REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 70 OF 2017

EPHANTUS WACHIRA KITHAKA.....APPELLANT

VERSUS

SUSAN MUKAMI KINYUA & ALEXANDER KARWIGI

(Suing as the Legal Representatives of the Estate of

DANIEL KINYUA KARWIGI (Deceased)).....RESPONDENTS

JUDGMENT

A. Introduction

1. The respondents filed suit on behalf of the deceased for general damages under the Law Reform Act and Fatal Accidents Act, special damages as well as costs and interest of the suit arising from a road traffic accident that occurred on the 4th April 2015. The trial court awarded the respondents Kshs. 50,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation of life, Kshs. 1,440,000/= for loss of dependency and Kshs. 31,715/= as special damages making a total of Kshs. 1,621,715/=.

2. Being aggrieved by the trial court's decision, the appellants filed a memorandum of appeal dated 4th December 2017 on seven grounds that are summarised as follows;

a) ***That the learned magistrate erred in law and fact in finding the appellant 100% liable.***

b) ***That the learned magistrate erred in law and fact in awarding the respondents a sum of Kshs. 1,621,715/= as damages which amount was manifestly excessive and high in the circumstances.***

3. The parties disposed of the suit by way of written submissions.

B. Appellant's Submission

4. The appellant submitted that respondent did not tender enough evidence to prove fault on the part of the appellant to warrant the trial court awarding liability against the appellant at 100% and as such their claim of negligence ought to have failed since there can never be liability without fault as was held in the case of **Nakuru Civil Case No 34/2014 Brian Muchiri Waihenya v Jubilee Hauliers & 2 Others [2017] eKLR.**

5. The appellant submitted that the respondents had failed to prove the deceased's minimum wage and the trial court should have used Kshs. 12,000 as per the Regulation of Wages (General Amendment) Order, 2013 Legal Notice no. 197 as the multiplicand. He relied on the case of **Beatrice W. Murage v Consumer Transport Limited & Another [2014] eKLR** where the court of appeal held that if one does not prove what the deceased earned the court would base the earnings on the minimum wage. He also relied on the case of **Monica Njeri Kamau v Peter Monari Onkoba [2019] eKLR** where the court stated that where there is no sufficient prove of employment it would be appropriate to adopt minimum wage.

6. On the dependency ratio, the appellant testified that from the testimony of PW2 it was clear that she only lost half of the contribution from the deceased as she is still farming on the land used by the deceased and as such loss of dependency ought to have been assessed using ratio of ½ as opposed to 2/3.

7. On pain and suffering under the Law Reform Act, it was submitted that a conventional figure of Kshs. 10,000/= would suffice whereas Kshs. 60,000/= would suffice for loss of expectation of life.

Respondent's Submission

8. The respondent submitted that the driver of the appellant's lorry was negligent as shown in the testimony and as such the trial court was correct to award liability at 100% against the appellant.

9. On quantum, it was submitted that the trial court correctly considered the submissions of the parties in arriving at the award and further that the appellant has failed to prove the requirements as was held in the cases of **United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KLR, Nina Mweu T/A Sassma Farm v Muus Kenya Limited & Anther [2015] eKLR** and that of **Mbogo v Shah & Another [1968] EA** where the court of appeal stated that it is only entitled to interfere with the discretionary decision of the judge appealed from if it is established that the judge misdirected himself in law, misapprehended the facts, he took account of considerations of which he should not have taken account, he failed to take account of considerations of which he should have taken account or that his decision albeit a discretionary one, is plainly wrong.

C. Analysis & Determination

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424**

11. Having the aforesaid in mind and having looked at the Appellant's grounds of appeal and the parties' respective Written Submissions, it is clear to the court that the said grounds crystallise into the issues for determination by this court which are;

a) *whether or not the learned trial magistrate finding of 100% liability against the appellant was based on evidence.*

b) *whether the trial magistrate erred in awarding the respondents a sum of Kshs. 1,621,715/= as damages in the various items.*

12. On liability, witness testimony on record that was adopted by the court in determination of the suit reveal that the deceased was knocked down by the appellant's vehicle. The statement by the appellant's witness was uncorroborated and incredible as described by the trial magistrate. The magistrate said that the statement of the witness did not portray an individual who knew what he was doing in moving the lorry.

