REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 51 OF 2017

1. JOHN KINYANJUI THUMBI

2. GAME WATCHERS SAFARIS LTD.............................APPELLANTS

VERSUS

1. IRENE WAMBUI NDUTA

2. EVANS LOGOSE LIHANDA.......................................RESPONDENTS

(Being An Appeal from the Judgment and Decree of Hon. S. Atambo, Senior Principal Magistrate at Kiambu in Civil Case Number 82 of 2016

J U D G M E N T

1. This appeal emanates from the judgment of Atambo, SPM in **Kiambu CMCC 82 of 2016.** In that case, **Irene Nduta and Evans Logose Lihanda** (now Respondents) had brought, as administrators of the estate of Gladys Wanja Wambui, a claim against **John Kinyanjui Thumbi** and **Game Watchers Safaris Ltd.** (now 1st and 2nd Appellants respectively). The claim was based on the tort of negligence. By the amended plaint filed on 25th April 2016, the Respondents averred that the 1st Appellant was the driver, while the 2nd Appellant the registered owner of motor vehicle **KBP 795V** Nissan Hard body. That on 1st March 2015 the 1st Appellant so negligently drove the said vehicle along **Gachie/Wangige** road that it knocked down **Gladys Wanja Wambui** and occasioned her fatal injuries. That the 1st Appellant was at the material time driving the said vehicle on the authority of the 2nd Appellant, hence the later was vicariously liable for the actions of the 1st Appellant. The Respondents sought general and special damages.

2. It does not appear that the 1st Appellant filed a defence. On 10th June 2016 a request for entry of judgment against him was made by the Respondents. It is not clear whether the said request for judgment was acted upon. Nonetheless the 2nd Appellant filed a defence statement on 6th June 2016 denying every key averment in the plaint. The 2nd Respondent pleaded *inter alia* that the deceased contributed to the accident through negligence. On 5.12.16 the parties recorded a consent judgment on liability in favour of the Respondents in the ratio of 75:25%. It was further agreed that the Respondents' witness statements and list of documents be admitted without calling the makers that the parties file written submissions on quantum.

3. On 27th March 2017, judgment was entered for the Respondents as follows:

a) General damages under the Law Reform Act

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

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

b) General damages under the Fatal Accidents Act

i) Lost years - KShs.1,000,000/=

ii) Special damages - KShs. 21,300/=

Less 25%

Net - KShs.1,030,175/= with costs and interest

4. Grounds 1, 3, 4 and 5 of the Memorandum of appeal filed on attack the award of KShs.1,313,000/= as being a result of the application of wrong principles and the alleged failure by the trial court to scrutinize and evaluate the evidence and case law and raise the failure by the trial magistrate to give reasons for her decision. In grounds 2, 6, 7 and 8 the Appellants complain that the award of KShs.100,000/= for pain and suffering was unwarranted as the deceased died instantly; that trial magistrate did not take into account the award under the Law Reform Act in arriving at the award under the Fatal Accidents Act, resulting, in a duplication of awards; that the award was inordinately high and an entirely erroneous estimate of damages.

5. The court directed that the appeal be disposed of by way of written submissions. The Appellants' submissions open with a restatement of the duty of the first appellate court. The Appellants assert that the award of KShs.1,313,000/= was totally erroneous, and point out that the judgment did not comply with Order 21 Rule 4 and 5 of the Civil Procedure Rule as to the requirement for setting out of issues for determination and reasons for decision. The decision of **Makhandia J** (as he then was) in **South Nyanza Sugar Co. Ltd v Omwando Omwando (2011) e KLR** is cited. Reiterating their authorities in the lower court, namely **Mombasa Court of Appeal No. 144 of 1990 Kenya Breweries Ltd v Saro [1991] e KLR and HCCA No. 40 of 2009, Oshivji Kuvenji & Another (1991) e KLR** where deceased minors were aged 6 years, the Appellants submit that the award of KShs.1000,000/= in this case was out of step and inordinately high. Moreover than since the deceased herein died instantly, an award of KShs.20,000/= for pain and suffering suffices and no reasons were given for a higher award.

6. Relying on the case of **Kemfro Africa Services (1976) t/a Meru Express Services Ltd and Another v Lubia and Another (No.2) (1987) KLR 30,** the Appellants argue that an award made under the Law Reform Act must be considered when assessing damages awardable under the Fatal Accidents Act. Finally the Appellants, currently submit that there is an error in the calculation of the judgment total, which ought to be KShs.1,213,000/= and not KShs.1,313,000/=. The Appellants urge the court to allow the appeal.

