REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 92 of 2016

**SAMMY KIPKORIR KOSGEI……..……...
…………………………….APPELLANT**

VERSUS

EDINA MUSIKOYE MULINYA

**PETER ANGUTWA INDIMA suing as a personal representative of the estate of NICHOLAS AIGAH ANGUTWA..…………..…..…….…………………………………………………...……..……
RESPONDENTS**

(Being an Appeal from the Judgment of Hon. M. Agutu (RM) in Kisumu CMCC NO.637 of 2014 delivered on 4th November 2016)

JUDGMENT

Edina Musikoye Mulinya and Peter Angutwa Indima ***(hereinafter referred to as respondents)*** sued **Sammy Kipkorir Kosgei** ***(hereinafter referred to as appellant)*** in the lower court claiming damages for fatal injuries suffered by Nicholas Aigah Angutwa, husband and son respectively, who was knocked down by the appellant's M/V KBB 197P while he was cycling along Kakamega-Kisumu Road on 7th May 2014.

The defendant/appellant filed a statement of Defence and denied the claim. On 4.8.16, parties entered into consent on liability at 70:30% in favour of the respondents as against the appellant.

In a judgment delivered on **4th November 2016,** the learned trial Magistrate awarded damages in the sum of Kshs.1, 750,644/- which was subject to the agreed contributory negligence ratio of 30%.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 5th December 2016 filed the Memorandum of Appeal dated 2nd December 2016 which sets out 8 grounds of appeal that may be summarized into the following two major grounds that:-

> **1) The quantum of general damages in respect of lost dependency is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice**
>
> **2) The Learned trial Magistrate erred in law in failing to take into account or deduct the sum payable under the Law Reform Act from the sum awarded under the Fatal Accidents Act or otherwise thus benefitting the respondents and beneficiaries who are the same under both acts twice**

SUBMISSIONS BY THE PARTIES

This appeal was argued by oral submissions supported by a list of authorities for each party.

Appellant's submissions

The appellant's Counsel Mr. Karanja, submitted that the trial court did not consider the appellant's authorities. On this end, he relied on the case of ***Bayusuf Freighters Limited v Patrick Mbatha Kyengo [2014] eKLR*** which cited with approval the case of ***Shabani -vs- City Council of Nairobi (1985) KLR 516,*** where the Court of Appeal expressed itself at page 527 as follows:-

> ***"There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is …....to have regard to recent awards in comparable cases in the local courts."***

The learned trial magistrate was faulted for applying the wrong multiplier and multiplicand in calculating damages for loss of dependency, hence arriving at an incorrect award. To this end, Counsel cited *Vincent* ***Sululu & Another V Rose Wanjiru [2016] eKLR*** which was cited with approval in the case of **ROGER DAINTY v MWINYI HAJI & ANOTHER [2004] eKLR** in which the Court of Appeal held that what is a reasonable multiplier is a question of fact to be determined from the peculiar circumstances of each case.

In the same appeal, the court held:

> ***"To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work the deceased was doing, the prospects of promotion and his expectation of working life."***

The Court added that other important factors for consideration are the age of the deceased and what his anticipated retirement age was.

In the same case, the court cited ***BOARD OF GOVERNORS OF KANGUBIRI GIRLS HIGH SCHOOL & ANOTHER v JANE WANJIKU & ANOTHER [2014]eKLR***, where it stated that:

> ***"The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason."***

On the multiplier issue, counsel cited ***Roger Dainty v Mwinyi Omar Haji & another [2004] eKLR*** where the Court of Appeal stated:-

> ***"We do not, with respect, agree with Mr. Satchu that courts have established as a matter of practice the appropriate multiplier to be applied to different age groups of victims of accidents. What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case."***

The court further stated that ***"to ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life."***

The appellant's counsel submitted that the deceased was a bodaboda rider and was engaged in risky business. He cited ***Ephantus Njagi P. Kamaitha V Kenblest Limited [2007] eKLR*** involving a 50 year old driver where Khaminwa J (as she then was) stated:-

> ***On the issue of multiplier the proposed 30 years is rather on the high side the defendants who were just over 50 years when the accident occurred can be expected to live another 20 years. However taking into consideration that the deceased carrier was in high risk bracket (matatu***

driver) considering the uncertainty of life a multiplier of 15 years is more appropriate.

