



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 454 OF 2015

YH WHOLESALERS LTD.....1ST APPELLANT
ABDINOOR ABDULRAHAMANI ALI.....2ND APPELLANT

VERSUS

JOSEPH KIMANI KAMAU
HANNAH WANGARI KIMANI (Suing as the Legal Representatives of the Estate of
MARY NJERI KIMANI (DECEASED).....RESPONDENTS

(Appeal from the original judgment of D.N Musyoka (Mr.) delivered on 26/08/2015 in Kikuyu CMCC No. 276 of 2012)

JUDGMENT

The Respondents were the Plaintiffs at the trial Court suing on their behalf and on behalf of the Estate of Mary Njeri Kimani (the “**Deceased**”). In a plaint dated 18th December, 2012, the Plaintiffs Claimed that on 21/4/2012, the Deceased was a lawful passenger in Motor Vehicle Registration Number KBB 126P travelling along Nakuru-Nairobi Road when, at or near Kiambaa, the 2nd Defendant negligently drove Motor Vehicle Registration Number KAW 222Y/ZD 1337 that he lost its control, veered off the road and collided with Motor Vehicle Registration Number KBB 126 P as a result of which the Deceased sustained fatal injuries for which the Plaintiff holds the Defendants, jointly and severally liable.

The Plaintiffs averred that the 2nd Defendant was negligent and has set out the following particulars;

- (a) Driving at an excessive speed in the circumstances
- (b) Losing control of the said Motor Vehicle Registration Number KAW 222Y/ ZD 1337.
- (c) Colliding with Motor Vehicle Registration Number KBB 126P.
- (d) Driving without due care and attention.
- (e) Failing to have due regard to other road users
- (f) Failing to brake , slow down , swerve and or in any other manner so to do to avoid the accident
- (g) Res Ipsa Loquitur

The Plaintiffs claimed damages for lost years under the Law Reform Act and sought the following:-

- a) General Damages under the Law reform Act
- b) Special damages-Kshs. 104,540
- c) Cost of the Suit, and
- d) Interest on (a), (b) and (c) above at court rates

The particulars of the special damages were:-

- a) Mortuary Fees Kshs 3,950/=
- b) Cost of obtaining Grant Kshs. 1,000
- c) Funeral Expenses Kshs.99,090
- d) Search Certificate Kshs. 500/=

The Appellants filed a Statement of Defence dated 24th April, 2013 in which the 2nd Appellant acknowledged that there was accident on the stated date involving the said two vehicles, however, the Defendants denied that the accident occurred solely as a result of any negligence on their part and attributed the accident to a tyre burst despite his best efforts to control the vehicle.

This case was consolidated with five other cases emanating from the same accident under Kikuyu CMCC No. 272 of 2012 and on 26/5/2015 the parties recorded a consent judgment on liability against the Defendants, jointly and severally, at the ratio of 90:10 % in favour of the plaintiff. Parties agreed to annex the following documents as exhibits; death certificate, letters of administration, police abstract, burial permit, funeral programme, letter dated 20/7/2012, admission letter, receipts in the sum of Kshs. 103,040, official search certificate and its receipt of Kshs. 500 and demand letter. Both parties filed written submissions on the quantum of damages to be awarded.

In its judgment, the trial Court noted that the deceased who was 20 years and a student at Kenya Medical Training College, Nyeri, would start working at the age of 22 years and would have worked for 38 years. The trial magistrate further noted that the work of a nurse is technical and bearing in mind that even after retirement one can engage in private practice, the court took 30 years of active age at a salary of Kshs. 20,000/= and awarded one half of that as lost years. Judgment was therefore entered in the following terms:

- a) Special damages Kshs. 103,540/=
- b) Pain and Suffering Kshs. 50,000/=
- c) Loss of expectation of life Kshs. 150,000/=
- d) Lost years Kshs. 3,600,00/=

TOTAL Kshs. 3,903,540/=

- e) Less 10% contributory negligence

Aggrieved by the trial magistrate's judgment, the Appellants filed this appeal on the following grounds:

- a. The Learned Magistrate erred in law by applying the wrong principles in arriving at the award of general damages for loss of dependency and thus giving an excessive award of Kshs. 3,600,000/=

which was erroneous in that;

