REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 33 OF 2016

WANDERA GEORGE

T/A ODINDIKO INVESTMENTS.....APPELLANT

VERSUS

SYLVESTER MRAMBA THOYA

(suing as the legal representative and/or

administrator of the estate of Isaac Mramba Thoya Deceased)...RESPONDENT

[Being an appeal from the judgment delivered by Hon. D. W. Nyambu, SPM on 29th June, 2016 in Kilifi PMCCC No. 60 of 2013, Sylvester Mramba Thoya (suing as the legal representative and/or administrator of the estate of Isaac Mramba Thoya-Deceased]

JUDGEMENT

1. The Respondent, Sylvester Mramba Thoya (suing as the legal representative of the estate of Isaac Mramba Thoya – (Deceased)) was the Plaintiff in Kilifi SPMCCC No. 60 of 2013. The Appellant, Wandera George t/a Ondidiko Investments was the Defendant.

2. The suit arose from a road traffic accident which occurred on 1st August, 2010 along Kilifi–Mombasa road resulting in the death of Isaac Mramba Thoya who was aged 4 years. In a judgment delivered on 29th June, 2016 the trial magistrate held the Appellant 100% liable for the accident and awarded the Respondent total damages of Kshs.589,225 made up of Kshs.50,000 for pain and suffering, Kshs.100,000 for loss of expectation of life, Kshs.400,000 for loss of dependency and Kshs.39,225 being special damages.

3. The Appellant being dissatisfied with the judgment of the trial court has appealed to this court on the grounds that:-

> **"1. The Learned Magistrate erred in fact and in law in finding that the Plaintiff/Respondent was entitled to general damages of Kshs.688,555.60 (sic) that was excessive and manifestly too high in view of the injuries suffered by the Plaintiff/Respondent.**
>
> **2. The Learned Magistrate erred in fact and in law in failing to consider the Defendant's submissions on quantum**.
>
> **3. The Learned Magistrate erred in both fact and in law in failing to consider the conventional awards for general damages in cases of similar injuries."**

4. The parties are in agreement that the Appellant's appeal is limited to the quantum of damages awarded to the Respondent by the trial court

5. The circumstances in which an appellate court can interfere with an award of damages by a trial court were outlined by the Court of Appeal in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No.2) [1985] eKLR** as follows:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

6. Those are the principles that will guide this court in determining this appeal. On the award of Kshs.50,000 under the Law Reform Act, Cap. 26 for pain and suffering, counsel for the Appellant urged this court to find that the same was exorbitant and substitute it with an award of Kshs.10,000.

7. This court was urged to follow the decision in **Albert Odawa v Gichimu Gichenji [2007] eKLR** where it was held that an award of Kshs.20,000 was without basis since the death of the deceased was instantaneous and there could not have been pain and suffering before death. The court was also referred to the decision in the case of **Samwel Kimutai Korir (Suing as Personal & Legal Representative of the estate of Chelangat Silevia) v Nyachwa Adventist Secondary School & another [2016] eKLR** where W. Okwany, J held that:-

> **"The deceased is reported to have died instantly when she fell head fast on the road and the rear tyres of the bus ran over [her] head. Still, even in cases of instantaneous death, the courts have severally held that the deceased must have undergone some pain before finally succumbing to the injuries even if for a brief moment. I will in the circumstances make an award of Kshs.10,000 under this heading."**

8. Another decision cited in support of an award of Kshs.10,000 for pain and suffering is that of **P. I. v Zena Roses & another [2015] eKLR.**

9. Opposing a review of the award of Kshs.50,000 for pain and suffering, counsel for the Respondent asserted that the award was not inordinately high to warrant disturbance by this court.

10. The decision of John M. Mativo, J in the case of **David Kahuruka Gitau & another v Nancy Ann Wathithi & another [2016] eKLR** where an award of Kshs.100,000 on this head was upheld on appeal is cited in support of the submission that the award herein is not inordinately high.

11. In his testimony, the Respondent told the trial court that:-

> **"I was told he died at the scene and was taken directly to the mortuary. We saw him at the mortuary."**

12. The fact that a person died at the scene of accident does not mean that they suffered no pain before succumbing to the injuries. In my view an award of Kshs.50,000 for pain and suffering cannot be termed exorbitant considering the authorities cited by the parties. Awards should mirror those awarded in other cases. In this case, it has been demonstrated that an award of between Kshs.10,000 and Kshs.100,000 is reasonable. I am thus not convinced that the award of the trial court should be disturbed.

13. On the award of Kshs.100,000 for loss of expectation of life, counsel for the Appellant submitted that the same is too high and an award of Kshs.60,000 is reasonable. I was again referred to **Albert Odawa** (supra) where an award of Kshs.100,000 was, on appeal, reduced to Kshs.70,000 on the ground that the said amount was the conventional award.

