REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 7 OF 2016

(CORAM: J. A. MAKAU – J.)

PAUL OUMA.....APPELLANT

VS

SARAH AKINYI AND MONICA ACHIENG WERE

(*suing as the legal representative in the Estate*

***of PAUL OTIENO WERE (deceased)*.....RESPONDENT**

JUDGMENT

1. The Appellant **PAUL OUMA** was the Defendant at the Lower Court. The Respondent through a plaint dated 18/6/2015 sued the Appellant at the Lower Court seeking general damages, special damages of Kshs. 26,639/=; costs of the suit and interest following fatal road accident.

2. The Appellant filed a Statement of Defence dated 6/8/2015 denying liability and seeking the Respondent's suit be dismissed with costs.

3. The Respondent filed a Reply to defence praying the Appellant's defence be struck out or be dismissed and judgment be entered for the Respondents as prayed in the Plaint.

4. At the hearing, the Respondent gave evidence and called one (1) witness whereas the Appellant gave evidence and called no witness. The Trial Court gave judgment in favour of the Respondent as follows: -

(i) Pain and suffering - Kshs. 200,000/=

(ii) Loss of expectation of life - Kshs. 140,000/=

(iii) Loss of Dependency - Kshs. 1,040,000/=

(iv) Special Damages - Kshs. 26,639/=

(v) Total - Kshs. 1,406,639/=

(vi) Costs to the Respondent with interest

5. The Trial Court found the Appellant liable at 100 per cent.

6. The Appellant aggrieved by the Trial Court's judgment delivered on 6th July 2016 preferred this appeal through a Memorandum of Appeal dated 29th July 2016 but filed on 5th August 2016; setting out the following grounds of appeal: -

(a) The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

(b) The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities or quantum cited in the written submissions presented and filed by the Appellants.

(c) The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Responded (if any) and failed to apply precedents and tenets of law applicable.

(d) The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.

(e) The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

7. The Parties' Advocates put in their respective submission which they relied upon and opted not to highlight on the same.

8. The Appellant in his submissions dated 1st December 2017 urges the Trial Court was in error in awarding the Respondent damages for pain and suffering of Kshs. 200,000/=; Kshs. 140,000/= for loss of expectation of life under the **Law Reform Act**; Kshs, 1,040,000/= for loss of dependency under the Fatal Accidents Act using a multiplier of 26 years and multiplicand of Kshs. 5,000/=.

9. The Appellant urged the sum awarded was excessive; as there was no proof of medical documents to prove that the deceased died as a result of the accident to warrant such an excessive sum of Kshs. 200,000/= under pain and suffering and that the award of Kshs. 140,000/= under loss of expectation of life were the multiplicand of 26 years was used.

10. The Respondent on his part through the submissions dated 6th March 2018 urged that the Respondent proved the deceased's death by production of the deceased's death certificate; that the Respondent proved the deceased was involved in an accident on 7/1/2015 and died on 2nd March 2015 after being under treatment for 55 days. On loss of expectation of life, it is urged the deceased died at the age of 29 years and an award of Kshs. 140,000/= was proper and fair. On general damages for loss of dependency; the Respondent urged the multiplicand applied was proper.

11. I have very carefully considered the proceedings at the Lower court, counsel submissions and authorities relied upon; I shall as such considered the issues raised under the award under pain and suffering, loss of dependency; multiplier of 26 years and multiplicand of Kshs. 5,000/=.

12. On award of Kshs. 200,000/= for pain and suffering the Appellant urges an award of Kshs. 200,000/= was excessive and proposes Kshs. 100,000/= whereas the Respondent insists that the award of Kshs. 200,000/= is proper. There is uncontroverted evidence from PW1, and summary discharge sheet exhibits 1; exhibit 2, exhibit 3, exhibit 4 and exhibit 5 that the deceased was involved in accident on 7/1/2015 and was admitted, treated and continued to be under treatment for a period of 55 days before he succumbed. There is no doubt during that period the deceased underwent a lot of pain and suffering. In the case of **Loise Wairimu Mwangi & Another V Joseph Wambue Kamau (2006)eKLR** referred to by the Respondent court awarded Kshs. 200,000/= for pain and suffering whereas in the case of **Patrick Kanai Waweru (suing as the legal administrator of the estate of Grace Njoki Kanai -vs- George Ogweta and 2 others (2010)eKLR**, referred to by the Appellant the court awarded damages of Kshs. 100,000/=. I have considered the deceased in this case did not die instantly but after some time. There is no evidence as to the seriousness of his injuries and the pain he underwent. It might have taken 55 days as he underwent treatment but the number of days do not mean the deceased underwent a lot of the pain nor has it been stated that the pain was serious as pain cannot be measured in terms of the duration the deceased underwent treatment. I therefore find that an award of Kshs. 200,000/= for pain and suffering was excessive and reduce the same to Kshs. 100,000/=.

