REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 43 OF 2013

DAVID KAHURUKA GITAU...........…..……......1ST APPELLANT

GEORGE KURIA..2ST APPELLANT

VERSUS

NANCY ANN WATHITHI GITAU……........…....1ST RESPONDENT

MERCY WANGUI NG'ANG'A...............................2ND RESPONDENT

(An appeal from the Judgment of Hon. Mrs W.A. Juma, C.M. delivered on 30 April 2013 in Nyeri C.M.C.C. No. 155 of 2011)

JUDGMENT

The Respondents' suit in the lower court was for recovery of general and special damages arising from a road traffic accident that occurred on 27th June 2009 in which a one **Benson Guchu Gitau** (hereinafter referred to as the deceased) sustained serious bodily injuries from which he died. The claim is brought under the Fatal Accidents Act[1] and the Law Reform Act.[2]

Consent on liability was recorded at **80%** in favour of the Respondents and **20%** as against the Appellants and the case proceeded for assessment of damages only.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda[3]*).**

Only the second Respondent, the deceased's widow gave evidence in the lower court. On special damages her evidence was Ksh. 163,000/= was used for funeral expenses, Ksh. 20,000/= for obtaining the grant of letters of administration. She produced some receipts. She testified that her husband used to sell drugs and produced a business registration certificate and some bank statements showing some cash deposits. She also stated that the deceased was operating the business of a school and that the deceased used to earn about Ksh. 60,000/= from both businesses. She testified that the deceased used to pay school fees, food, medical bills and provided shelter for the family.

Counsel for the appellants cross-examined this witness but the appellants did not call witnesses. Thus, the only evidence on record is what was adduced by the Respondents. In the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* ***[4]*** Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

In the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others*[5] the Learned Judge stated that it "*is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.*"

As mentioned above, the appellants' advocate cross-examined the Respondents' only witness but never testified or called any witnesses to support the appellants case and as pointed out above the Respondents' evidence remains unchallenged. The purpose of cross-examination is three-fold; **(a)** *To elicit evidence in support of your case;* **(b)** *To cast doubt on, or undermine the witness's evidence so as to weaken your opponent's case, and to undermine the witness's credibility;* **(c)** *To put your case and challenge disputed evidence*. But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses.

The learned Magistrate assessed damages as follows:-*Pain and suffering--Ksh. 100,000/=,Loss of life expectation ---Ksh. 100,000/=, Special damages---Ksh. 133,795/= ,Loss of dependency---- Ksh. 25,000/= x 25 x 4 x 2/3---Ksh. 5,600,000/=, Total---Ksh. 5,933,795/=, 80% thereof--Ksh. 4,747,036/=.*

The appellants have appealed against the said award and raised **9 grounds** of appeal. Both parties filed written submissions and left it to the court to determine the appeal.

The appellants' counsel in their submissions insisted that the sum of **Ksh. 25,000/=** adopted by the magistrate as the deceased income was not proved in evidence, and that even assuming that was the correct amount, the income tax element was not factored and that since income was not proved the court ought to have adopted the statutory minimum wage. I have perused the record and its clear the witness was never cross-examined on the issue of income tax, hence denying her the opportunity to respond to the issue. But what does the law say. Can a party raise issues in submissions which he/she never brought out during cross-examination.? Supposing the witness had answers to the questions but could not provide the answers simply because the questions were no put to him/her?

The answer to the above questions lies in the celebrated decision in *Browne v. Dunn*[6] a famous British House of Lords decision on the rules of cross examination. From this case came the common law rule known as the *"Browne v Dunn rule"* or *"The rule in Browne v Dunn"*. The rule in *Browne v Dunn* basically entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.

Therefore, under this rule if a witness gives testimony that is inconsistent with what the opposing party wants to lead as evidence, the opposing party must raise the contention with that witness during cross-examination. This rule can be seen as an **anti-ambush rule** because it prevents a party from putting forward a case without first affording opposing witnesses the opportunity of responding to it. This not having been done, that party cannot later bring evidence to contradict the testimony of the witness.

Lord Herschell in the said case of *Browne v. Dunn*[7] explained as follows:-

> *"... I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."*

The rule is best described in the judgment of **Hunt J** in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*,***[8]*** who observed: -

> *"It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn."*

Counsel also submitted that the multiplier of 25 adopted by the court was inappropriate and suggested a multiplier of **15** years. Further, counsel maintained that the award of Ksh. 100,000/= for pain and suffering was erroneous since the deceased died barely 30 minutes after the accident and suggested Ksh. 10,000/= under this head. As for dependency, counsel submitted **1/3** instead of **2/3** adopted by the court. Further counsel insisted that the damages awarded under the Fatal Accidents Act[9] ought to have been deducted from the damages awarded under the Law Reform Act[10] to avoid double compensation. Lastly, counsel submitted that his submissions in the lower court were not considered.

