REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 160 OF 2011

EASTERN PRODUCE (K) LIMITED.....1ST APPELLANT

ABRAHAM KIBIEGO.....2ND APPELLANT

-VERSUS-

DOMINIC LOKADOGI LOKADO

(suing as the personal representative

of the estate of the late

PETER EKUAM LOKADO).....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate in Eldoret CMCC No. 1280 of 2003 delivered on 12 August 2011 by Hon. C.G. Mbogo, CM)

JUDGMENT

[1] This is an appeal from the Judgment of the Chief Magistrate, **Hon. C.G. Mbogo**, in **Eldoret CMCC No. 1280 of 2003**. The Appellants had been sued before the lower court by the Respondent, **Dominic Lokadogi Lokado**, in his capacity as the personal representative of the estate of the late **Peter Ekuami Lokado**, in connection with a road traffic accident that occurred on **19 January 2003**, involving the 1st Appellant's **Motor Vehicle Registration No. KAJ 633B Datsun Pick Up**. The contention of the Respondent before the lower court was that the accident was attributable to the negligence of the 2nd Appellant, who was the 1st Defendant before the lower court, for which the 1st Appellant was vicariously liable.

[2] The Respondent accordingly claimed General Damages under the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya**; General Damages under the **Law Reform Act, Chapter 26** of the **Laws of Kenya**, Special Damages, costs of the suit plus interest and any other reasonable relief the Court may deem fit to grant. Although the Appellants filed their Memorandum of Appearance and Defence, they ultimately negotiated a settlement on liability in the ratio of 20:80 in favour of the Respondent and a Consent Order recorded to that effect on **8 June 2011**. The matter thereafter proceeded for assessment of damages; and to this end, the Learned Trial Magistrate relied on the evidence of the three witnesses who had testified in support of the Respondent's case, as the Appellant's opted to adduce no evidence. In the result, the lower court, after considering the evidence adduced, the submissions filed by Learned Counsel and the authorities relied on by them, assessed the damages payable as follows in its Judgment dated **12 August 2011**:

> **[[a] Kshs. 100,000/=** for loss of expectation of life under the **Law Reform Act;**
>
> **[[b] Kshs. 10,000/=** for pain and suffering;
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> **[c] Kshs. 4,000/=** as Special Damages;
>
> **[d] Kshs. 1,064,732/=** as damages under the **Fatal Accidents Act**.

[3] The Learned Trial Magistrate then reduced from the sum total an amount of **Kshs. 100,000/=** awarded under the **Law Reform Act** and the 20% contributory negligence apportioned to the Respondent; and consequently entered Judgment in the Plaintiff's favour in the sum of

Kshs. 862,985.60 together with interest and costs. Being dissatisfied by the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal, raising the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in applying a multiplicand of 2/3 instead of 1/3 as to dependence without any proof and/or evidence;
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> **[b]** That the Learned Trial Magistrate erred in law and fact in applying the Gross Pay of the Respondent instead of the Net Pay, hence the excessive award;
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> **[c]** That the Learned Trial Magistrate erred in law and fact in holding that the Respondent's earnings were **Kshs. 5,323.66** without any evidence in support of the same;
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> **[d]** That the Learned Trial Magistrate erred in law and in fact in failing to consider the judicial authorities cited by the Appellants which were binding on him;
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> **[e]** That the Learned Magistrate erred in law and fact in failing to hold that the Respondent did not discharge his burden of proof as envisaged under **Section 107, 108** and **109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya;**
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> **[f]** That the Learned Trial Magistrate erred in law and fact in awarding damages that were manifestly excessive as to amount to an erroneous estimate of the loss actually suffered by the Respondent.

Accordingly, the Appellants prayed that the said Judgment of the lower court be set aside and in lieu thereof a fresh Judgment be entered.

[4] The appeal was canvassed by way of written submissions, which were filed herein on **10 October 2017** and **8 November 2017**, respectively. In their written submissions, the Appellants collapsed their Grounds of Appeal, and therefore the issues for determination, into just two, namely:

> **[a]** Whether the Learned Trial Magistrate erred in using the wrong dependency ratio of 2/3 instead of 1/3;
>
> **[b]** Whether the Learned Trial Magistrate erred in using the Gross Pay of **Kshs. 5,323.66** as opposed to the Net Pay of **Kshs. 3,950/=.**

[5] On the first issue, it was the submission of **Mr. Isiji**, Learned Counsel for the Appellants that, since the deceased was a bachelor, it is given that the used a substantial part of his income on himself. He submitted that dependency is a matter of fact which has to be established by evidence; and that no such evidence was adduced before the lower court. According to him, the Learned Magistrate erred in adopting a dependency ratio of 2/3. He proposed a ratio of 1/3, and a multiplier of 16 years. He relied on the case of Board of Governors of **Kangubiri Girls High School & Another vs. Jane Wanjiku & Another: Nyeri Civil Appeal No. 35 of 2014 [2014] eKLR** in support of his submissions.

[6] In respect of the second issue, it was the submission of **Mr. Isiji** that the deceased was a tea plucker earning a gross pay of **Kshs. 5,323.66** per month as shown by his Pay Slip, which was produced before the lower court as Plaintiff's Exhibit No. 6; and that since a multiplicand is the net income of the deceased, the lower court was at fault in adopting that Gross Pay as the multiplicand. He relied on the cases of **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another: Nairobi HCCC No. 1638 of 1988;** and **Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & Another [2014] eKLR; Simeon Kiplimo Murey & 3 Others vs. Kenya Bus Management Services Limited & 4 Others [2014] eKLR**.

[7] Counsel for the Respondent, on the other hand, was of the posturing that since the multiplier was not appealed, there is no basis for disturbing the decision of the Learned Trial Magistrate thereon. He conceded that the deceased was unmarried as at the time of his death, but argued that the dependency ratio of 2/3 that was adopted by the Learned Trial Magistrate is not only reasonable, but is also supported by case law. In support of his submissions, Counsel relied on the cases of **Gachoki Gathuri (Suing as Legal Representative of the Estate of James Kinyus Gachoki (Deceased) vs. John Ndiga Njagi Timothy & 2 Others [2015] eKLR**; **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited: Nyeri Civil Appeal No. 22 of 2014**; **Simeon Kiplimo Murey & Milka Jemenjo Sang (Suing as administrators of the estate of David Murey (Deceased) & Another vs. Kenya Bus Management Services Limited;** and **Hellen Gesare Ayoti (Suing as the Legal Representative of the Estate of the late Justus Momanyi Ayoti vs. P.N. Mashru Ltd [2016] eKLR.**

[8] While conceding that the multiplicand is indeed the net income and not gross; **Ms. Soita** contended that that net income comes to **Kshs. 5,003.66** and not **Kshs. 3,950** as proposed by Counsel for the Appellants. In her submission therefore, even with the adjustment of the multiplicand, the Respondent would still be entitled to **Kshs. 1,000,732/=**. She prayed that Judgment be entered for the Respondent in that sum less 20% contributory negligence.

[9] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was expressed thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[10] Accordingly, having re-evaluated and reconsidered the entirety of the evidence adduced before the lower court, there appears to be no dispute that the deceased was the son of the Respondent; or that he died on **19 January, 2003** after having been knocked down by **Motor Vehicle Reg. No. KAJ 633B Datsun Pick Up** that was being driven at the time by the 2nd Appellant. Credible evidence was adduced to show that the motor vehicle belonged to the 1st Appellant. In any event, liability was compromised at the ratio of 20:80 in the Respondent's favour. Accordingly, the disputation is limited to the question whether the Learned Trial Magistrate correctly assessed the damages due to the Estate of the deceased on account of his unfortunate and untimely death.

[11] It is to be borne in mind that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** (supra), the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."**

[12] And in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others [1957] EA 748**, the Court of Appeal for East Africa approved the following passage from the lower court decision appealed from:

> **"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."**

[13] With the foregoing principles in mind, I have given consideration to the two issues that present themselves in this appeal for determination, namely:

> **[a]** Whether the Learned Trial Magistrate erred in using the wrong dependency ratio of 2/3 instead of 1/3;
>
> **[b]** Whether the Learned Trial Magistrate erred in using the Gross Pay of **Kshs. 5,323.66** as opposed to the Net Pay of **Kshs. 3,950/=** as the multiplicand;

Accordingly, I take the following view of the matter:

[a] On the Dependency Ratio

[14] The pertinent evidence adduced before the lower court shows that the deceased was unmarried at the time of his death; and, as rightly pointed out by Counsel for the Appellant, dependency ratio is indeed a matter of fact which has to be established by way of evidence. In this connection, the Respondent told the lower court that the deceased used to send him **Kshs. 500/=** monthly and sometimes more; and it was on the basis of this evidence that the Appellants contended that a dependency ratio of 1/3 would suffice. He urged the Court to surmise that since the deceased was single, he would spend most of his income on himself. It is to be noted that this was merely a postulation. No evidence was adduced before the lower court in this regard. It could very well be that there were other forms of assistance in kind or otherwise that the deceased would give to the Respondent and to his siblings. These were unfortunately not documented; and therefore the question arises whether the Respondent should lose out just because no proof was forthcoming as to the exact ratio of dependence as between him and his deceased son?

[15] In the **Hellen Waruguru Waweru Case**, the Court of Appeal provided useful insights in this connection thus:

> **"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-**
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> **We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

[16] Hence, the deceased could very well have exposed to heavier responsibilities and financial commitments towards the Respondent than the Respondent was able to document or remember. Accordingly, I find no valid reason for interfering with the 2/3 dependence ratio adopted by the Learned Trial Magistrate. I find succour in the decisions cited by the Respondent in which the same ratio was employed; for instance, **Gachoki Gathuri (Suing as the Legal Representative of the Estate of James Kinyua Gachoki (Deceased) vs. John Ndiga Njagi Timothy & 2 Others [2015] eKLR**, the deceased was a 29 year old unmarried man. The High Court adopted a dependency ratio of 2/3 and a multiplier of 25 years. Accordingly, I would uphold the lower court's finding on the 2/3 dependency ratio; and a multiplier of 25 years, noting that no complaint was raised in the Grounds of Appeal on the multiplier adopted by the lower court, and therefore no basis laid for the multiplier of 16 years proposed by Counsel for the Appellant.

[b] On the Multiplicand

[17] As has been pointed out herein above, the deceased was a tea plucker earning a gross pay of **Kshs. 5,323.66** per month; which was the sum adopted by the lower court as the multiplicand. Clearly, that was a misdirection on the part of the lower court, as was rightly conceded by Counsel for the Respondent. The multiplicand is the net earnings of the deceased after statutory deductions. I note that Counsel came up with different figures worked on the same Gross Pay. Accordingly, I have looked at the deceased Pay Slip for the month of **January 2003**, which was produced before the lower court as the **Plaintiff's Exhibit No. 6**; and would agree with the Respondent's posturing that the Net Pay was, not **Kshs. 3,909.85** as posited by the Appellants, but **Kshs. 5,003/=,** taking into account the only two statutory deductions made therein, namely NSSF and NHIF. In the **Hellen Waruguru Waweru Case**, the Court of Appeal was explicit that:

> **"...the net income determines the multiplicand and it is only net of statutory deductions. In this case...the net salary after statutory deductions was Sh. 19,373, and indeed counsel for KSSL accepted that figure in his submissions. There is no reason why the High Court should have interfered with that figure..."**

[18] It is also noteworthy that in his calculations, the Learned Trial Magistrate deducted the **Kshs. 100,000/=** that he awarded under the **Law Reform Act** for loss of expectation of life. He did not justify that deduction; but presumably, it was based on the practice that to award the same would amount to double compensation. Here is the thinking of the Court of Appeal on the matter as expressed in the **Hellen Waruguru Waweru Case:**

> **"...learned counsel for KSSL, Mr. C.K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law. 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." (emphasis added)**

[19] The reduction was thus reversed by the Court of Appeal on the basis that the words **"to be taken into account"** used in **Section 4(2)** of the **Fatal Accidents Act** and **"to be deducted"** are two different things; and that what is to be taken into account is not necessarily deducted. In coming to this conclusion, the Court of Appeal relied on the case of **Kenfro Africa Ltd t/a Meru Express Services 1976 & Another vs. Lubia & Another (No. 2) [1987] KLR 30**. It appears, from the evidence adduce before the lower court, the Respondent was the only beneficiary and therefore the awards under both the Law Reform Act and the Fatal Accidents Act would go to him ultimately. I note too that Counsel for the Respondent conceded that the deduction of the Law Reform component of the quantum was correctly made.

[20] In the premises, I would uphold that deduction and work out the sums due to the Respondent as hereunder:

Under the Law Reform Act:

- Loss of Expectation of life - Kshs. 100,000
- Pain and suffering - Kshs. 10,000

Under the Fatal Accidents Act

- Loss of dependency Kshs. 5,003.66 x 2/3 x 25 x 12=1,000,732

Special damages - Kshs. 4,000

Total - Kshs. 1,114,732

Less loss of expectation of life - Kshs. 100,000

Kshs. 1,014,732

Less 20% contribution - Kshs. 202,946.40

Net total - Kshs. 811,785.60

[21] Hence, the appeal is allowed, but only to the extent aforestated; and the total amount awarded to the Respondent is reduced to **Kshs. 811,785.60**. Judgment is accordingly hereby entered in favour of the Respondent in the aforesaid sum together with costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 31ST DAY OF JULY 2018

OLGA SEWE

JUDGE