REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 57 OF 2017

BETWEEN

BON TON LIMITED …….....…..……....……APPELLANT

AND

BEATRICE KANAGA KEREDA suing as administrators of estate of

RICHARD ALEMBI OCHENGA (DECEASED) …….…….. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. H. Adika, SRM dated 27th March 2017 at the Chief Magistrates Court at Kisumu in Civil Case No. 321 of 2017)

JUDGMENT

1. The case before the subordinate court was that the deceased was riding his motorcycle registration no. KMCA 458J along the Kisumu – Dunga Road near the Yatch Club when the defendant's authorised driver carelessly drove motor vehicle registration number KBT 695W causing it to lose control and hit the deceased after which he died. His estate filed suit claiming damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The trial magistrate apportioned liability equally and awarded damages as follows:

(a) Pain and suffering	Kshs. 200,000/-
(b) Loss of expectation of life	Kshs. 140,000/-
(c) Loss of dependence	
(Kshs. 10,954/- X 12X15X2/3)	Kshs. 1,314,564/-
(d) Special damages	Kshs. 124,740/-
TOTAL	**Kshs. 1,789,304/-**

2. In this appeal, the appellant contested the trial magistrate's findings on liability and quantum of damages. I will deal with the issue of liability first. The thrust of the appellant's contest contained in its memorandum of appeal dated 28th July 2017 is that trial magistrate erred in failing to hold that the respondent had failed to prove negligence. The respondent's position is that the trial magistrate weighed the entire evidence and came to the correct conclusion on the issue of liability.

3. In dealing with the issues in contention, I must bear in mind the principle that first appellate court must re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination as to whether or not to uphold the decision of the trial magistrate bearing in mind that it neither saw nor heard the witnesses testify (see ***Peters v Sunday Post Ltd*** **[1958] EA 424**).

4. On the respondent's side, the deceased's wife, Beatrice Kanaga Kereda (PW 1), testified while Newton Aradi Idafwa (DW 1), the appellant's driver testified on behalf of the appellant. The fact that the accident occurred at the place and time alleged and that the deceased died as a result was not disputed in the evidence. PW 1 testified that her husband had been injured in a road accident and was admitted to Jaramogi Odinga Oginga Teaching and Referral Hospital for treatment. When she went to see him, the deceased told her that he taking a customer to Dunga when a pick-up tried to overtake a lorry, came to his side and hit him.

5. DW 1 testified that he was following a lorry which was ahead of him when a motorbike tried to swerve to avoid hitting a stone and came to his side. The motorbike rammed into his vehicle. He recalled that there was a lot of dust at the time. As the deceased was injured, he took him to hospital.

6. The appellant argued that PW 1's testimony was inadmissible as she did not witness the accident. In as much as the deceased's statement to PW 1 was hearsay, it was admissible, having been made by the deceased after the accident but prior to his death and in relation to the cause of his death. Such a statement is normally referred to as a dying declaration and is admissible under the provisions of **section 33(a)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Such statements must of course be evaluated alongside other evidence to determine whether the plaintiff has proved her case on a balance of probabilities.

7. In this instance there two versions of how the accident occurred. The deceased's statements to PW 1 is that the appellant was trying to overtake the lorry while DW 1's version was that the deceased was trying to avoid hitting a stone that came on his side. Since there was a collision, both versions are plausible and in the absence of independent evidence, I cannot say the trial magistrate erred in apportioning liability equally. I therefore affirm the trial court's finding on liability.

8. On the issue of quantum, it is established that for the appellate court to interfere with an award of damages it must be shown that the trial court, in awarding of the damages, took into consideration irrelevant factors or failed to take into account relevant factors or the sum awarded is inordinately low or high so as to lead to the conclusion that the award was a wholly erroneous estimate of the damage. The appellant may also establish that a wrong principle of law was applied (see ***Butt v Khan*** **[1981] KLR 349).**

9. The appellant submitted that the award was excessive. Counsel for the appellant contested the fact that the award for pain and suffering was on the higher side and that the respondent did not have any dependants. He further submitted that the trial magistrate erred in relying on the ***Regulation of Wages (General)(Amendment) Order, 2015*** used to calculate the minimum wage when the accident took place in 2013. Counsel for the respondent submitted that the trial magistrate arrived at the proper assessment in light of the evidence.

10. Although the claim was brought to recover damages under both the ***Law Reform Act*** and ***Fatal Accidents Act***, the plaint was slovenly. The plaint amended on 6th May 2014 does not set out the particulars required by **section 8** of the ***Fatal Accidents Act*** which provides as follows:

> *In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.*

11. The plaint did not set out the names of the dependant and their relationship with the deceased nor the nature and basis of the claim. The particulars required include the age and income of the deceased which

would enable the court determine the claim for loss of dependency. The requirement to plead these facts is mandatory. However, the issue was not raised before the trial court and the parties proceeded on the basis that the claim was available. Even in submissions before this court, the appellant agreed that in the event liability was affirmed, the respondent was entitled to some recompense for loss of dependency. I shall therefore consider the claim in these circumstances.

12. The appellant is correct to state that the trial magistrate erred in using the ***Regulation of Wages (General)(Amendment) Order, 2015*** to determine the multiplicand as it could not be applied retrospectively. That leaves the question of the income of the deceased. There is no dispute that he was a boda boda rider. PW 1 did not give any indication of his income and how it was spent. In the absence of proper pleadings and paucity of evidence to make such a determination, the multiplier approach was inappropriate in the circumstances. In this respect I would adopt the reasoning by Ringera J., in ***Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another*** quoted by Koome J., in ***Albert Odawa v Gichimu Gichenji*** **NKU HCCA No. 15 of 2003[2007] eKLR** where he expressed the following view;

> *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 dependancy, and the expected length of the dependancy 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.*

13. Taking into account the deceased's age, nature of business, the fact that the deceased was married with children, I award Kshs. 800,000/- as a lumpsum as damages for loss of dependency under the ***Fatal Accidents Act***.

14. In respect of the claims under the ***Law Reform Act***, the appellant submitted that the award of Kshs. 200,000/- for pain and suffering was inordinately high. Counsel referred to my decision in ***Sukari Industries Limited v Clyde Machimbo Juma*** **HB HCCA No. 68 of 2015[2016]eKLR** where I observed as follows:

> *[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.*

15. In that case, the issue was whether the sum of Kshs. 50,000/- was reasonable and I did find that it was. Unlike in that case, the deceased died after a week in hospital. According to the death certificate, he had suffered a fracture femur and for that week, he must have suffered considerable pain. Thus, the award of Kshs. 200,000/- cannot be said to be excessive. I also find and hold that the award of Kshs. 100,000/- set out in the judgment for loss of expectation of life was reasonable.

16. **I allow the appeal to the extent that I set aside for loss of dependency under the *Law Reform Act* and substitute the same with a lumpsum award of Kshs. 800,000/-.**

17. Since the appellant has only succeeded in part, I award costs which I assess at **Kshs. 30,000/-** all inclusive.

DATED and **DELIVERED** at **KISUMU** this day of **31st January 2018.**

D.S. MAJANJA

JUDGE

Mr Mushindi instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Olang’o instructed by Wasuna and Company Advocates for the respondent.