14. For the Respondent, it was urged that the award should not be disturbed as it was conventional and reasonable. Reliance was placed on the case of **David Kahuruka Gitau** (supra) in support of the assertion that Kshs. 100,000 is the conventional award for loss of expectation of life.

15. I agree with the Respondent that the award of Kshs.100,000 for loss of expectation of life is not inordinately high. I am in agreement with the statement of John Mativo, J in **David Kahuruka Gitau** that:-

> **"As for loss of life expectation, my review of authorities shows that the first time an award of Ksh.100,000 was made by Kenyan courts was by Justice Apaloo, then a Judge of the Court of Appeal in 1986. Many years later our courts are still awarding the same amount which for a long time has been taken as a conventional sum. In my view, time has come for our courts to consider inflation and adjust damages under the said head upwards. The learned magistrate awarded Kshs.100,000 under the said head. I find no reason to fault the said award.**

16. Kshs.100,000 for loss of expectation of life is indeed the current conventional award and I find no merit in the Appellant's submission that the amount awarded by the trial court should be revised downwards.

17. In respect of the award under the Fatal Accidents Act, Cap. 32, counsel for the Appellant submitted that the global sum of Kshs.400,000 is extremely high and unjustified for a minor who was 4 years old at the time of death and whose academic records were not produced in court in support of the contention that he was a bright pupil. Counsel urged the court to set aside the award of Kshs.400,000 on this head and substitute it with an award of Kshs.200,000. Counsel for the Appellant relied on various decisions in urging this court to upset the award by the trial court. The decisions cited are **Kenya Breweries v Saro [1981] KLR 408** where an award of Kshs.100,000 was upheld by the Court of Appeal; **Zena Roses** (supra) where Kshs. 300,000 was awarded; and **Simon Kibet Langat & another v Miriam Wairimu Ngugi (Suing As The Administrator Of The Estate Of Daniel Mwiruti Ngugi) [2016] eKLR** where a global award of Kshs.720,000 for loss of dependency was made.

18. It is the Respondent's view that the award is not inordinately high and the appeal on this ground should also fail. Based on the decision of **Simon Kibet Langat & another** (supra) cited by the Appellant where a global award of Kshs.720,000 under the Fatal Accidents Act was upheld on appeal, I find that the award herein is not inordinately high. In finding the award of Kshs. 400,000 quite reasonable, I have considered the fact that the **Saro** case in which an award of Kshs.100,000 was upheld by the Court of Appeal was decided way back in 1981 and inflation should be taken into account when relying on such a decision.

19. The Appellant does not challenge the award of Kshs. 39,225 as special damages.

20. In summary the Appellant has failed to demonstrate that the trial magistrate erred in making the awards under the Law Reform Act and the Fatal Accidents Act. The appeal therefore fails.

21. Finally, the Appellant submitted that the award under the Law Reform Act should be deducted from the grand total as allowing the Respondent to retain the awards made under both the Law Reform Act and the Fatal Accidents Act would amount to double compensation. Counsel for the Appellant cited the decisions in **Transpares Kenya Ltd & another v S.M.M. (Suing as the Legal Representative for and on behalf of the Estate of E.M.M. (Deceased)) [2015] eKLR** and **Marwanga Jeffern v Jeckton Ochieng Ochieng & another [2015] eKLR** in support of the submission.

22. Counsel for the Respondent opposed this suggestion and urged the Court not to interfere with the award of the trial court. Reliance was placed on the decision of **David Kahuruka Gitau** (supra).

23. The law on the issue raised by the Appellant was clarified by the Court of Appeal in **Hellen Warunguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased)) v Kiarie Shoe Stores Limited [2015] eKLR; Civil Appeal No. 22 of 2014 (Nyeri)** when it held that:-

> **"20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act,* hence the issue of duplication does not arise.**
>
> **21. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the *ratio decindendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:-**
>
> > ***"6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.***
> >
> > ***7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means 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.***
> >
> > ***8. 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."***
>
> **22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages…. With respect, that argument is misguided since there is no compulsion in law to make the deduction."**

24. Considering that the awards are quite reasonable, I do not deem it fair to deduct the amount awarded under the Law Reform Act from the grand total. This particular ground of appeal also fails.

25. Before I conclude, I acknowledge the submissions by counsel for the Respondent on the alleged incompetency or defectiveness of the appeal. Having dealt with the merits of the appeal and found it wanting, I do not deem it necessary to address the question of the competency or otherwise of the appeal.

26. The end result is that this appeal is without merit and the same is dismissed with costs to the Respondent.

Dated and Signed at Nairobi this 24th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 28th day of June, 2019

R. Nyakundi,

Judge of the High Court