REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO 143 OF 2018

NZIOKA NDETI NICHOLAS..1ST APPELLANT

SABINA NDUKU TOM...2ND APPELLANT

VERSUS

ESTHER NDUNGE MANTHI [Suing as the Legal Representative

of the Estate of STEPHEN MANTHI MALILE (DECEASED).............RESPONDENT

(Being an Appeal from the Judgment of Hon. A. Lorot H.R (MR)

SPM delivered on 27th August, 2018 in Machakos CMCC No. 189 of 2017)

BETWEEN

ESTHER NDUNGE MANTHI [Suing as the Legal Representative

of the Estate of STEPHEN MANTHI MALILE (DECEASED)...................PLAINTIFFS

VERSUS

NZIOKA NDETI NICHOLAS..1ST DEFENDANT

SABINA NDUKU TOM...2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 18th April, 2017, the Respondent herein instituted a suit in her capacity as the legal representative of the estate of **Stephen Manthi Malile** (Deceased) against the Appellants herein claiming Special Damages in the sum of Kshs 82,425/- General Damages, Costs and interests.

2. The Respondent's suit was premised on the fact that on or about 24th December, 2016, the deceased was travelling as a lawful passenger in motor vehicle reg. no. KBD 725K when due to the negligence of the driver of the said vehicle the same lost control, veered off the road and as a result the deceased sustained fatal injuries.

3. On 5th July, 2018, the parties recorded a consent on liability in which judgement was entered in favour of the Respondent against the Appellant in the ratio of 85:15. Thereafter the plaintiff's filed documents were admitted in evidence by consent and the matter proceeded to submissions. The said documents according to the judgement were grant of limited letters of administration, police abstract, letter from the chief, death certificate. Admission forms to Machakos Funeral Home, Copy of the records from the register of motor vehicles and copies of the receipts for special damages.

4. In his judgement the learned trial magistrate awarded the Respondent Kshs 100,000.00 under the head of pain and suffering. According to him the deceased died while undergoing treatment at the hospital and the death certificate showed that he died the same day while the police

abstract showed that the accident occurred at around 9.45pm. It was his belief that the deceased was declared dead on arrival.

5. He then proceeded to award Kshs 150,000.00 for loss of expectation of life taking into account the fact that the deceased was 56 years old at the time of his demise. Though at that age it was his opinion that the deceased could not be said to have been at a prime age, he considered the fact that the deceased was in good health.

6. As regards loss of dependency, the learned trial magistrate found that the deceased was survived by three children and was said to have been a businessman and a farmer. While appreciating that from the plaint the deceased's children were all adults, the learned trial magistrate found that it could not be ruled out that his wife was dependent on him. Since the parties relied on the pleadings which showed that the deceased earned an average of Kshs 45,000.00 and was 56 years hence would have probably worked for another 10 years, the learned trial magistrate adopted a multiplicand of Kshs 45,000.00 per month with dependency ratio of 1/3rd and awarded Kshs 1,800,000.00 under this head.

7. With respect to special damages, the learned trial magistrate found that though the amount pleaded was Kshs 82,425/- the receipts availed totalled Kshs 63,075/- which he awarded. In total he awarded Kshs 2,113,075.00 less 15% contribution making a net award of Kshs 1,796,113.75 with costs and interests. It is this award that is the subject of this appeal.

8. It was submitted on behalf of the appellants that the assessment of Damages under ***the Fatal Accidents Act*** is not based on conjecture but is based on well-known legal principles. In this regard the Appellants relied on the decision of **Ringera, J** (as he then was) in Nairobi HCCC No. 1638 of 1988; **Beatrice Wangui Thairu –vs– Hon. Ezekiel Barngetuny & Another** as adopted by **Majanja, J** in Homa Bay HCCA Nos 25, 24 & 26 of 2013; **Oyugi Judith & Another –vs– Fredrick Odhiambo Ongong & 3 Others** that:

> "**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."**

9. They also relied on section 2 of the ***Insurance Motor Vehicle Third Party Risks Amendment Act, 2013*** which states that:-

> **""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."**

10. It was submitted that the Trial Court should have applied the legal principles set out above in reaching a determination on the quantum of Damages under the ***Fatal Accidents Act***.

