REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 30 OF 2018

BERNARD KYALO MAITHYA.......................APPELLANT

-VERSUS-

PHILOMENA KYUMWA MBITHI & JOSEPH MUTUNGA

(suing as the legal representative of the estate of)

MUTINDA MBITHI...................................RESPONDENTS

(Being an Appeal from the Judgment of Hon. C.O Nyawiri (SRM) in the Senior Resident Magistrate's Court at Makueni Civil Case No.72 of 2016, delivered on 28th February 2018)

JUDGMENT

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act *(LRA)* and the Fatal Accidents Act *(FAA)* on behalf of the Estate of *Mutinda Mbithi* pursuant to a fatal road accident which occurred on 27/08/2015 along the Kathiani-Ngutwa earth road. They also prayed for special damages, costs of the suit and interest.

2. The Appellant filed his statement of defence denying the claim. The matter proceeded for hearing and judgment was delivered in favour of the Respondent. The learned trial magistrate apportioned liability in the ratio of 80:20 in favour of the Respondents and awarded the Respondents Kshs.3,100,000/= before contribution. The award is made up as follows;

Pain & suffering………………………….Kshs. 20,000/=

Loss of expectation of life………………Kshs. 120,000/=

Loss of dependency……………………..Kshs.2,960,000/=

Total……………………………….………Kshs.3,100,000/=

Less

20% contribution……………..………..Kshs. 620,000/=

Net award………………………………...Kshs.2,480,000/=

3. Aggrieved by the award, the Appellant filed this appeal and listed 6 grounds stating that the learned

trial Magistrate erred in law and fact by;

a) *Apportioning liability in the ratio of 20:80 in favor of the plaintiff considering the evidence tendered.*

b) *Awarding damages of Kshs.20,000/= as pain and suffering.*

c) *Awarding damages of Kshs.100,000/= as loss of expectation of life* ***(should be 120,000/=)***

d) *Applying a multiplicand of Kshs.10,000/=*

e) Applying a multiplier of two third ***(should be 37 years).***

f) Applying a ratio of 2/3.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

Appellant's submissions

5. On ground **(a**), the Appellant submits that the accident which led to the death of the deceased was purely accidental and not caused by any fault of the driver of motor vehicle registration No. KBU 654X *(the lorry)*. That according to Pw2, the deceased was among a group of six people pushing the lorry uphill and it was the slipping that caused him to be ran down and not the manner in which the lorry was driven. He submits that it was acontradiction for Pw2 to blame the driver during re examination because no charges were ever preferred yet Pw2 was one of the investigating officers.

6. He also submits that the Respondents did not lead any evidence to prove any of the particulars of negligence in the plaint but instead sought to prove the case of a lorry pusher yet they had pleaded the case of a 'pedestrian'. He contends that the law does not allow a party to plead one case and prove a different case. He relies on **Nrb HCCA No. 421 of 1998: Associated Electrical Industries Ltd –vs- William Otieno** where the learned Judge reiterated that;

> *"Parties are bound by their pleadings…in the absence of leave to amend; the parties are bound by their particulars...."*

7. The Appellant submits that apportioning liability in the ratio of 80:20 was against the weight of the evidence and prays that the award be set aside for failing to prove the case on a balance of probability.

8. On ground **(b)**, he submits that an award for pain and suffering can only be made where the deceased experienced some pain but goes on to acknowledge that even though the deceased's death was instantaneous, he may still have experienced some pain even for a moment. He submits that a conventional award of Kshs.10,000/= would have been suitable.

9. On ground **(c),** he submits that the deceased dropped out of primary school in class 6 and had an ordinary life without much expectation of substantial improvement. He contends that a conventional award of Kshs.50,000/= would have been a suitable award for loss of expectation of life.

10. On grounds **(d)**, **(e)** and **(f)**, he submits that the Respondent was required to prove that the deceased was her son and that she was factually dependent on him. He contends that the deceased was expected to marry and as such, his assistance to his parents would reduce. He urges the court to find that a dependency ratio of 1/3 would have been more reasonable.

