REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 27 OF 2018

AMAZON ENERGY LIMITED.....APPELLANT

VERSUS

JOSEPHINE MARTHA MUSYOKA (suing as the legal administrators of the estate of

Johnson Musyoka Mawia-Deceased).....1ST RESPONDENT

ABDI ABDULAHI.....2ND RESPONDENT

[An appeal from the judgment and decree of the Hon. Ndungi, SRM

delivered on 18th April, 2018 in Maraikani PMCCC No. 1 of 2016]

JUDGEMENT

1. The Appellant, Amazon Energy Limited, was at all times material to this appeal the registered owner of motor vehicle registration number KBZ 949X Toyota Isis. On or about 20th July, 2015 John Musyoka Mawia (hereinafter simply referred to as the deceased) was travelling in the Appellant's motor vehicle along Mombasa-Nairobi road when it collided with motor vehicle registration number KBH 715Y belonging to Abdi Abdullahi Abdi. The deceased died as a result of injuries sustained in the accident.

2. The 1st Respondent, Josephine Martha Musyoka (suing as the legal representative of the estate of Johnson Musyoka Mawia-deceased) brought a claim for compensation vide Mariakani PMCCC No. 1 of 2016 and named the Appellant as the 1st Defendant and Abdi Abdullahi Abdi as the 2nd Defendant.

3. At the conclusion of the trial, the 1st Respondent was awarded damages as follows:

"1. Pain and suffering……..Kshs.120,000

2. Loss of expectation of life……Kshs.200,000

3. Loss of consortium…….Kshs.100,000

4. Loss of dependency……..Kshs.2,500,000

5. Special damages……..Kshs.424,000

6. Grand Total……Kshs.3,344,800

Less 20%.....Kshs.628,960

Net Award…… Kshs.2,515,840"

The 1st Respondent was also awarded costs of the suit and interest on the decretal amount.

4. Being aggrieved by the judgment, the Appellant has appealed to this court on the grounds that:-

> **"1.That the assessment and award of special damages for pain, suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate.**
>
> **2. That the learned trial magistrate in assessing damages for loss of dependency and loss of consortium failed to apply the correct principles hence arrived at an erroneous estimate of damages, which the deceased suffered.**
>
> **3. That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood or overlooked the correct legal principles and judicial precedent and the submissions by parties that he made an award that was erroneous and inordinately high.**
>
> **4. The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of *state decisis* and take into account public interest. He thus made an award that was arbitrary, inordinately high and erroneous.**
>
> **5. The learned trial magistrate's choice of dependency ratio, the multiplicand and multiplier is wrong and unreasonable."**

5. The Appellant in the memorandum of appeal named the Plaintiff at the trial as the 1st Respondent and the 2nd Defendant at the trial as the 2nd Respondent. The Appellant however withdrew the appeal against the 2nd Respondent on 28th November, 2018. I will henceforth refer to the 1st Respondent as the Respondent.

6. This appeal is limited to the assessment of damages, the parties having recorded consent on liability before the trial court on 4th July, 2017 in the ratio 80:20 in favour of the Respondent and as against the Appellant. For record purposes, the Respondent withdrew her claim against the 2nd Defendant on the same date.

7. The principles guiding an appellate court in deciding whether to interfere with an award of damages were laid down by the Privy Council in **Nance v British Columbia Electric Railways Co**. **Ltd (1951) AC 601** at page 613 cited with approval by the Court of Appeal in **Mariam Maghema Ali v Nyambu t/a Sisera Store [1990] eKLR** as follows:-

> **"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."**

8. In **Butt v Khan [1981] KLR 349** it was stated by the Court of Appeal that:-

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate**. **It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

Those are the principles that will guide this court in determining this appeal.