11. According to the Appellant, though the Respondent pleaded in the plaint that the deceased was earning Kshs 45,000/- per month and was aged 56 years old, in the defence, this was specifically denied. To the Appellants, the allegations having been specifically denied, the burden squarely lay on the Respondent to tender admissible evidence, [either by *viva voce* evidence or documents] to the requisite standards, to support those specific allegations and any other allegation which was formally denied by the Appellant. In support of this submission the Appellants relied on the Court of Appeal's judgement in **Wareham t/a A F Wareham & 2 Others –vs– Kenya Post Office Savings Bank 2 KLR [2004]**.

12. It was submitted that the Respondent did not tender any evidence whatsoever, to demonstrate that the Deceased was a Businessman or Farmer or that he earned Kshs 45,000.00 per month or any that he had any income whatsoever since none of the documents listed by the Respondent or presented as Exhibits show the Deceased's occupation or his Monthly Income. We invite your Lordship's attention to the Deceased's Certificate of Death. It was therefore submitted that in the absence of any evidence, the Learned Trial Magistrate was obligated by Section 2 of the ***Insurance Motor Vehicle (Third Party Risks) Act***, to reckon the minimum wage under the ***Labour Relations Act, 2007***, which was applicable at the time of the Deceased's death which as prescribed by the ***Regulation of Wages (General) (Amendment) Order 2015*, Legal Notice No 117 of 2015**. Accordingly, it was submitted that the applicable income should therefore have been that of a General Labourer in a Town Council - **Kshs 10,107.10** hence the Learned Trial Magistrate took into account irrelevant factors in arriving at the multiplicand of Kshs 45,000.00. As regards the adoption of a multiplier of 10 years on the basis that the Deceased was Fifty Six [56] years old and would have possibly worked for another Ten [10] years, it was submitted that the age of the Deceased's dependants ought to be taken into consideration when assessing damages for loss of dependency and reliance was placed on Nairobi HCCA 896 of 2005; **Francis K. Nthiwa –vs- Gregory K. Mwangangi and Another** where it was held that:-

> **"Having been born in 1947 the deceased's father was about 52 years, at the time of the deceased's death. No evidence was adduced with regard to the age of the deceased's mother which was pleaded as 37 years in the plaint. Be that as it may, I do concur with the submissions made by the appellant's counsel that the court ought to have taken into account the age of the dependants in arriving at the multiplier."**

13. The court was therefore invited to consider the fact that the letter by the Chief of Kimutwa Location indicates that the Deceased had One [1] wife and three [3] children and though the age of the wife was not disclosed, the three children are adults, aged 29, 34 and 37. It was submitted that the Plaintiff is an elderly woman since her eldest son is 37 years old, a fact which the Learned Trial Magistrate failed to take into account relevant factors in arriving at the multiplier. To the Appellants, a Multiplier of 4 years would have been reasonable in the circumstances and they relied on Nairobi HCCC No 365 of 2011; **Cecilia Wanja Maina & 2 Others -vs- Reme K. Limited & Another** where the court adopted a Multiplier of Six [6] years for a 56 year old man who had three children, two of whom were still undertaking their studies.

14. It was therefore the Appellants'' view that damages under the ***Fatal Accidents Act*** [loss of Dependency] ought to be assessed as follows:

> ***Kshs 10,107.10 ×12 Months × 4 Years × = Kshs 163,713.60***

15. In the Appellants'' view, having made an Award under the Fatal Accidents Act, the Trial Court should not have made any Award under the ***Law Reform Act***. This submission was based on HCCC No 110 of 2004; **Daniel Mugaru Kuria vs. Geoffrey Githeki Macharia & Another: -**

16. In the Appellants' opinion, the Learned Trial Magistrate failed to take into account relevant factors in arriving at the Award for Special Damages. There is no evidence whatsoever that the Respondent paid the amounts set out in the above receipts. They are neither made out in the Respondent's name nor do they contain the Deceased's name. To the Appellants, it is therefore clear that the sums were not expended by the Respondent as a consequence of the tortuous act complained of. They urged the court to Award Kshs 58,450.00 and not Kshs 63,075 as Special Damages.

17. In the final analysis the court was urged to find that the Appellant's Appeal has merit, set aside the Award of Damages for Loss of Dependency made by the Lower Court and substitute it with an Award of Kshs 222,163.60 or such other lessor Award this Honourable Court may deem reasonable.

18. In opposing the appeal, the Respondent submitted that since the Appellants do not contest the awards under pain and suffering of Kshs. 100,000.00 and loss of expectation of life of Kshs. 150,000.00 the same should not be disturbed. It was submitted that the rest of the awards of the trial court were well reasoned and informed and based on the proper principles under the Fatal Accidents and Law Reform Acts and should therefore not be reviewed based on **Kemfro Africa Limited T/A Meru Express Services & Another-vs-Lubia & Another, NRB CACA No. 21 of 1984** and **Kenya Power Ltd-vs-James Matata & 2 Others (Suing as the Legal Representatives of the Estate of Nyange Masaga-Deceased) (2016) eKLR**

19. On the multiplier, it was submitted that the deceased having being a farmer and a business man and thus effectively self-employed, his working life cannot be tied to the official retirement age of 60 years. At the time of his demise the deceased was a healthy, robust and hardworking man and since the nature of his work was not hazardous, he was expected to live long and thus the application of a multiplier of 10 years was reasonable. The Respondent relied on the Court of Appeal decision in **Priscilla Mwathimba-vs-Simon Kaibunga & Another Meru CA 132 of 2008**, while relying upon the cases of **Loise Wanjiku Kagunda-vs-Julis Gachau Mwangi Nrb CA 142 of 2003** whereby the court did not disturb a finding that a business man aged 77 years could live to 80 years and was awarded a multiplier o 3 years; and **Coast Bus (Msa) Ltd-vs-David Mandu Blembwa Ksm HCCA 42 of 2010** whereby a multiplier of 10 years was sustained for a deceased aged 56 years old.

20. On the multiplicand, it was submitted that the trial court properly noted that parties by consent elected not to call evidence but to rely on the pleadings which clearly indicate that the deceased had a monthly income of approximately Kshs. 45,000.00. The Respondent's claim supporting documents were actually produced in court in the presence, and consent of the Appellants advocates and no issue was raised. Thus, the Appellants claim that lack of production of evidence of income is fatal and or should instead attract a lower global award is misplaced and reliance was placed on the holding in the case of **Jacob Ayiga Maruja & Another-vs-Simeon Obayo (Suing as the administrator of the estate of Thomas Ndaya)** where it was stated:-

> **"We do not subscribe to the view that the only way to prove the profession of a person must be the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

21. According to the Respondent, the income of a General Labourer in a Town Council of Kshs. 10,107.00 as prescribed by the ***Regulation of Wages (General) (Amendment) Order 2015***, Legal Notice No. 117 of 2015 is not applicable as the deceased was not a labourer but from the pleadings was a self-employed farmer and business man and is therefore not bound the provision relied upon by the Appellants. On this issue the Respondent relied on case of **Priscilla Mwathimba Case** (supra) whereby the Court opined as follows:-

> **"While the Appellant did not produce evidence of earnings of Kshs. 30,000.00 per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of Kshs. 5,000.00 as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that the deceased had a wife and six children…can both a shop and farming be producing only Kshs. 5,000.00 per month? This court finds it's unreasonably low to sustain such a family. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural folks compensation for reason that there are no proper records of income."**

22. In view of the above, the court was urged to consider the Respondent's submissions herein and those of the lower court and being guided by the above mentioned binding case law; maintain the lower court's award as computed.

23. As regards special damages, it was submitted that although the Respondent had pleaded Special damages of Kshs. 82,425.00**,** the receipts produced in court and marked as exhibits in the presence of the Appellants Counsel were of Kshs. 63,075.00 which the trial court in its judgment confirms having seeing the receipts hence the award and thus the same should not be disturbed. In any event, although the Appellants submit on the same, their Memorandum of Appeal does not seek any action regarding the special damages.