11. He also submits that there was no proof of earnings and the deceased had no occupation. As such, he submits that the trial court should have been guided by the relevant minimum wage of Kshs.5,844.20/= per month for a general labourer.

12. The Appellant has also faulted the use of 37 years as multiplier and contends that the trial court was not cognizant of the fact that the only dependants for the deceased were his parents. He cites **Nrb. HCCC No. 2716 of 1989: Michiri Njenga –vs- John Kareko (UR)** where it was stated that;

> *"Dependency is a question of fact and the multiplier will depend upon the likely dependency of the dependants and not the likely remainder of productive years of the deceased"*

13. He submits that the deceased would have eventually established his own house and his mother's dependency would have substantially reduced. He submits that awarding a multiplier of 37 years was unreasonable and speculative and contends that 10 years would have been more reasonable. He relies on **Samuel Mwaura Kimani –vs- Clement Gachanja (UR)** where the court adopted a multiplier of 10 years for a 24-year-old deceased. He has also cited **Michiri Njenga *(supra)*** where a multiplier of 8 years was used for a 32-year-old deceased.

Respondents' submissions

14. On ground **(a)**, the Respondents frown upon the Appellant's submission that the accident was caused by slipping of the deceased and invites the court to consider the following aspects; that the deceased and others were pushing the lorry because it was stuck, it was not established that all persons pushing the lorry were doing it from the left side, or that all the persons pushing the lorry were on the same terrain and that since the deceased was pushing it from the left side, the driver was expected to see anything using the left side mirror.

15. They submit that since the lorry was inspected and found to have no defects, the question which arises is why else it got stuck if not due to the driver's carelessness. They contend that if the driver had been careful, he would have seen the deceased slip and stop the lorry immediately. They also contend that if the lorry never got stuck, the accident would not have happened and the deceased would still be alive.

16. As to whether they departed from the pleadings, they submit that the issue was not raised at the trial and cannot be raised now. They submit that the **Cambridge English dictionary** defines a pedestrian as '*a person who is walking, especially in an area where vehicles go.'* They also cite the **Oxford English dictionary** which defines a pedestrian as *'A person walking rather than travelling in a vehicle.'* They submit that thedeceased was on foot in an area with vehicles and was not travelling in a vehicle.

17. It is their contention that a person pushing a vehicle is obviously on foot making strides as the vehicle moves and therefore a pedestrian. They add that even the police abstract referred to the deceased as a pedestrian and even if he was not, that would not be a reason for the matter to fail because there was no denial that the deceased was crushed while pushing the lorry. They cite *inter alia* the case of **Leah Wambui Ngugi –vs – George Mbugua Karanja & 2 others (2016) eKLR** where the Court held that;

> *"8. The question arising therefore is whether the evidence tendered by the Appellant contains incurable contradictions. Contradictions according to the Learned Magistrate arose from the fact that in the Plaint the Appellant pleaded that the Motor Vehicle Registration Number KAW 327K hit the rear of another vehicle as a result of which she suffered injuries, whilst in the viva-vice evidence, she tendered evidence to the effect that the Motor Vehicle Registration KAW 327 K which she was aboard, was over speeding down a hill which caused it to over turn causing her injuries. In my view, the evidence suffers from omissions rather than contradictions. Even if l was to find that there are contradictions, the contradictions here are very minor to necessitate the dismissal of a suit altogether.*
>
> *9. The question here is whether the accident occurred and whether the Appellant was a victim of such accident. The Appellant in her list of documents produced the Police Abstract in evidence. According to the Police Abstract the accident occurred on 14th December, 2007 involving the 3rd Respondents Motor vehicle Registration Number KAW 327K and KAR 954N. The Abstract further lists the Appellant as one of the person injured. I find the Police Abstract to be proof enough that the Appellant was injured. The Respondents did not adduce any evidence to rebut the contents of*

the Police Abstract. In any case this being a civil case, the proof should be on a standard of probability and not beyond reasonable doubt as in criminal case."

