REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 36 OF 2014

JAMAL ALEEM.....APPELLANT

VERSUS

JANE CHEBORE TOO (Suing as the Administrator

and/or Personal Representative

of the Estate of STEPHEN KIPKEMOI

KOROS (DECEASED).....RESPONDENT

(Appeal from the judgment and decree in Kericho CMCC No. 101 of 2013

(Hon. S.M. Soita, Ag. Chief Magistrate, dated 19th September 2014)

JUDGMENT

1. The respondent in this matter was the plaintiff in **Kericho CMCC No. 101 of 2013.** She had filed a claim against the defendant following an accident involving the deceased and motor vehicle registration number KBA 470Q owned by the appellant which occurred on 8th January 2012. On 22nd January 2014, judgment on liability was entered by consent at the ratio of 85:15 in favour of the plaintiff respondent.

2. In his judgment dated 19th September 2014, the trial magistrate, after taking into account the apportionment on liability in the ratio of 85:15, made an award in damages of Kshs 743,730 made up as follows:

a. Pain and suffering-Kshs 21,250

b. Loss of life-Kshs 127,500

c. Loss of dependency-Kshs 544,000

d. Funeral expenses-Kshs 40,000

e. Special damages-Kshs 10,980

Total-Kshs 743,730

3. Dissatisfied with the award in favour of the respondent, the appellant has filed the present appeal in which he raises the following grounds in his memorandum of appeal dated 8th October 2014:

1. The learned trial magistrate erred in fact and in law in arriving at the decision against the weight of the evidence on record.

2. The learned trial magistrate's award of damages of Kshs. 743, 730 (Seven Hundred and Forty Three Thousand Seven Hundred and Thirty) was excessively and grossly erroneous in light of evidence tendered.

3. The learned trial magistrate failed to consider and/or ignored the defence submissions on record and hence came to a wrong conclusion in assessing damages.

4. The Learned Magistrate in overall handling of the assessment of damages was punitive to the appellant rather than compensatory to the respondent contrary to public policy in such cases.

4. This being a first appeal, the court is under a duty to re-evaluate the facts on record and reach its own conclusion- see **Selle vs. Associated Motor Boat Company [1968] E.A 123** and **Mahira Housing Co. Ltd vs Mama Ngina Kenyatta & Another (2008) KLR P.31**. In so doing, as was stated in **Selle vs. Associated Motor Boat Company** (supra), the court must bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect.

5. The evidence before the trial court was that the deceased and another, one Bernard Kiprono Langat, also deceased, were walking along the Kericho – Nakuru road at Cherote area along the said road when they were involved in an accident with the appellant's motor vehicle registration number KBA 470Q. The deceased in this case was the father of Bernard Kiprono Langat (Deceased).

6. The deceased in this case was a watchman, earning a salary of Kshs 10,000 per month. He was also a tea farmer. He was married with 11 children, ranging in age between 6 and 19 years, according to the evidence adduced by his widow, the respondent in this case, at the trial. She produced in evidence a police abstract in respect of the accident, the deceased's burial permit and death certificate, a limited grant and a receipt for Kshs 10,980, as well as a receipt for Kshs 4,012 showing monthly earnings from tea. There was no appearance for the defendant/appellant at the hearing, and so the respondent's evidence was uncontroverted.

7. In his judgment, the trial magistrate made an award of Kshs 25,000 for pain and suffering, noting that the deceased had died on the spot. On apportionment, this amount came down to 21,250. With respect to loss of expectation of life, with regard to which the appellant had proposed an award of Kshs 20,000 and the respondent Kshs 150,000, the trial court made an award of Kshs 150,000, apportioned as agreed between the parties to Kshs 127,500. The trial court reached his award on the basis of the authority of **Alice Mboga vs Samuel Kiburi Njoroge Nakuru HCCC No. 357 of 1999** which had been cited by the respondent. The deceased in that case was aged 53 years.

8. The court's award for loss of dependency was based on a multiplicand of Kshs 10,000 and a multiplier of 8 years. The court also adopted a 2/3 dependency ratio. The court also made an award in respect of funeral expenses of Kshs 40,000, and special damages of Kshs 10,980.