24. According to the Respondent, the Appellants submission that the trial court having made an award under the ***Fatal Accidents Act*** it should not have made an award under the ***Law Reform Act*** is quite misplaced and undeniably, a wrong misunderstanding of the law and precedent and she relied on the Court of Appeal's decision in **Mombasa Maize Millers Ltd-vs-Chrispine Asoyo (Suing as a personal representative/administrator of the estate of Martina Asoyo Akinyi) KSM CA 23 of 2017**.

25. She also relied on the holding in **Hellen Waruguru Waweru-vs-Kiarie Shoe Stores Ltd Nyeri CA 22 of 2014** where the Court of Appeal stated:-

> **"…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."**

26. She also cited the case of **David Kahuruka Gitau-vs-Nancy Anne Gitau (2016) eKLR,** where the Court expressed itself as follows:-

> "**I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of the section is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights on dependents by the Fatal Accidents Act."**

27. In addition she cited the case of **Richard Omino-vs-Christine Onyango Kisumu CA 61 of 2007** where the same issue was addressed as follows:-

> **"The Law Reform Act Section 2 (5) provides that the rights conferred by or under 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. 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". This 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."**

28. In view of the above, it was submitted that the Appellant's position is grossly misplaced and thus the award of the trial court under both Acts was proper and the same should not be disturbed. Accordingly, the Respondent prayed that this court finds that the trial court did not err in either law or fact in its judgment and to uphold the judgment of the trial court in its entirety and awards the costs to the Respondent.

Determinations

29. In this appeal, the appellant is only challenging the quantum of damages liability having been agreed. The consent was however drawn in the following terms:

> ***"By Consent:***
>
> ***1) Judgementon liability be and is hereby enterd in the ratio of 85%:15% in favour of the plaintiff as against the Defendant;***
>
> ***2) That the Plaintiff's original documents be produced and marked on 5th July, 2018 as they appear in the List of Documents dated 18th April, 2018;***
>
> ***3) That the issue of Quantum be canvassed by way of Written Submissions; and***
>
> ***4) That the suit be mentioned on 5th July, 2018 for production of documents and to take a mention to confirm filing of Submissions.***

30. O 5th July, 2018 the parties appeared in court and informed the court that there was a consent filed on 14th June, 2018. It is important to reproduce the said proceedings verbatim. This is what transpired on that day:

> ***5/7/2018***
>
> ***Before: Hon. A. Lorot – SPM***
>
> ***Court Assistant: Kalekye***
>
> ***Ms Mutinda for the Plaintiff***

Maina for Osino for Defendants

Mutinda: There is consent filed on 14/6/2018.

Court: I don't see one on record.

Mutinda: I can furnish a copy.

Maina: I confirm there is a consent. I produce the documents.

Court: Liability: 85:15

……………documents admitted. (Produced through submissions).

Maina: I have seen the documents. No objection.

Court: Mention on 19/7/2018 for Defendant submissions.

HON. A. LOROT – SPM

5/7/2018

31. It would seem that after this the parties filed their submissions.

32. It is clear that before the trial court apart from the consent on liability, no oral hearing took place. Whereas in the consent it was agreed that the Plaintiff's documents would be produced and marked on 5th July, 2018, from the record of the proceedings of that day, what was produced was by Mr Maina who was acting for the Defendant. Whether it was the consent or the plaintiff's documents that Mr Maina was producing, it is not clear from the record. However, the Court indicated that the documents were produced through submissions. There was no indication that the said documents were marked as had been agreed in the consent. While there was no mention of the state of the pleadings in that consent, the court in its judgement relied on the plaint particularly as regards the deceased's earning as a basis for making an award for loss of dependency.