18. The Respondents joined the Appellant in submitting that it was erroneous to award liability in the ratio of 80:20 and contend that no liability should have been assigned to the deceased as there was no evidence to that effect. They urge the court to adjust the judgment on liability to 100% in favour of the Respondent.

19. On ground **(b)**, they submit that the Appellant did not guide the trial court with a case to support their proposal of Kshs.10,000/= for pain and suffering. On their part, they cited the case of **Francis Wainaina Kirungu –vs- Elijah Oketch Adellah (2015) eKLR** where the deceased died shortly after the accident and was awarded Ksh.50,000/=.

20. On ground **(c)** they submit that the Appellant did not guide the trial Court to support their proposal of Kshs.90,000/= for loss of expectation of life and contend that the amount of Kshs.100,000/= ***(should be Kshs.120,000/=)*** awarded is not too high to warrant interference.

21. On ground **(f)**, they submit that the dependency ratio of 2/3 was reasonable because the deceased was supporting his mother and sister. They however propose the ratio of ½ if the court is of a different opinion and rely on **Njue Gitonga Nthiga –vs Edward Nyamu Kibuyu (2015) eKLR** where it was held that;

> "In the case of ***Maina Kamaru and Jane Wahito –vs- Josphat Muriuki Wangondu Civil Appeal No. 14 of 1989*** where court of appeal confirmed a dependency appellate ratio of ½ as appropriate in case of a widow and father of the deceased as dependants.
>
> In the case of ***Wandii Kimeu & Charles Kilonzi Kimeu –vs- Evanson Wamuti Njenga & Thiongo Wainaina Nairobi HCCC No. 1019 of 2005*** the appellate court confirmed the ratio dependency of ½ where the deceased who was unmarried maintained his siblings and parents. The deceased in this case was not married and it is unlikely that 2/3 of his income went to his mother and siblings.
>
> *Considering that the deceased in this case paid school fees for his siblings and maintained his parent, I am of the considered opinion that the ratio dependency of ½ is appropriate in place of the 2/3 adopted by the magistrate. It is hereby adopted in substitution of the 2/3 ratio."*

22. With regard to the multiplicand (**ground d**), they submit that although they did not produce documents to show the deceased's earnings, courts have long moved from this line of thinking. They cite *inter alia* the case of **Paul Ouma –vs-Rosemary Atieno Onyango (2018) eKLR** where it was held that;

> *"…it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind none production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings will be insisted on."*

23. With regard to the multiplier, it is their contention that the same was not raised in the memorandum of appeal and was only brought up in the submissions. They submit that a party is bound by its pleadings and cannot submit on issues not in their pleadings. They however go on to submit that from precedents, courts have awarded multipliers based on the retirement age of the deceased. They cite the case of **Gachoki Gathuri –vs- John Ndiga Njagi Timothy & 2 Others (2015) eKLR** where a multiplier of 25 years was adopted for a 29-year-old deceased who was survived by his siblings and parent.

24. They contend that for the Appellant to submit that a multiplier should have been arrived at by considering how long the dependants were expected to keep depending on the deceased, then he should have cross examined on the dependants age.

They also submit that since the deceased was maintaining a sibling, it is impossible to tell how long the dependency would go on as some siblings can be dependent for life. They urge court not to disturb the multiplier of 37 years.

25. This is a first appellate court and it has a duty to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A.**

26. Having looked at the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a. Whether the apportionment of liability in the ratio of 80:20 should be disturbed.

b. Whether the quantum of damages should be interfered with.

Issue no. (a) Whether the apportionment of liability in the ratio of 80:20 should be disturbed.

27. It is not in dispute that the deceased was fatally injured while pushing the lorry. **PC Billy Chebii (Pw2)** received a call about the fatal accident and proceeded to the scene, where he found the lorry loaded with firewood. The deceased was said to have been pushing the lorry when he slipped, fell and got crushed by the rear left tyre.

28. In cross examination, he said that the deceased was in a group of about 6 people who were pushing the lorry on a narrow, sharp, hilly earth road and was the only one who was injured. He was pushing the lorry from the left rear side. The lorry was stuck on the hilly road and could not climb. The deceased slipped and fell in front of the rear tyre which smashed him to death.

29. The driver was aware that the deceased was pushing the lorry. The driver was not charged and the lorry had no defects on inspection. In reexamination, PW2 blamed the lorry's driver for the reason that he (driver) knew there were people pushing the lorry and ought to have been more careful.

30. I have carefully evaluated the evidence on how the accident occurred and I am unable to agree with the Respondents' submission that the lorry got stuck because of the driver's carelessness. The fact that the lorry was inspected and found to have no defects after the accident means that even at the time of the accident, there were no defects yet it still got stuck and was unable to go uphill.

31. I find that the inability to go uphill was due to the lorry's weight and the terrain and gradient described by Pw2. Further and in the absence of expert opinion, I can only speculate about the practicability of stopping the lorry from reversing yet it was already in need of assistance from the pushers. I also found it contradictory for Pw2 to blame the driver yet he was one of the investigating officers and did not prefer any charges against him.

32. I have also considered the Respondents' submission that, if the lorry did not get stuck, the accident would not have occurred and the deceased would still be alive. In my view and at the risk of sounding blunt, there is no evidence that the deceased was coerced into pushing the lorry or that it was obligatory on his part. From the description given by Pw2, it was a precarious situation and the deceased voluntarily assumed the risk. It would therefore be fair to say that if the deceased did not push the lorry, the accident would not have occurred and he would still be alive.

33. I found the argument about pedestrian and lorry pusher to be neither here nor there and I am fully guided by the definitions given in the Oxford and Cambridge dictionaries *(supra)*. In my view, it is a question of semantics which should not distract or shift focus.

34. As for the Respondents' submission that the Appellant should be held 100% liable, my view is that even if there were reasons to agree with them, the same would be untenable in the absence of a cross appeal. Accordingly, I find the trial Court's apportionment of liability to be very fair in the circumstances.

Issue no. (b) Whether the quantum of damages should be interfered.

35. Award of damages is largely a question of discretion and the principles which should guide an appellate court in deciding whether to interfere with such an award are well settled. The appellate court should be satisfied that in assessing the damages, the trial magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

36. On pain and suffering, it is not in dispute that the deceased died on the spot. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.

37. The Appellant did not cite any authority to support his proposal of Kshs.10,000/= and in addition to the one cited by the Respondents, I have looked at several others where the deceased persons died on the spot. In **Josephine Kiragu –vs- Vyas Hauliers Ltd (2017) eKLR** Njoki Mwangi, J. held that an award of Ksh. 10,000/= for pain and suffering was on the lower side and increased it to Kshs.30,000/=. In **Simon Bogonko –vs- Alfred Mongare Mecha & Anor [2019] eKLR** Maina J. reduced an award of Kshs.100,000/= to Kshs. 20,000/= for pain and suffering.

38. I find relevance in the words of **Majanja J**. in **Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA No. 68 of 2015 [2016] eKLR** where he stated that;

> "[5] *On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."*

39. Similarly, I am of the view that the award of ksh 20,000/= in the instant case was not inordinately high and is in line with awards given in similar cases.

40. Damages for loss of expectation of life are awarded due to the fact that someone's life has been cut short unexpectedly hence occasioning loss to his/her estate. The conventional figure under this head is Kshs.100,000/=. In this case, the deceased died at the young age of 24 years and there was no evidence that he suffered from any disease that would otherwise have cut his life short had the accident not occurred. It is my considered view that the award of Kshs.120,000/= is not inordinately high to warrant interference.

41. As for the multiplicand, the deceased's mother *(Pw1)* testified that the deceased earned Kshs.10,000/= per day from his hawking business but abandoned it to become a lorry conductor four (4) days before his death. The learned trial magistrate expressed himself as follows;

> *"..even though no documents were produced in support, the amount said to have been earned by the deceased is reasonable and not exaggerated in view of the minimum wage limit in our Country of Kshs.10,594.70/=. It was not controverted that the deceased was working as a conductor in a lorry. Therefore Kshs.10,000/= according to me does not exceed the minimum wage for unskilled labourers"*

42. The learned trial magistrate appreciated the use of the minimum wage where earnings cannot be ascertained but erred by not using the correct figure as per the applicable schedule. The deceased having died on 27/08/2015, the applicable minimum wage is as provided in the **Regulations of wages (General) (Amendment) Order, 2015** which came into operation on 01/05/2015.