9. In the written submissions dated 29th October, 2018 and filed in Court on 2nd November, 2018 the Appellant abandoned **"the appeals against all other heads of damages and focuses on the award of loss of dependency."**

10. In the judgment delivered on 18th April, 2018, the trial magistrate made findings on dependency as follows:-

> **"I find it just and reasonable to use the lump sum approach in this case since there are no bank statements of income or payslip. Justice H.P.G Waweru used a lump sum approach in the case of Nairobi Case HCCC No. 303 of 2011 MNM & FM (Administrators of the Estate of BERNARD MBUGUA, Deceased) vs SOLOMON KARANJA GITHINJI. He awarded a lump sum of Kshs.3,000,000 for a deceased who was aged 46 years and was carrying out a butchery business at the time of his death. The judgement by Justice H.P.G. Waweru is recent as it was delivered on 5/6/2015.**
>
> **In the present case the deceased was aged 56 years and was doing curio business. I award a lump sum of Kshs.2,500,000 (i.e. Kshs.2.5 million) to the dependants for loss of dependency."**

11. Citing the definitions of the terms **"dependency"** and "**multiplier"** as provided in Section 3 of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, counsel for the Appellant submitted that in assessing damages for loss of dependency at Kshs.2,500,000 the trial magistrate acted arbitrarily, disregarded the principles laid down over the years on assessing the same, disregarded the statute and went contrary to the pleadings and evidence that was before him.

12. Counsel for the Appellant submitted that, as was held in the case of **Gerald Mbale Mwea v Kariko Kihara & another [1997] eKLR**, loss of dependency is a matter of fact that requires hard evidence before any award can be made.

13. It was submitted for the Appellant that the only evidence on dependency placed before the trial court was that of the Respondent who testified as PW1 and told the trial Court that:-

> **"The deceased used to support me and our children. He used to pay Kshs.80,000/= school fees per semester for the child TEDDY KIVUVANI. He also used to support his mother and the children of his brother who died."**

14. According to counsel, apart from the Kshs.160,000 paid as fees per annum for the son, no other form of dependency was testified upon. This he submitted, militates against the award of Kshs.2,500,000 as damages for loss of dependency which make the amount inordinately high and wrong.

15. Counsel for the Appellant also faulted the trial Court for stating that the deceased was doing curio business in assessing loss of dependency. Counsel pointed out that in the amended plaint nowhere was it pleaded that the deceased was a businessman selling curios or that he had any income and the trial magistrate's finding that he operated curio business amounted to taking into account extraneous matters.

16. Counsel stressed that the Respondent having not pleaded an occupation or income it was not within the trial court's power to hold that he was a curio dealer or that he had an income on which other people depended.

17. The decision in **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] eKLR** was cited in support of the preposition that issues for determination in a suit generally flow from the pleadings and the trial court may only pronounce judgment on the issues arising from the pleadings. The case of **Philip Kiplimo Tuwei v Elkana Kipserem Ngetich (suing as legal administrator of the estate of Esther Jeptoo (deceased)) [2016] eKLR** is cited in support of the submission that a trial court should use the minimum wage as a guide on the multiplicand where no evidence of income has been adduced.

18. According to counsel for the Appellant, the trial magistrate erred by failing to take into account the age of the dependants when making the award. He submitted that the son of the deceased was a fairly mature person and the parents were fairly advanced in age.

19. The case of **Philip Kiplimo Tuwei (supra)** was cited as stating that mature children cannot be said to depend on their aged parents. The Appellant cited the case of **General Motors East Africa Ltd. v Eunice Alila Ndeswa & another [2015] eKLR** as stating that **"there is an established formula for calculating loss of dependency and giving global figures is not one of them."**

20. It was therefore urged on behalf of the Appellant that this court should vacate the award for loss of dependency and dismiss the same or re-calculate the same based a multiplier of 5 years and earnings of Kshs.5,844 being the minimum wage of a general worker in Kwale County as per the Regulation of Wages Amendment Order 2015 the deceased having been a resident of Ukunda within Kwale County. Further, that a dependency ratio of one half (1/2) would suffice considering that the deceased would have used a large portion of his income to cater for expenses like rent and food.

