REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 45 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

MAINGI CELINA..APPELLANT

AND

JOHN MITHIKA M'ITABARI suing as the administrator of the estate of

ERASTUS KIRIMI MITHIKA (DECEASED)...................RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D.A.Ocharo, SRM dated 17th August 2016 at the Senior Principal Magistrates Court at Nkubu in Civil Case No. 124 of 2014)

JUDGMENT

1. The deceased was a passenger in the appellant's motor vehicle registration number KBM 147F when she died as a result of an accident that took place on 17th December 2013 along the Meru-Chuka road when the vehicle collided with another vehicle registration number KBV 836N. The deceased's personal representative and dependants claimed 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 issue of liability was resolved by consent in the ratio 85:15 in favour of the respondent. After assessment of damages, the trial court made the following award, subject to contribution, which has now precipitated this appeal;

Pain and Suffering	Kshs.	70,000/-
Loss of expectation of life	Kshs.	100,000/-
Lost years	Kshs.	3,722,400/-
Special damages	Kshs.	74,350/-
Total	**Kshs.**	**3,966,750/-**

2. In the memorandum of appeal dated 15th September 2016, the appellant assails the award as being inordinately high and excessive and against the weight of evidence. The appellant's case focused on the fact that the trial magistrate adopted a multiplicand of Kshs. 31,020/- in calculating lost years without any legal or evidentiary basis. The appellant contended that the deceased was a student awaiting admission to University without any source of income and that the trial magistrate assumed that the deceased would have completed his education, got employment and proceeded to support his parents when in fact the deceased had not reported to college. The appellant complained that the trial magistrate erred in relying on documents that had not been agreed by the parties and produced by consent. He also complained that the trial magistrate considered extraneous evidence and facts and failed to have regard to the appellant's submissions and authorities and thus came to a conclusion that was erroneous. At the hearing, counsel for the appellant reiterated what was stated in the memorandum of appeal and emphasised that there was no basis to award the multiplier which was wholly speculative in the circumstances.

3. Counsel for the respondent supported the judgment of the trial court and submitted that the trial magistrate appreciated the evidence and applied accepted principles in coming to the correct decision on the multiplicand.

4. Before I consider the said grounds and contesting arguments, I must keep in mind the general principal upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR**

5 stated as follows;

> *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 ….*

5. According to the plaint, the deceased was at the time of death aged 18 years old and had just joined Kabianga University to study economics and he had great future prospects. He enjoyed good health and a happy life. According to the proceedings neither party called any witnesses. Parties filed witness statements and exchanged lists of documents and agreed to file written submissions. Although the respondent informed the trial court that he wanted to call one witness, he never called the witness. On 27th January 2016, the parties recorded a consent order where they agreed that the plaintiff be allowed to re-open its case and be allowed to file a statement of one witness. Thereafter the parties filed written submissions and the matter was reserved for judgment.

6. The respondent's case set out in the written submissions was based on a claim for lost years under the ***Law Reform Act***. His counsel submitted that the deceased would have completed his university degree and would have been eligible for employment at the age of 22 years. He submitted that;

> *[T]hat the deceased would have been legible to either the Government Civil Service as a graduated at the level of Job Group K, with a minimum salary of Kshs. 31,020/- with house allowance ….. he could be expected to work until retirement age of 60 years old.*

In support of this submission, the respondent relied on a document titled, *"Civil Servants Salaries & Allowances in Kenya"* which he asked the court to take judicial notice of.

7. The appellant submitted on the basis that the claim was for loss of dependency. His counsel urged that the issue of dependency is a question of fact and proof of income was essential to success of the claim. He contended the expected income was not proved hence the claim ought to be dismissed. The appellant's counsel however submitted that in the event that the court found that there was evidence of income, then a lump sum of Kshs. 160,000/- ought to be awarded.

