REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 14 OF 2015

CORAM: D.S. MAJANJA J.

BETWEEN

JOSHUA MUNGANIA.....1ST APPELLANT

JOSEPH KINOTI MUKIRI.....2ND APPELLANT

AND

GREGORY OMONDI ANGOYA suing as the legal representative and administrator of the estate of CHRISTINE ANYANGO OMONDI (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D.N. Mburu, Ag. PM dated 6th March 2015 at the Chief Magistrates Court at Meru in Civil Case No. 22 of 2015)

JUDGMENT

1. The subject of this appeal is a road traffic accident that took place on 2nd December 2011. The 2nd appellant was driving the 1st appellant's motor vehicle registration number KAR 208S when it lost control near the Meru Municipal Council Offices off the Meru-Makutano road, veered off the road and knocked the deceased who was a pedestrian walking along the side of the road. Following her death, 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 trial court found the appellants fully liable and made the following award that has now precipitated this appeal;

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs. 100,000/-
Lost years	Kshs. 3,000,000/-
Total	**Kshs. 3,110,000/-**

2. The appellants contest the trial court's findings on liability and quantum. I will deal with the issue of liability first. The principle that governs the exercise of this court's exercise of appellate jurisdiction is that it is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

3. On the issue of liability, the appellant complained that the trial magistrate erred in finding the appellants liable when there was clear and uncontroverted evidence that the accident was inevitable without negligence on the part of the appellants. They also attacked the judgment on the grounds that the trial magistrate failed to apportion liability against the deceased who was a pedestrian and who contributed to the accident.

4. The key witness in the matter was PC Hillary Ochieng (PW 2) who testified that the investigated the matter and that the accident occurred on 2nd December 2011 at about 5.00pm when the 1st appellant's vehicle being driven by the 2nd appellant lost control after its brakes failed and it slammed into six other vehicles, veered off the road and knocked down 6 pedestrians including the deceased who died on the spot. He told the court that the lorry was loaded with sand and coming from Makutano towards Meru. He produced the sketch plan and police abstract. He told the court that the driver was unable to control the vehicle due to brake failure. In cross-examination he stated that although

the brakes of the vehicle were effective, the steepness of the slope and the fact that the lorry was loaded led to a reduction in brake effectiveness. He stated that in his view, the driver tried the best in the circumstances and that there was nothing he would have done to avoid the accident.

5. The respondent's evidence was uncontroverted leading the trial magistrate to hold that the appellants were liable. I agree with this conclusion since the defendant had a duty to offer an explanation how the accident took place since the fact that the vehicle rammed into 6 other vehicles and hit pedestrians who were walking off the road connotes negligence. This is a clear case where there was sufficient evidence to establish a prima facie case of negligence which required the appellants to answer (see ***Richard Kanyago and 2 Others v David Mukii Mereka*** **NRB CA Civil Appeal No. 206 of 2002 [2007] eKLR**).

6. The fact that PW 2 stated that the accident could have been inevitable does not assist the appellant as this was merely an opinion and the appellants failed to discharge the burden imposed on them to prove the defence of inevitable accident which is an affirmative defence. Finally, there would be no basis for apportioning liability as she was a pedestrian off the road and was hit when the 1st appellant's vehicle veered off the road. I affirm the trial court's finding on liability.

7. On the issue of quantum, the appellants contested the award on the basis that the trial magistrate erred in adopting a multiplicand of Kshs. 30,000/- being the starting salary for a graduate banker whereas the deceased was not a banker. They further contended that the multiplicand adopted was speculative as the deceased was unemployed. According to the particulars pleaded in the plaint, the deceased was aged 23 years and was a 4th year student at Chuka University College studying Bachelor of Commerce, Insurance Option. Her father, Gregory Omondi Angoya (PW 1) in his evidence noted that she wished to transition into banking. A classmate of the deceased, Ocwando Makori Livingstone (PW 2) told the court that he started working as a banker and his net starting salary was Kshs. 30,000/-.

8. The appellants, in their written submissions, contended that the evidence in support of the award for loss of dependency was too speculative as the deceased was still a student and it could not be argued that she would be employed as a banker earning a starting salary of Kshs. 30,000/-. They urged the court to adopt a lumpsum approach that would be more suitable in the circumstances of the case. The appellants cited the decision of 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.

9. I would point out at this stage that the lumpsum approach was not agitated before the trial court. In their submissions before the trial court, the appellants contended that since the salary of the appellant was too speculative, the minimum wage of Kshs. 4,854 based on the ***Regulation of Wages (General) (Amendment) Order, 2013*** should be adopted. In this case, I cannot say that the future career of the deceased was speculative. She was in University and was about to complete her undergraduate course in commerce. The respondents called evidence to show that she would probably work in a bank and if not in the financial sector as she had done her course in insurance. There was thus a basis for using the multiplier approach. In light of the evidence led, the suggestion by the appellants to fall back on the minimum wage could not be supported in law or in fact.

10. Our law reports are replete with cases where the court has extrapolated the earning of the deceased from the nature of education and expected career path (see for example ***Richard Osoro Jindiga v Alex Thangei and Another*** **NRB HCCC No. 42 of 2007[2013]eKLR**). The issue really is one of evidence and common sence as the Court of Appeal observed in ***Kenya Breweries Limited v Saro*** **MSA CA Civil Appeal No. 144 of 1990 [1991]eKLR** 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.

11. More recently in ***Rosemary Mwasya v Steve Tito Mwasya and Another*** **NBI CA Civil Appeal No. 100 of 2017 [2018] eKLR**, the Court of Appeal upheld the trial court's assessment of the multiplicand where the trial court had recourse to other evidence and observed that:

> As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions …….. [Emphasis mine]

12. The general principal upon which this Court, as an appellate court, will interfere with an award of damages was stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5** 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 ….

13. Based on what I have stated, I do not find any error in the manner in which the trial magistrate proceeded to evaluate the evidence and

award damages. I note that the trial magistrate seemed to conflate the claim under the ***Fatal Accidents Act*** and the ***Law Reform Act***. He awarded damages for lost years yet the claim was urged on the basis that it was a claim for loss of dependency under the ***Fatal Accidents Act***. I however do not find any prejudice to the parties as the multiplicand is the common denominator in both cases and that appeal was not agitated on that basis.

14. I dismiss that appeal with costs to the respondent which I assess at **Kshs. 70,000/-**.

DATED and **DELIVERED** at **MERU** this **30th day of May 2018.**

D.S. MAJANJA

JUDGE

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

Namada and Company Advocates for the respondent.