13. On loss of expectation of life, the Trial Court awarded Kshs. 140,000/= which the Appellant urged is excessive and should be reduced to Kshs. 70,000/=. The Respondent did not agree. The Appellant has not urged why on award of Kshs. 140,000/= is excessive for loss of expectation of life for the deceased who died at the age of 26 years. The death certificate exhibit 5 produced as exhibit reveals the deceased died at the age of 29years. I have considered the authorities relied upon and evidence on record and find an award of Kshs. 100,000/= for loss of expectation of life would be proper.

14. On Loss of Dependency, the Trial Court applied a multiplier of 26years and multiplicand of Kshs. 5,000/=. The Appellant urges that both multiplicand and the multiplier are excessive. The deceased was a watchman aged 29years. In Kenya, there is no prescribed retirement age for a watchman. Indeed, in Kenya most of the watchman are passed retirement age and can even work upto to 75years. The Trial Court held the deceased would have worked as a watchman upto the age of 55. I find that reasonable though at 55years most of the watchman would considered themselves strong enough to continue working for the next 10 to 15 years. I shall therefore adapt the multiplier of 26 years as found by the Trial Court and find that it is fair and reasonable. On the deceased's earnings, PW1 alleges the deceased was a watchman with dependants as per Chief's letter exhibit 6. He produced grant of letters of administration intestate exhibit 7; police abstract as exhibit 8. He urged the deceased earnings were Kshs. 12,000/= per month but no payslip or employer's letter was produced to prove the deceased's earnings.

15. In case of **Philip Wanjera & Another -vs- Ahmed Libah & Another, HCCA No. 343 of 2014**, the court held thus: -

"No documentation was produced to show that she earned Kshs. 15,000/= per month. While I am alive to the fact that a farmer may not have any payslips or books of accounts to prove her earning or any documentation for that matter, the onus of proof rests with the respondent to prove that she was indeed a farmer who earned Kshs. 15,000/= . There was no evidence adduced to show that she was a farmer. However, in broad interest of justice I am inclined to apply the Government Minimum Wage Guide for unskilled labourers. The Regulation of Wages (Agricultural Industry) 2008 provides for Kshs. 5,000/= for unskilled employee."

16. In the instant case, PW1 did not produce any document to confirm the deceased was a watchman earning Kshs. 12,000/= per month nor did he indeed prove he was a watchman. That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor issued with pay slips or sign payment vouchers as regards

their earnings but 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 on proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, 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.

17. In the case of **Jacob Ayiga Maraja and Francis Karani V Simeon Obongo (suing as the Administrator of the Estate of Thomas Ndenga Obonyo C.A. No. 167 of 2002 (Kisumu)**, the Court of Appeal stated thus:-

> ***"In our view, there was more than sufficient material nr record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.***
>
> ***In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we know of no law or any other requirements that a self-employed compensator must retire at age 55."***

18. In view of the above, I find and hold the income of Kshs. 5,000/= applied by the Trial Court as earning of the deceased who was a watchman was proper and correct. This court shall therefore adopt the multiplier of 26 years and multiplicand of Kshs. 5,000/=.

19. As regards the correct principle regarding awards **under Fatal Accidents Act and the Law Reform Act** and in dealing with principle of duplication of awards; this principle in *Kemp & Kemp on Damages* is clearly stated to be that where a claim is made under both the **Fatal Accidents Act** and the **Law Reform Act**, and where the claimant succeeds in both, the award made under the **Law Reform Act** must be deducted in full from the award made under the **Fatal Accidents Act** as the deceased's estate cannot benefit twice. In the instant case, both sides have not appreciated the law and have in their respective submissions not appreciated the principle and did not cite the law in support of their submissions, nor did they urge the Court to do so in this matter. I cannot nevertheless shut my eyes on the law but have to act as the law provides.

20. In the case of **Hellen Warunguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited, Nyeri CA Civil Appeal No. 22 of 2014 [2015]eKLR**, the court 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 under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. 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"***

21. The Upshot is that the appeal succeeds partly. I hereby set aside the decision of the Trial Court on quantum by substituting it with an award of Kshs. 1,066,639/= to the Respondent. The award is therefore tabulated as follows: -

(a) Liability 100 percent against the Appellant

(b) General Damages

(i) Pain and suffering - Kshs. 100,000/=

(ii) Loss of expectation of life - Kshs. 100,000/=

(iii) Loss of Dependency - Kshs. 1,040,000/=

(iv) Special Damages - Kshs. 26,639/=

- Kshs. 1,266,639/=

(c) Less award under Law Reforms Act Kshs. 200,000/=

(d) Net Total due Kshs. 1,066,639/=

22. The Appellant gets half costs at the lower scale as he succeeded partially in this appeal. The Respondents get costs of the Lower court with interests.

DATED AND SIGNED AT SIAYA THIS 20TH DAY OF APRIL 2018.

HON. J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Odengo: *for the Appellant*

Mr. Odino: *for Respondent*

Court Assistants:

1. *Laban O. Odhiambo*
2. *Brenda Ochieng*

HON. J.A. MAKAU

JUDGE