Counsel for the 1st and 2nd Respondents submitted that by arriving at the sum of Ksh. 25,000/=, the learned magistrate considered the evidence and quoted the magistrates statement justifying the basis of her finding on that issue. Counsel also supported the magistrates decision to adopt a multiplier of 25 years and insisted that the deceased was self employed hence not subject to the retirement age limit and could have carried on his business for long. Respondents counsel also defended the awards under the Fatal Accidents Act[11] and the Law Reform Act.[12] On whether to adopt **2/3** or **1/3** as the ratio of dependency, counsel referred the court to the appellants' submissions in the lower court where they had proposed **2/3.** Finally counsel also insisted that the award of Ksh. 100,000/= for pain and suffering was justified.

In my view, the only issue that falls for determination in this appeal is whether or not there is any reason to interfere with the learned magistrates' award of damages.

Accordingly, I now turn to the question of damages awarded by the lower court, the crux of this appeal. The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli****[13]*** had this to say:-

> *"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:-* ***(a)*** *where the trial Court acted under a mistake of law; or* ***(b)*** *where the trial Court acted in disregard of principles; or* ***(c)*** *where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or* ***(d)*** *where the trial Court acted under a misapprehension of facts; or* ***(e)*** *where injustice would result if the Appellate Court does not interfere; or* ***(f)*** *where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*
>
> Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore, as was held in the above cited case, and indeed in numerous authorities in this country, an appellate court will only interfere with the award on general damages on the above cited grounds.

In *Kivati -vs- Coastal Bottlers Ltd*[14] the Court of Appeal had the following to say:-

> *"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or*

if the award is so high or so low that it amounts to an erroneous estimate."

In *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates****[15]*** stated as follows:-

> *"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."*

The Court of appeal proceeded to observe that this is the general principle to be found in *Rook v Rairrie*.[16] This principle was adopted with approval by the Court of Appeal in *Butt v Khan****[17]*** where it was held per **Law, JA**:-

> *"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."*

Turning to the facts of this case the learned magistrate awarded damages under the following heads, **(i)** Pain and suffering, **(ii)** Loss of life expectation, **(iii)** Special damages and **(iv)** Loss of dependency. There is no dispute that damages are recoverable under the above heads.

As for pain and suffering, It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in *Rose v Ford*.[18]

It is not in dispute that the deceased sustained serious injuries and that the deceased died after about 30 minutes. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the *International Review of Law and Economics****[19]*** entitled *"Pain and Suffering in Product Liability Cases: Systematic Compensation Or Capricious Awards"* by W. Kip Viscussi who argues that:-

> *"Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement......Pain and suffering is by no means a negligible component of awards.....The general implication is that pain and suffering awards are not entirely random or capricious."*

The position laid down in *Rose vs Ford****[20]*** is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 100,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable. I find no reason to fault the award under this head.

As for loss of life expectation, my review of authorities shows that the first time an award of Ksh. 100,000/= was made by Kenyan courts was by Justice Apaloo, then a Judge of the Court of Appeal in 1986. Many years later our courts are still awarding the same amount which for a long time has been taken as a conventional sum. In my view, time has come for our courts to consider inflation and adjust damages under the said head upwards. The learned magistrate awarded Ksh. 100,000/= under the said head. I find no reason to fault the said award.

As for the special damages, the Respondents were even claiming more, but the court awarded what was proved. There is nothing to show that the same were not proved as the law demands.

Finally, as for the income of Ksh. 25,000/=, the Respondents evidence was that the deceased was earning Ksh. 60,000/= but the court after de consideration assessed the said sum of Ksh, 25,000/= for two the business.

The most important group of torts in practice is that dealing with personal injuries, especially the tort of 'Negligence'. In the Ghanian case of *Mensah v. Amakom Sawmill*[21] Apaloo, J. (as he then was)[22], did express how difficult the subject of assessment of damages was and turned to the judgment of **Lord Wright** in *Davies v. Powell Duffryn Associated Collieries Limited*,[23] for support. This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. **Lord Wright** said:-

> *"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."*

Some of the questions asked are:-

i. *How long would the deceased have continued to live if he had not met this particular accident?*
ii. *How much working life did he have? This second question brings into focus the deceased's state of health and age.*
iii. *Some of the uncertainties taken into account in rolling down the amount are:- the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time.****[24]***

Lord Wrights rule, which was applied by other decided cases, was admirably summarized in

Charlesworth on Negligence[25] as follows:-

> ***"Method of calculating damages:*** *When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.' The manner of arriving at the damages is;* ***(a)*** *to ascertain the net income of the deceased available for the support of himself and his dependants;* ***(b) (i)*** *to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or* ***(ii)*** *what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and then;* ***(c)*** *to capitalize the difference between the sums* ***(a)*** *and* ***(b) (i)*** *or* ***(b) (ii)*** *(sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependants and the probable duration of the continuance of the deceased's assistance to the dependants during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependants in consequence of the death." (Emphasis added)*

I find nothing in the judgment the lower court to suggest or even in the arguments advanced by the appellants counsel to suggest that the manner of assessing damages as enumerated in the above cited decision was not followed. The learned magistrate had the benefit of listening to the witness. I find no reason to fault the said finding.

