REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 174 OF 2015

BASARI COMPANY LIMITED.....APPELLANT

VERSUS

PETER MWAMBURI WANGIO & REHEMA MUCHEMUNDA MANJAMA

(Administrators of the Estate of the late

OMAR SAID LUNGUZE (DECEASED).....RESPONDENT

J U D G M E N T

1. The appeal before court for determination was initiated by the Memorandum of Appeal dated 4/12/2015 and filed in court the same day. That memorandum does not fault the judgment on its findings on liability but only on the quantum of damages awarded which the appellant considers excessive and manifestly high on account that the choice of dependency ratio was high and the award itself to high regard being had to the injuries suffered and failure by the trial court to observe the principle of law that comparable injuries ought to attract comparable awards.

2. Even though the grounds are truncated into four, ideally, all only end up into two grounds, asking the court determination of two issues:-

a) Whether the trial court erred in principle and thus arrived at an award that was manifestly high.

b) Whether the trial court erred in failure to consider the submissions offered by the Appellant.

3. Of the two, the second issue is the easier one and I propose to deal with it pronto. It is an established and crystalized point and position of the law that submissions by themselves are not pleadings nor evidence. However when submissions are offered to court to purely assist it come to an award comparable to previous awards for comparable injuries, the same must be seen as assistance offered to court by the litigant or counsel towards discharge of duty to court. In that event a court is obligated to make reference and take regard of such submissions even if such is done at the level of courtesy and appreciation of the parties' industry. It would be to this court unwarranted for parties to take time and employ material resources in offering submissions to court only for the court to wholly ignore same. Did the court here ignore the submissions offered?

4. At trial the appeal did file submissions but the same was to a very large extent on the definition of the words ***dependency, earnings and multiplier*** under the Insurance (**Motor Vehicle Third Party Risks(Amendment) Act 2013**. No attempt was made to help the court compare what other courts had decided on the criteria for assessing damages using the multiplier formula.

5. But even with such scarcity of help, the trial court did indeed take into the submissions when it noted that the defendant had proposed a sum of Kshs.4,805,000/= for general damages. It is thus not right to say the submissions were ignored.

6. Having considered all the materials availed to it and noting that parties had agreed on apportionment of liability, the court awarded to the Respondent damages as follows:-

Loss of dependency - 3,040,000.00

Loss of expectation of life - 100,000.00

Pains and suffering - 20,000.00

TOTAL - 3,160,000.00

7. That is the sum the Appellant now considers too high and excessive as to amount to an erroneous assessment of damages.

8. No doubt, the court in assessing damages for personal injury claims exercises a judicial discretion[1] and it is a strong thing for an appellate court to disturb such discretion unless it be shown that there was taken into account an irrelevant matter or that indeed a relevant matter was ignored or neglected.

9. For an appellant to succeed on an appeal like this, he has to demonstrate an error on the part of the trial court. It is not enough that the appellate court would have awarded a different sum.

10. I have had a chance to read the written submissions as well as the oral ones offered to me here. Those submissions largely fault the trial court for its choice of the multiplicand of Kshs.10,000/= a multiplier of 38 years and a dependency ratio of 2/3.

11. It may be observed that the trial court did not assign any reason for adopting the multiplicand of Kshs.10000 and a dependency ration of 2/3 which may itself be a reason to interfere with the discretion exercised. The choice of the multiplicand was in fact a critical matter noting that there was no document produced to prove income while the Appellant had infact availed to court the prevailing registration of wages order.

12. Here even though the trial court did not give any reason for settling ona multiplicand of Ksh.10,000/= there was evidence that the deceased was a mason or a casual labourer. According to the Regulation of Wages Order availed to court, the lowest earnings at the material time was Kshs.9,780.95. I do find that the choice of Kshs.10,000/= as a monthly earning, even without reason being assigned, was not a misdirection or an error to warrant an interference. I however do not find a proposal by the Appellant on a multiplicand of 4,000 to be reasonable. To adopt it would at this stage on appeal be unreasonable and unjust.

13. However in settling on a multiplier of 38 years on the basis that the deceased would have worked for the age of 60 years was to this court a misdirection and erroneous because the courts have always said that vissiatudes of life and uncertainties thereof are matters to be taken into account together with the fact that the sum being awarded amounts to accelerated payment which may be invested to earn and grow[2].

14. For failure to take into account those material facts I find that the trial court erred and I do interfere with the choice of multiplier.

15. Decisions were cited to court in which for a deceased aged 29 years a multiplier of 30 years was applied. I do find that on the evidence led, a multiplier of 30 years would have been reasonable. I do however decline to interfere with the choice of dependency ratio. Accordingly damages for loss of dependency work out as follows:-

10000 x 12 x 20 x 2/3 = 2,400,000/=

16. I do not consider the awards for pains and suffering as well as loss of expectation of life to have been exaggerated and I uphold such awards.

17. Accordingly, I set aside the judgment of the trial court only as far as it relate to loss of dependency and in place of the sum of Kshs.3,040,000/= awarded by the trial court a substitute a sum of Kshs.2,400,000/=.

18. The lower court judgment is therefore substituted with a judgment working out as follows:-

Loss of dependency - 2,400,000.00

Loss of expectation of life - 100,000.00

Pains and suffering - 20,000.00

Total - 2,520,000.00

Less 15% contribution - [378,000.00]

Net done - 2,142,000.00

19. That sum shall attract interest at court rates for date of the lower Court's judgment till payment in full. On costs I reckon that the Appellant has only succeeded to a very small extent and I therefore order that each party bears own costs.

Dated and delivered at **Mombasa** this **18th** day of **December 2018**.

P.J.O. OTIENO

JUDGE

[1] Kemfro Africa vs Lubia (No. 2) [1985] eKLR

[2] Dainty Roger vs Mwinyi Omar Haji [2004] eKLR