21. Lastly, counsel for the Appellant urged the court to rectify the trial court's judgment under Section 100 of the Civil Procedure Act, Cap. 21 so as to effect the trial magistrate's statement in his judgment that:-

> **"I will deduct or discount the award for loss of expectation of life from the grand total since the same two dependants are claiming under the Fatal Accidents Act (i.e. loss of expectation of life) and the Law Reform Act (i.e. loss of dependency)."**

Counsel for the Appellant submitted that the trial magistrate did not execute the deduction and this court should rectify the error.

22. The appeal was opposed by the Respondent. Through submissions filed on 28th November, 2018 counsel for the Respondent submitted that the award for loss of dependency was justified and fair in that the trial court considered that the deceased was a prominent businessman selling curios in Kenya and Tanzania.

23. It is the Respondent's case that the trial court correctly found that the multiplier approach was not applicable in the case and therefore adopted the lump sum approach. The decisions in **Mary Khayesi Awalo & another v Mwilu Malungu & another [1989] eKLR** and **Albert Odawa v Gichimu Gichenji [2007] eKLR** were cited as upholding the use of the lump sum approach where the multiplier approach is not appropriate. Counsel for the Respondent pointed out that the trial magistrate cited the decision of **Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR** in deciding the amount of damages to be awarded.

24. On the claim that the award of Kshs.200,000 for loss of expectation of life was not deducted from the total award of kshs.3,344,800, counsel for the Respondent stated that this was done leaving the Respondent with the sum of Kshs.2,515,840 after the deduction of 20% contribution. It is the Respondent's case that the appeal is without merit and the same should be dismissed with costs to her.

25. In my view, the key issues in this appeal are whether the lump sum approach was ideal in the circumstances of this case and whether the award for loss of dependency was inordinately high.

26. The use of the global award approach or the multiplier approach in determining the award for loss of dependency is a matter to be decided based on the evidence placed before the trial court. In **Albert Odawa v Gichimu Gichenji [2007] eKLR** the age of the deceased was not disclosed in the pleadings and the evidence. Adopting the global award approach, Martha Koome, J (as she then was) stated that:-

"On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased's earnings and thus the multiplicand of Kshs.8,100 was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased income by applying the basic salary which is paid to unskilled workers. This would also have been difficult as the age of the deceased was not stated so the best option would have been to apply the global award. In this case the age of the deceased was not indicated and in the circumstances, I would consider the global award for the loss of dependency and give a global sum of Kshs.400,000."

27. In **Mwanzia Ngalali Mutua v Kenya Bus Services (MSA) Ltd & another,** as quoted in **Albert Odawa** (supra) Ringera, J (as he then was) opined that:-

"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 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 amount of annual or monthly dependency, 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."

28. The opinion of Rignera J (as he then was) finds support in the decision of the Court of Appeal in **Theta Tea Company Limited & another v Florence Njau Njambi [2002] eKLR** where the decision of the learned Judge to award a lump sum of Kshs.320,000 for loss of dependency was challenged. Rejecting the appeal on the use of the lump sum method, the Court of Appeal held that:-

"We broadly agree with these views of the learned trial Judge though we must nevertheless point out that in the case of Sheikh Mushtaq Hassan, ante, there was no claim in the plaint that the deceased (a school-boy) was earning any particular amount per month, while in the appeal under consideration it was specifically pleaded that the income of the deceased from his business was Shs.10,000/= per month and if the respondent was serious with that averment, one would expect her to prove it. But we agree that the principle must be the same and that is where it is proved that a claimant was dependant on a deceased party but the amount of the dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that were to be so, a lot of Kenyans would be denied substantial justice, taking into account our level of literacy and such like factors….

The respondent proved her dependency and that of her children on the deceased. She was not able to quantify the amount of the dependency. The learned trial Judge was, in our view, perfectly entitled in the circumstances, to arrive at a lump sum."

29. In my view the multiplier approach is a sure-footed method when it comes to assessment of the amount to be awarded for loss of dependency. The formula to be used was stated in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another, Nairobi HCCC No 1638 of 1988** (unreported), as quoted by George Dulu, J in **Leonard O. EKisa & another v Major K. Birgen [2005] eKLR**, as follows:-

"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 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."

30. Section 3 of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, Cap. 405 was amended in 2013 and the terms "dependency", "earnings" and "multiplier" were defined through the amendment. Dependency **"means that part or portion of the deceased's earnings that he or she spent on maintenance or financial support of his or her dependants or in the case of a person who was not in employment, reasonably anticipated earnings."** Earnings **"means revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007 or the determination of the reasonable income, whichever is higher",** whereas the term multiplier **"means the number of years a dependant would reasonably have been expensed to receive financial support from the deceased person."**

31. Where the multiplier approach has been used to assess the damages to be awarded for loss of dependency, one can easily follow and understand why a particular claimant has been awarded a certain amount. On the other hand, when the global award approach is used, one cannot understand why different amounts have been awarded in cases with similar facts. With respect, I find the global award/lump sum formula capricious and subject to the whims of the trial court. Between the multiplier approach and the lump sum approach, the lump sum approach should be avoided as much as possible save for cases involving minors whose earning capabilities and prospects cannot be determined.

32. Nevertheless, from the cited case law, the trial magistrate cannot be faulted for adopting the lump sum approach. My dislike for it cannot be used to overturn a valid decision. The appeal therefore fails to the extent that it seeks to overturn the trial magistrate's decision to award a lump sum to the Respondent for loss of dependency.

33. The remaining question is whether the amount of Kshs.2,500,000 was inordinately high in the circumstances of the case. The trial magistrate backed his decision by citing the decision of H.P.G. Waweru, J in **Nairobi HCCC No. 303 of 2011 MNM & another (administrators of the Estate of Bernard Mbugua, Deceased) v Solomon Karanja Githinji** where a lump sum of Kshs.3,000,000 was made under the Fatal Accidents Act for loss of dependency.

34. In making the award in that case, the learned Judge observed that:-

> **"I have taken into account the fact that the dependants' dependency upon the Deceased would have been only to a certain extent (it is usually no more than two-thirds of the available income). I have also borne in mind the age of the deceased at the time of death."**

35. The circumstances of the cited case could not be compared to those of the instant matter. In that case the deceased was 46 years old and had left behind a wife and four young children. In this appeal, the deceased was 56 years old and had left behind a wife and one son in college. The period of dependency could not be the same in such circumstances. These factors needed to have been taken into account when making the award. In my view, the trial magistrate therefore failed to consider relevant factors.

36. I have already expressed my discomfiture with the lump sum/global award approach. In making a global award, the trial court should always ask itself whether the award made is close to an award that could have been made using the multiplier approach taking into account the age of the deceased, and using the minimum wage of a general worker, where the earnings of the deceased cannot be ascertained. It will be unjust for the lump sum to be much higher than the award to the estate of a deceased whose earnings have been established and a multiplier approach used.

37. For a 56 year old person whose only child was in college the dependency, all things being equal, was expected to cease a few years thereafter. An award of Kshs.2,500,000 was in such circumstances inordinately high. I therefore allow the appeal and set aside the award of Kshs.2,500,000. For the reasons already stated in this judgment, I substitute the same with an award of Kshs.1,200,000.

38. The new figures will therefore work out as follows:-

a) Pain and suffering……...Kshs.120,000

b) Loss of expectation of life…….Kshs.200,000

c) Loss of consortium……..Kshs.100,000

d) Loss of dependency……...Kshs.1,200,000

e) Special damages……...Kshs.424,800

Total…….Kshs. 2,044,800

39. As agreed by advocates for both sides, the trial court directed that the Kshs.200,000 awarded for the loss of expectation of life would be deducted from the award for loss of dependency. That will leave a balance of Kshs.1,844,800 which when subjected to a deduction of 20% being the Respondent's contributory negligence gives the Respondent a net award of Kshs.1,475,840.

40. The Appellant having partially succeeded will have half the costs of the appeal. For avoidance of doubt, the Respondent will have the full costs of the trial but based on the figures as revised in this judgement.

Dated and Signed at Nairobi this 7th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 20th day of June, 2019

R. Nyakundi,

Judge of the High Court