- i. The Learned Magistrate applied a dependency ratio of $\frac{1}{2}$ instead of $\frac{1}{4}$ as submitted, since the deceased was a student and unmarried and the alleged dependants were adults who did not prove dependency;
 - ii. The Learned Magistrate applied a multiplicand of Kshs. 20,000/= which was too high for a student who had not started earning;
 - iii. The Learned Magistrate applied a multiplier of 30 years which was too high and did not take into account the vagaries of life that would shorten the deceased's working life.
- b. That the Learned Magistrate proceeded on the wrong principles in entering judgment against the Defendants for the sum of Kshs. 3,903,540 which is beyond the statutory limit under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
 - c. That the Learned Magistrate erred in failing to scrutinize/evaluate the evidence tendered and to correctly relate them to case law cited to him and thereby failed to arrive at a fair and reasonable compensation to the estate of the deceased.
 - d. That the Learned trial Magistrate erred in failing to give his reasons for finding that the sum of Kshs. 3,903,540/= was reasonable and/or adequate compensation.
 - e. That the Learned Magistrate erred in law and in fact in failing to find that the particulars of the claim by the Respondents did not warrant the award of Kshs. 3,903,540/=.
 - f. That the Learned Magistrate erred in law by not taking into account the award under the Fatal Accident Act when arriving at the award under Law Reform Act and thus duplicity of award to the same dependants.
 - g. That the Learned Magistrate erred in law in failing to uphold the doctrine of precedent.
 - h. That the Learned Magistrate erred in awarding such an inordinately high award of damages under statute and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent

This being the first appeal, the role of this court as an appellate court is to re-evaluate the evidence that was tendered before the lower court and determine whether the appeal is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

From the grounds of Appeal, it is clear that the Appeal is only on the quantum of damages awarded and in any event there is judgment on liability. The issues for determination therefore are;

- a)Whether the award of Kshs. 3,600,000/= in lost years was excessive in the circumstances;
- b) Whether the Learned trial Magistrate erred in failing to give reasons for finding that the sum of Kshs. 3,903,540 was reasonable compensation; and
- c) Whether there was duplicity of awards to the same dependants.

At the trial court, the Respondent submitted that the starting salary of Kshs. 45,000 would be reasonable and expected useful working life of 35 years and a ratio of $\frac{1}{3}$. The Respondents relied on the case of **Ruth Wangechi Gichuhi –V- Andrew Mangeni Luande (2011) eKLR** where the High Court adopted a

starting salary of Kshs. 30,000/= for 30 years for a graduate pharmacist aged 22 years. The Respondents also relied on the case of **Daniel Kuria Nganga –V- Nairobi City Council (2013) eKLR** where the deceased was aged 18 years and the court used a multiplier of 37 years.

On the other hand, the Appellants submitted that the deceased died instantaneously at the scene of the accident and proposed a sum of Kshs. 10,000/= for pain and suffering. On lost years, the Appellants worked out the computation on a net salary of Kshs. 15,000 for 20 years at a dependency ratio of $\frac{1}{4}$. The Appellants relied on the case of **Satwidner Singh Bhogal Vs. Satwidner Kaur Benawra & 2 Others** where the deceased was aged 23 years and a university student and a ratio of one quarter was used in tabulation of lost years for 20 years.

This appeal was canvassed by way of written submissions which this court has duly considered. The Appellants have quoted the case of **Beatrice Wangui Thairu V. Hon Ezekiel Bargetuny & Another Nairobi HCCC No. 1638 of 1998** in order to illustrate the manner of assessment of damages under the Fatal Accidents Act. The cases of **Multiple Haulers (EA) Limited & Another Vs. William Abiero Ogeda & 2 others 2016 eKLR** and **Albert Odawa V. Gichimu Gichenji NKU HCCA No. 15 of 2003 (2207) eKLR** were also relied on by the Appellants but I find that they are not relevant in this matter as the Deceased herein was already an enrolled and schooling student pursuing a career.

The Appellants further submitted that even though the Respondents had asked for a multiplier of $\frac{1}{3}$, the trial magistrate used a multiplier of $\frac{1}{2}$ and did not give reasons for that.

I have read the two page judgment and I find that actually there were no reasons advanced for using the multiplier of $\frac{1}{2}$ and not $\frac{1}{3}$ or $\frac{1}{4}$ and the same was not in compliance with Order 21 Rules 4 and 5 of the Civil Procedure Rules that, “Judgments *in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions ...*”. The Appellant relied on the case of **South Nyanza Sugar Co. Ltd v. Omwando Omwando (2011) eKLR**.

