REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 61 OF 2015

JAMES OKOTH MBUYA...APPELLANT

=VRS=

JAMES BORIGA NYANETI & GLADYS GECHEMBA

MOGIRE (Suing as the Legal Representatives of the Estate of

PETER MOGIRE NYANETI (Deceased)..................RESPONDENTS

[Being an Appeal from the Judgement and Decree of Hon. J. Njoroge (CM) dated and delivered on the 17th day of July 2013 in the original Nyamira PMCC No. 143 of 2012]

JUDGEMENT

The respondents in this appeal sued the appellant for damages under the Law Reform Act and the Fatal Accidents Act following the death of Peter Mogire Nyaneti, deceased, in an accident involving the appellant's motor vehicle Registration No. KBQ 346N. The accident is said to have occurred at Miruka area along the Miruka – Kisii Road on 26th April 2012.

Judgement on liability was by consent of the parties entered for the respondents against the appellant in the ratio 70:30%. The trial court thereafter awarded the respondents a sum of Kshs. 787,500/= as damages under the Fatal Accidents Act. It is that award that forms the basis of this appeal. The appellant was also dissatisfied that the trial magistrate did not deduct a sum of Kshs. 100,000/= awarded for loss of expectation of life from the sum awarded under the Fatal Accidents Act.

The appeal which is vehemently opposed was canvassed by way of written submissions. Counsel for the appellant faulted the trial magistrate for adopting a multiplier of Kshs. 20,000/= per month when it was not proved. He submitted that as the deceased's monthly income was not proved, the trial magistrate should have used the minimum wage in Regulation No. 71 of June 2012 produced by the respondents which at the time was Kshs. 4,577.20. Counsel urged this court to assess loss of dependency as follows: -

Kshs. 4577.20 x 12 x 2/3 x 6 = 219,705/=.

Relying on the case of **Charles Omwenga Ongiri & Another Vs. Daniel Muniko [2017] eKLR,** he urged this court to subtract the award of Kshs. 100,000/= for loss of expectation of life and thereafter subject the entire award to 30% respondents' contributory negligence agreed between the parties.

For the respondents, it was submitted that this court can only interfere with the award if it is satisfied that the trial court took into account an irrelevant factor or left out a relevant one or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. For this proposition, Counsel relied on the case of **Kemfro Africa Ltd Vs. A. M. Lubia & Another [1982 – 88] KAR.** Counsel for the respondents submitted that the figure of Kshs. 20,000/= adopted as the multiplier was proved to be the deceased's income and had not been plucked from the air. On the issue of deduction of the award under the Law Reform Act, Counsel for the respondents submitted that the trial magistrate did not err as no sum was awarded for lost years. Counsel contended that an award for pain and suffering and loss of expectation of life under the Law Reform Act does not amount to duplicity and for this cited the case of **Richard Matheka Musyoka & Another Vs. Susan Aoko & Another (suing as administrators of Joseph Onyango Owiti – deceased [2016] eKLR**. Counsel urged this court to dismiss the appeal with costs to the respondents.

The principles that should guide an appellate court in such appeals are settled. In the case of **Mariga Vs. Musila [1984] KLR 251 at page 252** it was held: -

> ***"4. The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has***

misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

Applying the above principle to this appeal, I am not persuaded that the trial magistrate acted on a wrong principle of law or that he misapprehended the facts or that the award made was a wholly erroneous estimate of the damage suffered. The award is not manifestly excessive and it is clear that the trial magistrate took into consideration all the relevant matters that he ought to have considered in arriving at the award. I am not persuaded that there are good grounds to warrant this court to disturb the award.

As for the argument that the trial magistrate erred in failing to deduct the award for loss of expectation of life from the award for loss of dependency it was held in **Kefro Africa Limited t/a "Meru Express Services (1976)" & Another Vs. Lubia & Another (No. 2.) [1987] KLR 30.**

" ………………

4. Only the part of the Law Reform Act award which represents the non-pecuniary loss e.g. the award for the loss of expectation of life is deductible. Account is taken of the award under the Law Reform Act under the Fatal Accidents Act only when the persons entitled to the deceased's estate are the same persons for whose benefit the action under the Fatal Accident is brought and not otherwise.

5. ………………

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. ………………

8. The words "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 be taken into account and not necessarily deducted. It is sufficient if the judgement 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."

In his judgement, the trial magistrate did not state that in reaching the figure awarded under the Fatal Accidents Act he considered the award for loss of expectation of life. I am therefore persuaded that the award of Kshs. 100,000/= for loss of expectation of life should be deducted from the award under the Fatal Accidents Act. However, it is evident from the judgement that the trial magistrate clearly applied the respondents' contribution of 30% and this court shall not interfere with the award on that account. I notice however that in calculating the sums awarded under the different heads the trial magistrate omitted to include the sum of 50,000/= he had awarded for special damages and that there was a mathematical error in his calculation. I have corrected the error and also added the special damages of Kshs. 50,000/=.

Accordingly, judgement for the respondents against the appellant shall be as follows: -

(a) Special Damages	**–**	**Kshs. 50,000/=**
(b) Pain and Suffering	**–**	**Kshs. 15,000/=**
(c) Loss of Expectation of life	**–**	**Kshs. 100,000/=**
(d) Loss of Dependancy	**–**	**Kshs. 960,000/= less**
	-	**Kshs. 100,000/=**
	-	**Kshs. 1,025,000/=**
Less 30% contribution	**–**	**Kshs. 307,500/=**
TOTAL		**Kshs. 717,500/=**

The respondents shall have the costs and interest in the court below while the appellant shall have half the costs in this appeal.

It is so ordered.

Dated, signed and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE