REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 56 OF 2017

ERICKSON ROVER SAFARIS.....APPELLANT

VERSUS

PENINAH NDUKU MULI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF

MICHAEL KYALO WAMBUA (DECEASED).....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Gesora, SPM, Delivered on 5th December, 2017, in the

Chief Magistrate's Court at Narok in Narok CMCCC No 157 of 2017, Peninah Nduku Muli (Suing as

legal representative of theestate of Michael Kyalo Wambua (deceased) v Erickson Rover Safaris)

JUDGEMENT

The appellant has appealed against the judgement and decree of the magisterial court that awarded the plaintiff/respondent damages in the sum of Shs. 1,966, 308/= arising out of a fatal motor vehicular accident; on the basis that the award was manifestly excessive.

In this court the appellant has raised eight (8) grounds of appeal in its memorandum of appeal.

The defendant/appellant has faulted the trial court both in law and fact in awarding excessive damages in favour of the plaintiff/respondent without any legal and or evidential justification. In this regard, the trial court in its pronouncement found as follows: *"My award is therefore as follows: -*

Pain and suffering……. Kshs. 50,000/=

Loss of expectation of life…… Kshs 100,000/=

Loss of dependency (25,514 x 12x12x2/3) ……Kshs 2,449,344/=

Less 25 0/0 contribution…….. …. Kshs 1949,508/=

Add special damages……. Kshs 16,800/=

Grand total……. Kshs 1,966,308/=

I therefore enter judgement for the plaintiff against the defendant in the sum of Kshs 1,966,308/=. The plaintiff shall also have the costs of the suit. Decree accordingly."

This is a first appeal. As a first appeal court, I am required to independently re-assess the entire evidence produced at the trial and make my own independent findings in the light of the applicable law. I have done so. As a result, I find the following to be the issues for determination in the instant appeal. It is clear from the above passage that the main issues in this appeal are as follows.

1. First, the proper multiplier to be applied**.**

2. Secondly, whether or not the awards under both Fatal Accidents Act (Cap 32) in respect of lost years and the Law Reform Law Act (Cap 26) in respect of loss of expectation of life should be awarded without the latter award being offset from the former.

3. Thirdly, whether or not the sum of Kshs 50,000/= awarded as damages for pain and suffering is excessive in the circumstances of the case.

4. Fourthly, who bears the costs of this appeal?

Issue 1: which is the proper multiplier?

This issue is raised in grounds 1, 2, 3 and 5 in which the appellant has faulted the trial court both in law and fact in awarding excessive damages, without, regard to the appellant's submissions, to the principle of *stare decisis* and in ignoring the appellant's evidence and pleadings. It is clear from the above magisterial award that the trial court used a multiplier of 12 years in respect of assessing loss of dependency. Counsel for the appellant urged the court to use a multiplier of five years based on the authority of *Jane Wairimu Maona v Peter Githinji Kahindi & Another (2006) eKLR*, in which the deceased died at the age of 49 years. The Court of Appeal therein reduced the multiplier of 11 years to 6 years. Counsel submitted that the retirement age is 60 years, which is the retirement age for Government civil servants. In his view this gives 7 years in respect of which the deceased would have actively worked. In using the multiplier of 12 years counsel submitted that the trial court acted on speculation and failed to take into account the vicissitudes and imponderables of life. Counsel for the respondent on the other hand has submitted that the deceased's line of work has no age limit, since he was not a civil servant.

I have considered the rival submissions in respect of the proper multiplier. At the outset, I must admit that it is a difficult exercise and is contentious. I find that the trial court did not give reasons for adopting a multiplier of 12 years. I find after anxious consideration that it is proper to use 60 years as the age of retirement which produces a multiplier of 7 years (60 subtract 53 years). The usage of 60 years as the retirement age provides for certainty and uniformity is assessing damages. This is the position where no age of retirement is provided for in respect of the employee.

It is to be borne in mind that this country inherited the English common law in respect of which equity came to its assistance in the 19th century England. The Lord Chancellor, the English judge in charge of the equity or chancery courts, granted equitable relief, which in the course of time was said to be depended on the size of the chancellor's foot.

To avoid the fluid situation of the equitable courts, there developed the maxims of equity. Furthermore, it should also be borne in mind that whether one is the private sector or government service, we live under the same economic circumstances. I therefore find merit in ground 1, 2, 3 and 5 and I hereby uphold them.

I therefore find that the proper multiplier to be used is seven (7) years.

Issue 2: Whether or not awards should be made under both heads of lost years and loss of expectation of life.