The learned trial magistrate was faulted for failing to deduct the sum payable under the Law Reform Act from the sum awarded under the Fatal Accidents Act or otherwise thus benefitting the respondents and beneficiaries who are the same under both acts twice. Counsel Cited ***Jackline Mueni Nzioka V Jethat Ramji Kerai [1996] eKLR*** in which the Court of Appeal held as follows:-

> ***The claim was brought under both the Law Reform Act (Cap 26) and the Fatal Accidents Act (Cap 32) for the benefit of the estate and the dependants of the deceased. The trial court, therefore, was under a duty to assess damages under both Acts but bearing in mind that the net benefit inherited by the dependants under the Law Reform Act must be taken into account for the damages awarded under the Fatal Accidents Act, because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.***

On the same issue, counsel cited ***Hellen Muhonja Maina V Peter Kinagi Gituka*** ***[1995] eKLR*** in which Ringera J (as he then was) held:-

> ***There is no doubt that the claim by the Plaintiff in her capacity as the administrator of the estate of the deceased under the Law Reform Act is a distinct and separate cause of action from the claim bythe plaintiff on her own behalf and on behalf of the minor children of the deceased as dependants of the deceased under the Fatal Accidents Act. It is however recognized that in assessing damages under the Fatal accidents act, the trial court should take into account the award under the Law reform act because the loss suffered under the former Act must be offset by the gain to the dependants from the estate under the former Act.***

Respondent's submissions

Mr. Odino, counsel for the respondent submitted that all the authorities cited by the appellant are for the period 1993 to 2011. He however singled out ***Bayusuf Freighters Limited v Patrick Mbatha Kyengo (supra)*** in which a multiplier of 20 years was applied for a deceased that was 27 years old and submitted that it was relevant to the present case. Counsel urged the court to find that a multiplier of 20 years conforms to recent precedents. He relied on two persuasive authorities i.e. the case of ***James Gakinya Karienye & another (suing as the legal ... estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR*** in which a multiplier of 25 years was applied for a deceased that was 28 years old and ***Jeremiah Njuguna & Another v Angela Yator & Edel Biwott (Administrators of Paul Kiplagat) [2016] eKLR*** where the court adopted a multiplier of 25 years for a 27 year old deceased.

Counsel further submitted that the discretion of the trial court was exercised judiciously and that a multiplier of 20 years was acceptable although it was not explained. Additionally, counsel submitted that it was not mandatory to deduct the sum payable under the Law Reform Act from the sum awarded under the Fatal Accidents Act.

The evidence

This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR** and **Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of multiplier and quantum generally. The appellant holds the quantum on dependency is inordinately high, erroneous, oppressive and punitive. The

respondent on the other hand holds the view that the quantum conforms to recent awards in comparable cases and urged the court not to disturb the decision of the trial court.

Having said that; I will consider whether the learned Magistrate applied the wrong principles in arriving at a multiplier of 20 years.

In her judgment; the learned trial magistrate stated as follows:

"Considering the uncertainties and vagrancies of life, I will adopt a multiplier of 20 years."

I have considered the holding in ***Roger Dainty v Mwinyi Omar Haji & another*** (Supra) where the Court of Appeal stated that there is no established practice that there is an appropriate multiplier to be applied to different age groups of victims of accidents. The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason (see ***BOARD OF GOVERNORS OF KANGUBIRI GIRLS HIGH SCHOOL & ANOTHER v JANE WANJIKU & ANOTHER [2014] eKLR*** (Supra)

The learned trial magistrate in her judgment stated that she had considered the 7 cases cited by the appellant where a multiplier of 15 was adopted for deceased persons who were 24 years to 29 year. She also noted that the respondent had proposed a multiplier of 27 years. I do not, therefore, with respect, agree with Mr. Karanja that the learned magistrate did not consider the authorities cited by the appellant.

In my considered view, the trial magistrate's decision in adopting a multiplier of 20 years cannot be erroneous only for the reason that the court did not adopt 15 years proposed by the appellant. The decision was in tandem with the previous decided cases of similar nature and was therefore exercised judicially.

As a result, this court finds no reason to interfere with the decision of the learned trial magistrate on the multiplier and quantum generally. For the reasons given on the assessment above, the appeal is dismissed in it's entirely. The lower court's decision is confirmed. The respondents will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 29th DAY OF June 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Barasa h/b for Mr. Karanja

Respondents - Ms. Oketch h/b for Mr. Okoth