Analysis and Determination

9. I believe the sole issue for determination is whether the award made by the trial court in this matter was so excessive as to warrant interference by this court. It is, I believe, settled law that an appellate court will only interfere with an award in damages, which is discretionary in nature, if the award is so inordinately low or high as to represent an entirely erroneous estimate. In the words of the court in **Butt -vs- Khan Civil Appeal No. 40 of 1997:**

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*** See also Kemfro Africa Ltd and Another -vs- A.M. Lubia & Another (1982-1988)

10. In the present case, the deceased was aged 59 years, and was working as a watchman, earning a salary of Kshs 10,000. He also had tea earnings of Kshs 4,012. He was married and had 11 children ranging in age, from the evidence before the trial court, between 6 and 19 years. The appellant challenges the award made to the respondent under separate heads, and I will consider each of these heads separately.

Pain and suffering

11. The appellant submits that the deceased died immediately at the scene of the accident, and that there should therefore have been no award made in respect of pain and suffering. The respondent submits in response that the deceased's estate is entitled to an award for pain and suffering as provided for by the Law Reform Act, and that the award of Kshs 21,250 made by the trial court is reasonable in the circumstances of this case. The respondent relies on the decision in **Edner Gesare Ogega vs Aiko Kebiba (Suing as personal representative of the estate of Alice Bochere Aiko (Deceased) Kisii CA NO 52 of 2013** in which the court (Nagillah J) expressed the view that an award for pain and suffering should be made even in those cases where the deceased died immediately after the accident, and that a higher award may be made where pain and suffering is prolonged after the accident.

12. In the present case, I am not satisfied that the award made by the trial court in respect of pain and suffering was so inordinately high as to amount to an erroneous estimate or misapprehension of the evidence or applicable principles so as to warrant interference by this Court. I will accordingly not disturb the award made by the trial court under this head.

Loss of Expectation of Life

13. The appellant challenges the award of Kshs 150,000, apportioned to Kshs 127,500, on two grounds. The first is that the said amount should have been deducted from the final award made to the plaintiff/respondent, while the second is that the amount was excessive and that an award of Kshs 50,000 should have been sufficient.

14. The respondent counters, in response to the first argument, that the trial magistrate did not err by failing to deduct Kshs. 127, 500/= from the total sum awarded.

15. The appellant has relied on the decision of Kimaru J in **Joseph Wachira and Another vs Mohammed Hassan 2006 eKLR** in which the court did not make an award for loss of expectation of life on the basis that it would still have to deduct such amount from the final award made to the plaintiff in that case. However, as submitted by the respondent, the position in **Joseph Wachira and Another vs Mohammed Hassan** was held by the Court of Appeal to be erroneous.

16. In its decision in **Agnes Bosibori Ogega vs Tea Research Foundation & Another Nakuru Court of Appeal Civil Appeal No. 226 of 2007,** the Court of Appeal, cited the provisions of section 2 (5) of the Law Reform Act and section 4 (1) and (2) of the Fatal Accidents Act with respect to the award of damages for loss of expectation of life. It then relied on the decision of the Court of Appeal (Chesoni, Lakha and Omolo, JJA) in **Nyanza Sugar Co. Limited vs James Martin Matoke Kisumu CA No. 91 of 1997** (U.R) to conclude that:

> ***"The trial court should assess and make an award of damages under both sets of law as each is intended for a distinct head: under the Law Reform Act for the benefit of the estate of the deceased as compensation for loss of expectation of life and under the Fatal Accident Act for benefit of the dependants of the deceased for loss of support from the deceased. We agree that in most cases the beneficiaries of both may be the same and that is why there is a requirement that awards under one Act take into account the award under the other to avoid over compensation or unjust enrichment. But such taking into account does not mean not making the award at all."***

17. In allowing the appeal before it, the Court of Appeal went on to conclude as follows:

> ***"..we are in agreement with the appellant that the learned trial judge erred firstly when he failed to make a determination of an award under the Law Reform Act for the benefit of the deceased's estate; and secondly for holding that had he made such a determination then the resulting figure awarded would have been reduced mathematically from the sum awarded under the Fatal Accidents Act."***

18. What can be garnered from the holding of the Court of Appeal set out above, which is binding on this court, is that the position in law is that an award for loss of expectation of life should be made in circumstances such as were before the trial court, which was correctly done in this case, and that such an award should not be deducted from the final award in damages.