13. I have perused the evidence of the witness who alleges that the deceased was sleeping under the lorry at 5.00am when the accident occurred. This evidence weighed against that of the respondent left a lot of gaps and was neither reliable no credible.

14. I find that the explanation of the respondent on how the accident occurred was coordinated and credible. The appellant was wholly liable for the accident and the issue of contribution does not arise.

15. The finding of 100% liability against the appellant was based on the evidence on record. It is my considered opinion that the magistrate did not err in his finding which I hereby uphold.

16. On quantum, the evidence tendered by the pw2 was unrebutted and credible taking to account that charcoal sellers and many Kenyan working in the informal sector hardly keep account or records a fact this court can take judicial notice of. In the case of **Nelson Rintari v CMC Group Ltd (2015) eKLR** the court held ;

> ***"……..I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges courts to do justice without procedural technicalities ….."***

17. The trial court to have applied same amount as pleaded and orally proved and un-rebutted. Therefore, this court adopts a multiplicand of Ksh.3000/=. In contrast, The Court of Appeal in the case of of **Beatrice W. Murage (supra)** stated that, *"Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage."* I am bound by the decision of the Court of appeal and further the submissions of the appellant who submitted that trial court should have used Kshs. 12,000/= as per the Regulation of Wages (General Amendment) Order, 2013 Legal Notice no. 197 as the multiplicand.

18. From the death certificate and the evidence of PW 2 the deceased was aged 42 years. The age in the death certificate is a reflection of the age which was in his ID card which this court can take judicial notice of.

19. The appellant did not rebut the same thus court adopts deceased age as thereof reflected. PW 2 testified that the deceased was doing charcoal business and also tilled the land. There was no evidence that the deceased lived a sickly life. Nonetheless, it cannot be denied that in life there are preponderables and vicissitudes that can shorten one's life, besides an accident.

20. t is however, a matter of discretion for the court to make that decision. As for the multiplier of 15 years complined of as being too high, I

rely on the case of **Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] eKLR** the court adopted the multiplier of 20 years where the deceased was 41 years old. The multiplier adopted by the trial court is within the range of the conventional figure and it is not a misdirection on part of the trial court.

21. I reach a conclusion tht the multiplier was reasonable in the circumstances and hereby find no reason to disturb it.

22. On dependency; it is not denied that the deceased was a family man with wife and children who depended on him.

23. In **Boru v Ondu v (1988-1992) KAR 299** the court followed the pattern of court decisions showing that in claims for loss of dependency under the Fatal Accidents Act, the court had, as a rule, taken one third of the deceased's net income as his living expenses and two thirds of his net income as a dependency rule. It is therefore conventional for the court to apply the ratio of 2/3 as part of income deceased was using to maintain his family. The ratio of 2/3 in assessing damages for loss of dependency was in order.

24. From the death certificate and the Plaintiff's testimony it is settled the deceased died on the same day as the accident. The trial magistrate awarded Kshs. 50,000 for pain and suffering. In the case of **Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering. I am thus convinced that the award by the trial magistrate is sufficient in the circumstances.

25. Under loss of expectation of life appellant proposes a figure of Kshs.60, 000 as against the award of Kshs. 100,000 awarded by the trial magistrate. In the case of **Wanjiku Kahiga and Elizabeth Murugi Kahiga both deceased) v World Vision Kenya & 2 Others (2014) eKLR** & that of **Joseph Kahiga Gathii & Paul Mathaiya Kahiga v World Vision Kenya & 2 Others (2014)eKLR** the appellate court upheld the trial court's decision to award a sum of Kshs.60,000/= . I disagree with the appellant and adopt the amount awarded by trial court of Kshs. 100,000/= under loss of expectation of life as same is within the range of the conventional figure and it is not inordinately high for this court to disturb it.

26. The upshot of the above is that the trial magistrate's decision was based on the law and evidence. The quantum of damages was not excessively high to warrant this court to disturb it. I find that there was no evidence that some important factors were not taken into consideration in making the award.

27. I therefore find no merit in this appeal and hereby dismiss it with costs to the respondent.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Karimba for Appellant