8. The trial magistrate accepted the multiplicand proposed by the respondent and used it to calculate the award for lost years. As I have set out before, the issue in this case is whether the trial magistrate was entitled to use Kshs. 31,030/- being the starting salary in the Civil Service as a multiplicand. I note here that in so far as the nature of the claim was concerned, both parties were at cross-purposes arising from the manner in which they chose to proceed with the case. The appellant believed the respondent's claim was for loss of dependency under the ***Fatal Accidents Act*** and submitted as such while the respondent agitated his case under the ***Law Reform Act*** for lost years. Although the trial magistrate took the respondent's position, there was no appeal on this issue. In any case, the issue remains one of the multiplicand which is a common denominator in either case.

9. I now turn to the question of what was the basis of the adopting the multiplicand. From the tenor of the consents recorded by the parties, the documents relied upon were those contained in the list of documents filed on either side and the witness statements. I have perused the respondent's witness statement dated 24th October 2014 and the list of documents of the same date. They neither allude nor contain any evidence of the deceased's expected income or the document titled, *"Civil Servants Salaries & Allowances in Kenya"*. The trial magistrate erred in relying on this document which was introduced through the submissions. I find and hold that it was improper for the respondent to introduce new evidence in the submissions. I adopt what Aburili J., stated in ***General Motor East Africa Limited v Eunice Alila Ndeswa and Another*** **NRB HCCA No. 527 of 2013 [2015] eKLR** that;

> *Parties do not provide new evidence in submissions and therefore one cannot adduce evidence by way of a submission to challenge evidence or documents which in this case did not form part of the pleadings.*

10. On the same issue, the Court of Appeal in ***Douglas Odhiambo Apel and Another v Telkom Kenya Limited*** **NRB CA Civil Appeal No. 115 of 2006 [2014]eKLR** observed that;

> *The learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annextures to the plaintiffs' submissions. Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.*

11. Since the document titled, *"Civil Servants Salaries & Allowances in Kenya"* was not admitted as part of the lists of documents and witness statements, it could not be relied upon by the trial magistrate and was extraneous. The trial magistrate could not take judicial notice of the document when the fact of actual or expected income of the deceased is a question of fact that ought to be proved by evidence. I also find that inclusion of the document as evidence denied the appellant an opportunity to challenge it and offer counter evidence. I therefore find and hold that there was no basis to award the respondent an award for lost years in the absence of a multiplicand.

12. This does not mean that the deceased's dependants remain without a remedy. This is a case where the deceased's dependants were his father and mother. In ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 4 Others*** **[1986] KLR 457**, the Court of Appeal acknowledged that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. Our courts have, in several cases, awarded damages for loss of dependency even on the death of a child in primary or secondary school. The Court of Appeal in ***Kenya Breweries Limited v Saro*** **MSA CA Civil Appeal No. 144 of 1990 [1991]eKLR** observed that;

> *We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and*

doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law.

13. In this case, the deceased was aged 18 years at the time of his death. He was just about to be admitted in University and no doubt he would have supported his parents once he completed his studies. I have seen two decisions cited by the respondent; ***David Micheni v Stephen Johana Njue and Another*** **MRU HCCA No. 21 of 2014 (UR)** where the trial judge awarded Kshs. 1,200,000/- as a lumpsum for loss of dependency where the deceased was 16 years old and ***Daniel Mwangi Kineni and 2 Others v Jackim Gikunda Mbaya and Others*** **MRU HCCA No. 18 of 2014 (UR)** where the a lumpsum of Kshs. 1,000,000/- was awarded where the child was 9 years old. Taking all these factors into consideration, I would award a global lumpsum of Kshs. 1,000,000/-.

14. For the reasons I have stated, I allow the appeal and set aside the amount awarded for lost years and substitute with a sum of Kshs. 1,000,000/- for loss of dependency under the ***Fatal Accidents Act***. The sum shall accrue interest from the date of judgment in the subordinate court and shall be subject to the agreed contribution.

15. As regards costs, I order that each party bears their own costs. The appeal would probably have been avoided had the parties agreed on the documents to be admitted and conducted a hearing in the usual manner.

DATED and DELIVERED at MERU this 31st day of May 2018.

D.S. MAJANJA

JUDGE

Mr Kariuki instructed by Mithega & Kariuki Advocates for the appellant.

Mr Gitonga instructed by Haron Gitonga & Company Advocates for the respondent.