The appellant has raised this issue in grounds 7 and 8 in which it has faulted the trial court for awarding excessive damages under the Fatal Accidents Act and for failing to deduct the award under the Law Reform Act, respectively. Counsel for the appellant has submitted that the award under the Law Reform Act, which is loss of expectation of life should be deducted from the award under the Fatal Accidents Act. In this regard, there are two conflicting authorities from the Court of Appeal. The appellant has relied on *Kemfro Africa Ltd t/a Meru Express Services & Another v A. M. Lubia & Another (1985) eKLR* and submitted that the award for loss of expectation of life should be deducted from the general award of damages; since the beneficiaries under both statutes are the same. In its pronouncement the Court of Appeal therein expressed itself in the following terms: *"…… the net benefit will be inherited by the same defendants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act……"*

It seems the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) v. Kiarie Shoe Store Ltd, Nyeri Court of Appeal, Civil Appeal No 22 of 2014 (2015) eKLR* held a different view in respect of the issue of what appeared to be double compensation. In the latter case, the Court of Appeal expressed itself in the following terms: "…. *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 are the same, and consequently the claim for lost years and dependency will go to the same person. 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."*

The issue raised by the two conflicting decisions is a fundamental one. The issue is whether the decisions of the Court of Appeal under the Independence Constitution of 1963, which was abolished on 27th August 2010 are binding on the current Court of Appeal under the 2010 Constitution. The peaceful revolution which ended in the proclamation of the current Constitution on 27th August 2010 abolished the old order under the Independence Constitution. That is why judges of the superior courts (High Court and Court of Appeal) who were serving under the Independence Constitution had to take the oath of allegiance in support of the current Constitution. In this regard, I have drawn guidance from the case of ***Madzimbamuto v. Lardner – Burker (1969) 1A C. 645 (P.C),*** in which serving judges had to take oath of allegiance in support of the new constitution in what is now Zimbabwe, then known as Rhodesia. It therefore follows that the decisions of the Court of the Appeal under the Independence Constitution do not bind the current Court of Appeal. They are only persuasive and are only entitled to great respect. See generally ***Dodhia v. National and Grindlays Bank Ltd (1970) EA 195,*** in which the Court of Appeal held that the decision of the Privy Council in respect of appeals from Kenya were entitled to be treated with great respect, since they were not binding. The position would have been the same even if the proclamation of the current Constitution had come about through violent means. See generally ***Uganda v. Commissioner of Prisons, ex parte Michael Matovu (1966) EA 514.***

It seems to me that the decision of the Court of Appeal in ***Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Menja (deceased) v Kiarie Shoe Store Ltd, supra, has overruled Kemfro Africa t/a Meru Express Services Ltd & Another v A M Lubia & Another***, ***supra,*** with the result that the former now represents the correct position in law. It therefore follows that damages awarded under loss of expectation of life should not be offset from damages awarded under the Fatal Accidents Act. I therefore find that grounds 7 and 8 fail and are hereby dismissed.

Issue 3: whether or not the amount of Kshs. 50,000/= awarded for pain and suffering is manifestly excessive?

?It is clear from the magisterial judgement that the trial court did not take into account that the deceased died on the same day of the accident namely 25th August 2013 according to the death certificate. Furthermore, according to the police abstract the deceased died on the same date at 19.30 hours at Nguswani area along Narok-Maasai mara road. I find from this police abstract report that the deceased died on the spot. It follows that he suffered minimal pain. The trial court did not take this into account before awarding Kshs 50,000/= for pain and suffering.
It therefore follows that I am entitled to interfere with this award. In doing so, I am persuaded by ***Samuel Kabuthia Ndana v. Jenifer Wawire Njeru & Another (2019) eKLR,*** in which the court observed that very nominal damages will be awarded on loss of expectation of life and for pain and suffering. In respect of loss of expectation of life the conventional award is Shs.100,000/- *"while for pain and suffering the conventional awards range from Shs.10,000/- to Kshs.100,000/- with higher damages being awarded if the pain and suffering was prolonged before death"*. Doing the best I can in the circumstances I hereby reduce the award from KShs. 50,000/= to Kshs 15,000/= for pain and suffering. I therefore uphold the appellant's ground 6 of appeal in which it faulted the trial court in law by awarding excessive damages under the scope of evidence and/or legal entitlement.

It is important to point out that liability had been agreed at 25:75 in favour of the plaintiff/respondent. As regards the multicand, the court was guided by *Chunibhai J. Patel & Another v PF Hayes & others [1957] EA 748* and found that the gross income was Kshs. 28, 572/= and after tax, the net was Kshs 25, 514/=.

Final assessment of damages in the light of the foregoing is as follows.

Pain and suffering……. Kshs. 15,000/=

Loss of expectation of life……. Kshs 100,000/=

Loss of dependency (25,514 9(net income) x 7 (multiplier) x 12 (number of months) x2/3)

(being the dependency ratio……Kshs 1,428,784/=

Less 25 0/0 contribution…… Kshs 385,946/=

Total…… Kshs 1,157,838/=

Add special damages…… Kshs 16,800/=

Grand total…… Kshs 1,174,638/=

I therefore enter judgement for the respondent in the sum of Kshs 1, 174, 638/=

Issue 4: on costs

The appellant has succeeded in its appeal on some grounds and has failed on others. In the circumstances, each party will its own costs.

Judgement signed, dated and delivered in open court at Narok this 28th day of October, 2019 in the presence of Mr. Kilele holding brief for Mr. Mwambi for the appellant and in the absence of the respondent.

J. M. Bwonwong'a

Judge

28/10/2019