The Appellants submitted that the Deceased’s only dependants are the parents and they relied on the case of **Alexander Okinda Anangwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) V. Reuben Kahuha Muriuki, City Hopper Limited, Michael A. Craig & Reuben Kamande Mburu** where a dependancy ratio of $\frac{1}{3}$ to a deceased aged 25 years was used.

Finally, the Appellants submitted that it was wrong for the Court to award damages under the Fatal Accidents Act which was not pleaded and fail to take such award into consideration when arriving at the award under Law Reform act which resulted to duplicity of awards to the same dependants. Section 2(5) of the Law Reform Act Cap.20 Laws of Kenya) provides that

“The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act (Cap. 32) or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons’ shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)”.

It was also argued that the trial court ought to have deducted the amount awarded of Ksh.150,000.00 under (Law Reform Act) as held in the case of **Kemfro Africa Ltd t/a Meru Express Services (1976) & Anor Vs. Lubia & Anor (No. 2) (1987) KLR 30**.

They submitted that the law is clear that when the people entitled to the deceased’s estate are the same persons for whose benefit the action over the Fatal Accident Act is brought, they should not benefit twice.

I have considered the submissions filed in this Appeal together with the evidence on record. As pointed out earlier in this Judgment, the Appeal relates to the quantum of damages as there is already a judgment on liability. The deceased had been enrolled in a medical college pursuing a career from which future earnings could be ascertained at a market value for such a professional.

The Appellants have argued that the multiplier approach is just a method of assessing damages, that it is not a principle of law but a dogma and can and must be abandoned where the facts do not facilitate its application. They have relied on the case of **Albert Odawe Vs Gichimu Gichenji BKU HCCA 15 of 2003 eKLR** to support that contention and have asked the court to instead award a global sum.

While I am in agreement that the multiplier approach is just a method of assessing damages, I wish to note that, it offers sound principles that guide the courts, without which, courts would be completely lost on the approach to employ in assessment of damages. In my view, it is a more reliable method than where a court awards a global sum without any basis at all. The multiplier method has been used over the years and as long as there are facts to facilitate its application, it is a useful and practical method.

Having said that, there is evidence on record that the deceased had enrolled in a medical college whereby she was studying nursing. I note that the Appellants adopted the multiplier method in their submissions in the lower court, and had even suggested as a guide, a sum of ksh.27,000 as an average salary of a nurse. In his judgment, the learned Magistrate adopted ksh.20,000 as the expected salary that the deceased would have earned for a start, which in my opinion, is reasonable.

With regard to the ratio, the deceased was single and the only two dependants who were her parents are adults and their demands for their age would not have been much. In the circumstances, a dependency ratio of 1/3 would be reasonable and the learned Magistrate made an error in applying a half ratio.

On the multiplier, the deceased was aged 21 years. It is not certain how long she would have lived but considering her career as a nurse she would have worked up to the retirement age 60 years. She therefore had a balance of 39 working years. The Respondent has sought a multiplier of 35 years and has relied on the case of **Ruth Wangechi Gichuhi Vs Andrew Mangeri Luande 2011 eKLR** where a multiplier of 30 years was applied for a person aged 22 years.

They have also relied on the case of **Daniel Kuria Nganga Vs Nairobi City County (2013) eKLR** where a multiplier of 37 years was adopted for an 18 years old.

Considering the vagaries of life, a multiplier of 30 years would be reasonable in the circumstances of this case.

In the premises, the total sum is as follows;

- a) Special damages – ksh 103,540/=
 - b) Pain & suffering – ksh. 50,000/=
 - c) Loss of expectation of life – ksh 150,000
 - d) Lost years ksh. 2,400,000/=
- Sub Total ksh. 2,703,540
- Less 10% ksh. 270,354
- Total Ksh. 2,433,186

I have awarded damages both under the Law Reform and Fatal Accidents Acts following a recent Court of Appeal decision in **Hellen Waruguru Waweru (Suing as legal representative of Peter Mwenja Vs Kiarie Shoe stores Limited and Appeal no. 22 of 2014** where the court of Appeal sitting in Nyeri made a finding that damages should be awarded under both heads and the court should not discount an award under the Law Reforms Act.

The Appeal therefore partly succeeds and the Judgment of the trial Magistrate is set aside to the extent

explained above.

The Appellant shall bear half of the costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **19th** day of **October, 2017**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent