REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 86 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

HENRY LAMATA.....1ST APPELLANT

JOHN MURIUNGI .....2ND APPELLANT

AND

GLADYS MAKENA GITONGA & JOSPHAT BUNGI

suing as the legal representative of the estate of

CHARLES GITONGA (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Ambasi, CM dated 28th September 2017 at the Chief Magistrates Court at Meru in Civil Case No. 330 of 2013)

JUDGMENT

1. The subject of this appeal is a road traffic accident that took place along the Kianjai – Ruiri road on 13th July 2012 where the deceased died as a result of the negligence and careless driving of motor vehicle registration number KDJ owned by the 2nd appellant and driven by the 1st appellant. Following the accident, 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/-

Loss of dependency Kshs. .....…1,547,680/-

Special damages Kshs. 26,000/-

Total .....Kshs. 850,000/-

2. The appellant 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 is 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 reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

3. In the grounds of appeal, the appellant complains that the trial magistrate did not take into account the finding contained in Traffic Case No. 274 of 2008 and this reached the wrong conclusion on liability. They further complain that the 2nd respondent was wholly and or substantially to blame for the accident as a metal rod/object escaped into the 1st appellant's motor vehicle as they by passed each other and that there was no contact between the two vehicles. The appellant also attacked the judgment on the ground that the trial court did not consider the entirety of the evidence and submissions and thereby came to the wrong conclusion on the issue of liability.

4. The evidence on the issue liability before the trial court was as follows. Zakary Mbundi Mwithiu (PW 2) recalled that in the morning on the material day as he was walking along the Meru-Mukinduri road towards Mery, he saw the 1st appellant's minibus coming from the Meru direction going downhill towards Mikinduri on the left side. The 2nd respondent's pick-up was going uphill. He recalled that the minibus was travelling at a high speed and was moving in a zig zag manner and it moved to the side where the pick up was and tilted as if it was going to overturn. It hit the pickup at the body, tore off the angle line of the pickup. He further recalled that when the minibus went as if to overtake the pickup, the driver of the pick up tried to control it away from the minibus but was unable to. The minibus stopped about 100 metres away while the pickup was left where it was hit. PW 2 went to check minibus and found the deceased had hit her chest against the seat. He told the court that the driver of the minibus was charged. In cross-examination, PW 2 told the court that the angle line is the piece of metal on the body of the vehicle that makes the carrier and that the minibus is the one that tore off the angle line.

5. The appellants complain that the trial magistrate erred in law and in fact in finding that they were 100% liable having regard to the evidence on record and the circumstances of the accident. On this issue, the only evidence was that of Douglas Gitonga (PW 2) who was the deceased's pillion passenger on the material day. He testified that the 1st appellant's motor vehicle lost control and veered on to the deceased's lane and hit him. In cross-examination, he told the court that he was able to see in front and that the 1st appellant's vehicle was coming towards him at a high speed, left its lane and hit the deceased. He insisted that the deceased did not leave his lane. The appellants did not call any witnesses. Since the respondents' evidence was uncontroverted, I do not find any reason to depart from the trial court's finding that the appellants were fully liable.

6. I now turn to the issue of quantum. 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. It 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 ….*

7. The thrust of the appellants' appeal was that the award of loss of dependency under the Fatal Accidents Act was inordinately high and was not supported by any evidence particularly of documentary evidence of the deceased's earnings. The appellants also contended that the trial court did not consider their submissions. To support the claim, the deceased's wife. Alice Kawira (PW 1) testified that they had a 6 year old son and that he was operate a boda boda from which he earned Kshs. 1000/- to support the family.The death certificate produced in court showed that the deceased was 28 years at the time of his death.

8. At this stage I would point out that there seems to be an error in the award of lost years. From the tenor of the judgment, the trial magistrate must have been referring to loss of expectation of life awarded under the *Law Reform Act* which award is usually a conventional figure. I also do not think the issue of consortium arises as the respondent's spouse is dead and there is no expectation of consortium.

9. I now turn to the claim under the Fatal Accidents Act. As regards the earnings, the trial magistrate was correct to note that it was not necessary that the claimant produce documents. This finding is consistent with the decision of the Court of Appeal in ***Jacob Ayiga Maruja & Another v Simeone Obayo*** **KSM CA Civil Appeal No. 167 of 2002 [2005]eKLR** where it was observed that, *"We do not subscribe to the view that the only way of proving earnings is equally the production of documents."* The claimants need only prove the case on a balance of probabilities. PW 1 testified on oath that the deceased was in boda boda business and he in fact died while carrying a pillion passenger. The issue is what is the multiplicand to adopt. PW 1 stated that the deceased was earning about Kshs. 1,000/- per day while the trial magistrate relied on, *"gazetted wages which is about Kshs. 15,000/- per month."* It is no clear what gazette the trial magistrate was referencing. Further . While the sum of Kshs. 1,000/- per day would be reasonable, I take into account the fact that there would be good days and bad days and I find a sum of Kshs. 500/- on average more reasonable and if he was working for 6 days a week, his monthly income would be Kshs. 10,000/-.

10. As regards the multiplier, the deceased was aged 28 years. The trial magistrate awarded 32 years based on the fact that he would work until he was 60 years old. The Court of Appeal in ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another*** **NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In ***Roger Dainty v Mwinyi Omar Haji & Another*** **MSA CA Civil Appeal No. 59 of 2004 [2004]eKLR** the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life of the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. The trial magistrate erred by failing to discount the multiplier by failing to take into the factors I have enumerated. Accordingly, I reduce the multiplier and award 22 years.

11. Determination of the applicable dependency ratio is a question of fact (see ***Boru v Onduu*** **[1982 -1992]2 KAR 288**). The respondent did not plead that the deceased had a child at paragraph 4 of the plaint. A plaintiff is required to plead the dependants under section 4 of the Fatal Accidents Act. Therefore the evidence of the child cannot supercede the pleading therefore the dependency ration must be reduced. I would find that ½ would be appropriate.

12. For the reasons I have stated, I allow the appeal and set aside the awarded for loss of dependency under the ***Fatal Accidents Act*** and substitute it with an award of **Kshs. 1,320,000.00 being (Kshs. 10,000 X 12 X 22 X ½)**. Accordingly, the total award shall be as follows:

Pain and Suffering Kshs. 50,000/-

Loss of expectation of life Kshs. 100,000/-

Loss of dependency Kshs. 1,320,000/-

Special damages Kshs. 140,000/-

TOTAL Kshs. 1,610,000/-

13. The amount shall accrue interest from the date of judgment in the subordinate court. The appellant shall have the costs of the appeal which I assess at **Kshs. 70,000/-**.

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

D.S. MAJANJA

JUDGE

Mr Mutegi instructed by Kiauthia Arithi & Company Advocates for the appellant.

Mutembei & Kimathi Advocates for the respondent.