19. The appellant argues that the award of Kshs 150,000 was excessive, and that an award of Kshs 50,000 would have been sufficient. No authorities were cited in support of this submission. I note that the award for loss of expectation of life has been in the region of Kshs 100,000-150,000. An award of Kshs 140,000 was made in the case of **Alice Mboga vs Samuel Kiburi Njoroge** (supra) which was relied on by the trial court in this case in reaching its award. I note further that in the **Agnes Bosibori Ogega vs Tea Research Foundation & Another** (supra) the Court of Appeal made an award of Kshs 140,000 under this head. I therefore find no basis for interfering with the trial court's decision with respect to the award for loss of expectation of life.

Loss of Dependency

20. The appellant submits that the court erred in using the multiplicand of 10 years without regard to the fact that the deceased, who was 59 years old, had only one year left before reaching the retirement age of 60. He is also aggrieved that the court used a multiplier of Kshs 10,000 yet the respondent was only able to prove a net salary of Kshs 3510. Finally, the appellant is aggrieved that the court based its decision on a dependency ratio of 2/3.

21. The respondent argues in response that the trial court properly applied the rules applicable in assessment of damages for loss of dependency under the Fatal Accidents Act. She notes that the deceased died at the age of 59 and had a wife and 11 children who were dependent on him. The respondent relied on the case of **Irene Kagondu & Anor vs W.K Tilley (Muthaiga) Ltd & Another (2008) eKLR** in which the court had used a multiplier of 8 years for a person who died at the age of 57 years. The respondent contends that there is no retirement age for a watchman in Kenya, and the deceased would have remained active till the age of 70 years, and would have worked for another 10 years before reaching the retirement age. In the respondent's view, the multiplier of 10 years adopted by the trial court is reasonable.

22. It is undisputed that the deceased was 59 years old, working as a watchman. He was also a tea farmer, and from the evidence, earned approximately Kshs 4,000 per month. The trial court adopted a multiplicand of Kshs 10,000 and a multiplier of 8 years, though no explanation is given for settling on these figures.

23. I note that the appellant proposes a multiplicand of 1 year, and a multiplier of 5 years. The appellant is correct in his argument that but for the accident, given that the retirement age is 60 years, the deceased had just one year of formal employment. The respondent argues that there is no retirement age for watchmen, and the deceased could therefore have remained in employment for another 10 years.

24. From the evidence, while the deceased had a job as a watchman, he was also engaged in tea farming. The appellant argues that the respondent was able to prove a salary income of Kshs 3510. This, coupled with his earnings from tea farming of approximately 4000, would in my view justify the adoption by the trial court of a multiplicand of Kshs 10,000.

25. The other issue in contention is the multiplier to be adopted. The deceased was 59 years old. He had a wife and children depending on him, some as young as 6 years. Even were the court to accept the submission by the respondent that there is no retirement age for watchmen, and that his responsibilities to his family would have required that he continue in employment, it is to push it rather far to argue that he would have remained in employment for a further 10 years after the statutory retirement age.

26. In the circumstances, I am of the view that the multiplier of 8 years was too high, and I would accordingly reduce it to 6 years. I would, however, not interfere with the dependency ratio which I am satisfied that the trial court was correct in adopting.

27. Consequently, the damages for loss of dependency shall be as follows:

Kshs 10,000x12x6x2/3=480,000

Less 15%=408,000

28. The appellant has also challenged the award of Kshs 40,000 in respect of funeral expenses, as well as the special damages of Kshs 10,980. No sufficient reasons have been advanced for interfering with these awards, which I am satisfied are reasonable in the circumstances.

29. Accordingly, it is my finding that the appeal succeeds only with respect to the multiplier on loss of dependency. The final award to the respondent shall be Kshs 607,730 made up as follows:

a. Pain and suffering -Kshs 21,250

b. Loss of life -Kshs 127,500

c. Loss of dependency -Kshs 408,000

d. Funeral expenses -Kshs 40,000

e. Special damages -Kshs 10,980

Total -Kshs 607,730

30. As the appeal largely is unsuccessful, the respondent shall have the costs of this appeal.

Dated, Delivered and Signed at Kericho this 15th day of February, 2018.

MUMBI NGUGI

JUDGE