33. That averments in pleadings are not evidence was appreciated in **Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara [1972] E.A 166** where that the contents of a plaint are only allegations, not evidence. According to **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997,** where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, **Madan, J** (as he then was) expressed himself as hereunder:

> **"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."**

34. This Court has had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved. It is however unfair to the court to just throw all manner of documents at the court by way of annexures to the submissions and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by **Ringera, J** (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

> **"the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise."**

35. The same Judge in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** held that:

> **"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident."**

36. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure

they won’t land you in a ditch. In **Lehmann’s (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

> **“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”**

37. However, where the parties produce exhibits by consent the court has no option but to make the best out of them. In **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**, the Court of Appeal held that:

> **“The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as “No qualifications disclosed; the doctor is not a consultant”. If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant’s claim as to the nature of the injuries he had sustained as a result of the accident.”**

38. The law is however clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

> **“16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"**
>
> **17. The respondents’ contention is that the appellant by failing to object to the three documents marked as “MFI 1”, “MFI 2” and MFI 3” must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**
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> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**
>
> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**
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> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.**
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> **21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**
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> **22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.**
>
> **23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent’s case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The**

record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……"

39. In this case the court erroneously relied on the pleadings in the plaint as regards the deceased's earnings and the submissions as regards the state of the deceased's health before his demise. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

40. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

41. Similarly, in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

42. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

43. The Court of Appeal in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that** no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the ***Civil Procedure Rules*** [now Order 18 rule 2 of the ***Civil Procedure Rules***]. The same Court in **Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998** found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

44. The mode of hearing in civil suits is provided for in Order 18 rule 2 of the ***Civil Procedure Rules*** as follows:

2. Unless the court otherwise orders—

(1) On the day fixed for the hearing of the suit, or on any other

day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his

evidence, and may then address the court generally on the case. (3) The party beginning may then reply.

45. In this case, though the consent was clear that documents were to be produced and marked but what followed was a procedure by which the court was left with nothing to rely on hence the resort to pleadings. It is clear that the court is given a discretion to deviate from that prescribed mode of hearing. However, the said rule provides that there must be an "otherwise" order if that is to happen. The parties may for example agree that certain documents be admitted in evidence by consent and that those documents be marked as they agreed here. Unless the documents are marked, it means that the said documents are not produced otherwise the court would be unilaterally amending the consent.

1. In my view whereas in adversarial systems like ours parties are at liberty to conduct theor matters in a manner they deem fit, the process of doing so ought to lawful. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote **Oder, JSC** in the case of **Gokaldas Tanna vs. Rosemary Muyinza & DAPCB Scca No. 12 Of 1992 (SCU)**:

> **"An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".**

46. In this case as I have stated above the parties did not conduct the proceedings in terms of the consent since the documents relied upon were never produced and marked.

47. The orthodox statement of law is that documents filed with pleadings do not *ipso facto* amount to evidence since such documents are not introduced by consent or on oath. The absurdity of the manner in which the case proceeded can be clearly discerned from the submissions of the parties before me. While the Respondents insists that the trial court was entitled to rely on the plaint despite the averments not having been admitted as evidence, the Appellant insisted that the court should go by the prescriptions under the ***Regulation of Wages (General) (Amendment) Order 2015*****, Legal Notice No 117 of 2015** which provide that the wage of a general labourer in a Town Council is Kshs 10,107.10. As stated hereinabove, reliance on pleadings in a plaint unless expressly or impliedly admitted is clearly erroneous. On the other hand, there is no basis for this court to invoke the provisions of the ***Regulation of Wages (General) (Amendment) Order 2015*****, Legal Notice No 117 of 2015** in a case where it is contended that the deceased was a businessman and a farmer. To adopt either amount in my view would amount to injustice to either party since it is the Appellant's case that as the deceased's children are all adults, there is no loss of dependency. That issue can only be properly determined in a properly conducted trial.

48. It is clear that the manner in which the proceedings before the learned trial magistrate were conducted rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law.

49. What then is the consequence of that? In **Mumias Agricultural Transport vs. Sony Agricultural Ltd. Civil Appeal No. 201 of 1997**, the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing.

50. In the premises the order that commends itself to me and which I hereby grant is that this appeal succeeds, the judgement in Machakos Chief Magistrate's Court Civil Suit No. 189 of 2017 is hereby set aside. The matter is hereby remitted to the said court for hearing and determination of the case in the manner stated hereinabove. For avoidance of doubt the consent on liability remains undisturbed.

51. As the confusion in the manner of proceeding was caused by the parties, there will be no order as to costs of this appeal. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of November, 2019.

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Kaloki for Mr Njoroge for the appellant

CA Susan