee. The appellant reiterates it's submission that a multiplier of 15 years would be appropriate.

16. On the other hand, the respondents submit that a 30 year old man is considered to be of good health with probability of living a long life. They also submit that judicial officers have discretion and the case laws quoted by Counsels are for guidance. They rely on the case of

Wilson Nyamai Ndeto & Anor –vs- China Wu Yi Ltd & Anor (2017) eKLR where the Court adopted a multiplier of 27 years for a 30 year old deceased.

17. As for the occupation, it was pleaded at paragraph 6 of the plaint that the deceased was an electrician and the death certificate indicates as much. I find the appellant's submission, that the deceased was a turnboy, to have no basis.

18. I have taken the liberty to look at the multipliers adopted in several cases. In **David Kimathi Kaburu –vs- Gerald Mwobobia Murungi (2014) eKLR** where the court used a multiplier of 30 years for a 28 years old deceased. **In Nelson Ndawa Kioko & Anor –vs- Mombasa Liners & Anor (2012) eKLR** the Court adopted a multiplier of 18 years for a 31 year old deceased.

19. As rightly submitted by the respondents, assessment of damages is largely a question of discretion and appellate Courts should be slow to interfere with such discretion for no good reason. It is my considered view that the multiplier adopted by the trial Court was within an acceptable range.

Conclusion

The court reaches into a conclusion that the appeal has no merit and makes the following orders;

i. Appeal is hereby dismissed.

ii. Costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

…….……

C. KARIUKI

JUDGE