7. The Respondents for their part submitted that in support of the award as follows. The assessment of damages is a discretion of the trial court and the appellate court will only interfere with the award if the court applied a wrong principle of law by taking into account some irrelevant factor or leaving out of account a relevant one, or that the amount awarded is so inordinately high or law as to represent a wholly erroneous estimate. The Respondents relied **on Nakuru HCCA No.39 of 2013 Simon Kibet Langat v Miriam Wairimu Ngugi** (suing as administrator of the estate of **Daniel Mwiruti Ngugi NKU Civil Appeal No. 39 of 2013and Daniel Mwangi Kimemi and 2 others vs J G M and SMM** (the personal representatives of the estate of N K) **Meru HCC No. 18 of 2014.** None of these authorities were supplied. The only authority attached, namely **Benedeta Wanjiku Kimani v Chengwon Cheboi and Another [2013] e KLR** was relied on to support the award of KShs.100,000/= for pain and suffering.

8. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, **Peters v Sunday Post Ltd (1958) EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambusu [1982 – 1988] IKAR 278).** The sole question in this appeal is the quantum of damages.

9. Two witness statements by the two Respondents were filed on 17.10.16 and contain the same details. The substantive part states as follows:

> **"On 1st March 2015, the deceased was lawfully walking along Gachie/Wangige Road when she was knocked by a motor vehicle registration number KBP 795 V Nissan which was carelessly, recklessly and/or negligently driven, managed and/or controlled by the Defendant. She was seriously injured and she passed away after the accident ... I pray for a judgment against the Defendant as prayed in the plaint plus cost. That is all" (sic)**

10. The Respondents' list of documents which were admitted alongside these statements pursuant to the consent of the parties in the lower court included:

a) death certificate showing that **Gladys Wanja Wambui** was aged 3 years and 6 months, that she died at Kihara Sub County Hospital on 1st March 2015 and that the cause of death was craniocerebral injuries due to blunt force trauma in a motor in motor vehicle accident.

b) receipts in respect of mortuary fees and purchase of the coffin.

11. From these records, it appears that the deceased died on the same day of the accident, possibly while at the Kihara Sub County Hospital. It is not possible to tell the exact time of the death or the period that had elapsed since the accident. Both parties had in their written submissions urged an award of KShs.10,000/= and KShs.100,000/= for pain and suffering and loss of expectation of life, respectively. The trial court awarded KShs.100,000/= on both heads in its judgment. Evidently the award of KShs.100,000 for pain and suffering cannot be justified in the circumstances of this case. It seems likely that the said sum is a result of a clerical error on the part of the court as no party had urged the same. In the circumstances the damages in respect of pain and suffering must be reduced to the figure of KShs.10,000/= which both parties in their submissions seemed to agree upon. It is too late in the day for the Respondents to cite an authority supporting a higher award as they have attempted on this appeal.

12. Regarding awards under the Fatal Accidents Act, the trial court stated:

> **"The deceased died at the age of 3 years and 5 months. The deceased was a minor, a toddler to be precise. Damages are**

payable to parents. An award of KShs.1,000,000/= (One million shillings only) as a global figure would suffice."

13. Although the trial court stated earlier on in its judgment that it had considered the authorities in the parties' written submissions, there is neither discussion of the authorities nor reasons stated for the final award. As has been stated time and again, the award of damages in an exercise of discretion. The discretion must however be exercised judicially. The trial court was not bound to accept the Appellants' proposal in support of an award of KShs.400,000/= under this head.

14. On their part the Respondents had urged an award of KShs.1,500,000/=, relying on the case of **Dr. Appolo Maina t/a Fugalima Centre v Grace Njambi Irungu** suing as the Administratrix of the estate of Lucy Njambi (deceased). However, the authority attached to their submissions in the lower court was **Nairobi HCC No 1015 of 2003 A. A. M. V Justus Gisairo Ndarera and Michael Ochichi Koroso.** I am unable to see the relevance of that authority in this case, involving as it did, a claim for damages in respect of a minor who sustained several injuries in an accident that left him severally incapacitated.