43. The deceased was a resident of Ikua in the then Makueni District in Eastern Province. I do not agree with the Appellant that the deceased had no occupation. The evidence that he was a lorry conductor was not challenged. Accordingly, his category was that of a turn boy under column 4 for *'all other areas'* hence entitled to a minimum wage of Kshs.6,752.50/= per month. In my view, this is the multiplicand that should have been adopted by the trial court.

44. As for the multiplier, the Respondents complain that it was only brought up in the submissions yet it appears as ground No. 5 in the memorandum of Appeal. It has been captured as *'multiplier of 2/3'* which I find to be a typographical error. The deceased was 24 years old and the trial magistrate adopted a multiplier of 37 years which the Appellant considers unreasonable and speculative.

45. In addition to the authorities cited by the parties, I have looked at trends in other decided cases and in Mary **Kerubo Mabuka –vs- Newton Mucheke Mburu & 3 others (2006) eKLR** the Court used a multiplier of 20 years on a 26-year-old unmarried lady. In **Alice O. Alukwe –vs- Akamba Public Road Services Ltd & 3 others [2013] eKLR** the court used a multiplier of 30 years on a 24-year-old unmarried lady. In **Henry Waweru Karanja & another –vs-Teresiah Nduta Kagiri [2017] eKLR** the court used a multiplier of 20 years on a 24-year-old unmarried man and in **F M M & anor –vs- Joseph Njuguna Kuria & another [2016] eKLR** the court used a multiplier of 23 years on a 26-year-old deceased.

46. Accordingly, I am of the view that the multiplier of 37 years was on the higher side and should be replaced with one of 26 years which I hereby do.

47. With regard to the dependency ratio, it was pleaded that the deceased's dependants were his mother and minor sister and the Respondents submitted as much. Dependency is a question of fact and the only dependants recognized by section 4(1) of the FAA are wife, husband, parent and child.

Accordingly, the only dependant recognizable in this claim is the deceased's mother.

48. In addition to the cases cited by the Respondent, I have looked at other relevant cases and in the **Mary Kerubo case *(supra)*,** the Court used a dependency ratio of ½ for the unmarried deceased lady who was survived by her parents and 3 siblings. In the **Alice Alukwe case *(supra)*** the court used a dependency ratio of ½ for the unmarried deceased lady who was survived by her parents.

49. As can be seen, courts tend to lower the dependency ratio where the deceased is an unmarried child and the only claimant is the parent. The probable presumption is that such a child spends less at home by virtue of being unmarried. From the emerging judicial practice, I agree with the Appellant that the ratio of 2/3 was high and should be replaced with ½. In any case, the Respondents agree that the ratio of ½ is appropriate in the circumstances.

50. From the adjustments made herein, the award for loss of dependency should work out as follows;

6,752.50 x 12 x 26 x ½ =1,053,390/=

51. The net award should therefore be;

Pain & suffering…………………………..Kshs.20,000/=

Loss of expectation of life……………….Kshs.120,000/=

Loss of dependency……………………….Kshs.1,053,390/=

Total……………………………….………Kshs.1,193,390/=

Less

20% contribution……………..……..…..Kshs.238,678/=

Net award…………………………………...Kshs.**954,712/=**

52. I find the appeal to have merit. I therefore set aside the judgment of the lower court and substitute it with a judgment for Kshs.954,712/= (***Nine hundred and fifty four thousand, seven hundred and twelve thousand shillings only***)with interest. The Respondents will get costs for the lower court while the Appellant will get costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 21st day of November 2019, in open court at Makueni.

……………………………….

Hon. H. I. Ong'udi

Judge