15. On the face of it therefore, only the Appellants supplied relevant authorities to support their proposed award under the Fatal Accidents Act. In his judgment in the **Kemfro case Chesoni Ag J A** (as he then was) discussed the inter play between Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act. He observed:

> **"It has been argued in some English cases that this provision affects the right and not the benefits. Indeed the legislation can be looked at narrowly or in a wide sense. Narrowly it means rights and no more; widely it means the rights and benefits arising from those rights are in additions and not in derogations to the rights and benefits resulting from them under the Fatal Accidents Act. In my view, what Section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death."**

16. The learned judge continued:

> **"To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Accidents Act are "taken into account". The Section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deductions as suggested by Mr. Barasa .... the award under the Law Reform Act, if any, is one of the factors to be taken into account ... The judge did what he was required to do and I do not agree with the English authorities that suggest or say that there should be a mathematical deduction as opposed to mere taking into account the award under the Law Reform Act. I do not find any error in the approach by the learned judge."**

17. In a more recent decision in **Hellen Waruguru Waweru (suing as legal representative of Peter Waweru Mwenja) v Kiarie Shoes Stores Ltd, [2015] e KLR,** the Court of Appeal reiterated this position, stating *inter alia* that:

> **"20. 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 confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as <u>Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2)</u> and the *ratio decindendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:-**
>
> ***"6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.***
>
> ***7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.***
>
> ***8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."***

18. Similarly, in this case, there was no requirement for the trial magistrate to carry out a mathematical deduction of the award under the Law Reform Act while assessing damages under the Fatal Accidents Act. Nonetheless, the trial court was obligated to consider the principles governing awards under the Fatal Accidents Acts in respect of deceased minors. Before the court were two useful authorities, in that regard; the decisions in **Kenya Breweries and Oshivji Kuvenji** where the deceased minors were six years old.

19. In **Kenya Breweries Ltd. v Saro** the Court of Appeal stated that in claims brought in respect of deceased minors, the age of the child is a relevant factor. The court stated:

> **"... 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 a case of a four year old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or low that an application of wrong principles must be interfered."**

20. The Court went on to consider awards made on this head between 1982 and 1990 before concluding that an award of KShs.100,000/= in 1990 cannot be taken to be so inordinately high that the application of a wrong principle must be inferred. The Court concluded by stating that:

> **"While we would express the view that damages on this head must be kept relatively low, we do not think that the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less had we been the trial judge but that is not a reason to warrant us interfering."**

21. The appeal in that case was dismissed. That was in July 1991. The case of **Shivji** is more recent. The trial judge having considered several authorities of the High Court awarded a global sum of KShs.320,000/=. In this case, the deceased minor was a 3 year 6 months old toddler. There was no evidence that she had enrolled in school. The trial magistrate did not express the reasons for the award of KShs.1 million as damages, notwithstanding the young age and the dearth of evidence as to her abilities. As earlier observed, the Respondents did not tender at the trial or on this appeal, the authorities cited to support the award of KShs. 1.5 Million which was urged in their submissions.

22. Nevertheless, this court having searched and perused the authorities found that one related to much older child, of 17 years in the case of **David Ngunje Mwangi v BOG Njiri High School HCCC 2409 of 1998**; and an award of KShs.400,000/= in the case involving a deceased child who was five years old at death and was already in school. **Ngaah J** confirmed the award in 2014.

23. Reviewing all the foregoing I have to agree with the Appellants that the award of KShs.1 million for lost dependency in this case was so inordinately high that the application of a wrong principle must be inferred. Moreover, it is difficult to tell from the rather short judgment whether the trial court took into account the award made under the Law Reform Act, while assessing damages under the Fatal Accidents Act. All in all the award of KShs.1 Million as damages for lost dependency is in the circumstances of this case indefensible. This court has reason therefore to interfere with the award, and considering the authorities cited at the trial and on this appeal, the age of the deceased herein, the award under the Law Reform Act and inflation over the years would reduce the award of damages under the Fatal Accidents Act to KShs.500,000/=. Evidently there was an error in the calculation of the total sum awarded in the judgment. The appeal is therefore allowed.

24. The judgment and decree of the lower court are therefore set aside and this court substitutes therefor judgment for the Respondents against the Appellants as follows:

a) Damages under the Law Reform Act

- Pain and suffering - KShs. 10,000/=

- Loss of expectation of life - KShs.100,000/=

b) Damages under the Law Reform Act

- Loss of dependency - KShs.500,000/=

Grand total - KShs.610,000/=

Less 25% contribution - KShs.457,500/=

Special damages - KShs. 21,300/=

Net - KShs.478,800/=

The Appellants are awarded the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF OCTOBER, 2018

C. MEOLI

JUDGE

In the presence of:

Miss Maina holding brief for Mr. Wanjihia for Appellant

Respondent – No appearance

Court clerk - Nancy