I find wisdom in the words of **Holroyd Pearce, L.J.** who said:- *"since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury."* He was however, of the view that arithmetical calculations do not provide a substitute for common sense."[26]

In *Beatrice Wangui Thairu vs. Hon. Ezekiel Barng'etuny & Another* ***[27]***which was relied in Rev. *Fr. Leonard O. Ekisa & Another vs. Major Birgen,*[28] **Ringera J** said *inter alia*:-

> *"... there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.."*

In *Hannah Wangaturi Moche & Another vs. Nelson Muya* ***[29]*** it was held as follows:-

> *"In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum*

Applying the above approach, considering the age of the deceased at the time of his death, the possible balance of earning life of the deceased and the ages of the dependants and the other factors stated in the above decisions, I conclude that the multiplier adopted by the magistrate was reasonable.

Counsel for the Appellants in his submissions urged the court to find that by awarding damages under both the Law Reform Act[30] and the Fatal Accidents Act[31]the awards were duplicated. **P. S. Atiyah** on Accidents Compensation and the Law[32] states that:-

> *"... hard reality enters this extraordinary legal stage, the law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from an award under the Fatal Accidents Act on the legal justification on pretext that the inheritance is a "gain" from the death which must be set off against the loss."*

The Court of Appeal decision in *Kemfro vs. A. M. Lubia and Olive Lubia* **[33]**where that court inter alia said -

> *".. the net benefit will be inherited by the same Dependants under the Law Reform Act and that must be taken into account in 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."*

That court also proceeded to add -

> *"This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that -*
>
> *"the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act … anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya."*

The relevant and corresponding provision in our law is Section 2(5) of the Law Reform Act[34] which reiterates the provision and says: -

> *"(5) the right 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 dependants by the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom."*

Discussing the above provisions, **Anyara Emukule** J in Benedeta *Wanjiku Kimani v Changwon Cheboi*

& another[35]

> *"In common law jurisprudence of which Kenya is part, the courts have evolved two principles, **loss of expectation of life and pain and suffering** by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering ….... ....The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident.. .... It is of course correct both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estate. These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above."*

In other words, the reasoning by the learned judge which I agree with is that these damages must be capped in the minimum so that the estate does not benefit twice. The award arrived at by the learned judge is in my view the conventional figure. I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act.[36] My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act[37] cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act.

I am fortified in my above finding by the reasoning of **Karanja J** in *Richard Omeyo Omino vs Christine A. Onyango*[38]where the learned judge discussing the provisions of Section 2 (5) of the Law Reform Act[39] cited above had this to say:-

> *"The Law Reform Act[40] Section 2 (5) provides that the rights conferred by or under 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.[41] This therefore means that a party entitled to sue under the Fatal Accidents Act[42] still has the right to sue under the Law Reform Act[43] in respect of the same death.*
>
> *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[44] are "taken into account". This 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,[45] the trial judge bore in mind or considered what he had awarded under the Law Reform Act[46] for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."*

In conclusion, I find nothing to show that the award appealed against *is inordinately high, or is inordinately low.* Further I find nothing to show that *the estimate is erroneous nor has it been shown that the award is based on wrong factors nor has it been demonstrated that the award is founded on wrong principles of law.*

Accordingly, I find no justifiable basis to warrant this court to interfere with the said award. Having so found, I found no merits in the grounds of appeal. The upshot is that I hereby dismiss this appeal with costs to the Respondents.

Orders accordingly

Dated at **Nyeri** this **18th** day of **February** 2016

John M. Mativo

Judge

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[1] Cap 32, Laws of Kenya

[2] Cap 26, Laws of Kenya

[3] **Nyeri civil appeal no. 147 of 2002**

[4]{Milimani} Hccc no. 165b of 2000

[5] Nairobi (Milimani) HCCS No. 1243 of 2001

[6] {1893} 6 R. 67, H.L.

[7] Ibid

[8] [1983] 1 NSWLR 1 at 16

[9] Supra

[10] Supra

[11] Supra

[12] Supra

[13] {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G) -

[14] Civil Appeal No. 69 of 1984

[15] Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

[16] [1941]1AII E.R. 297

[17] [1981] KLR 349

[18] {1935} 1 KB 99

[19] {1988}, 8 (203-220}

[20] Supra

[21] [1962] 1 GLR, 373,

[22] Apaloo J later became a High Court Judge of Kenya, Court of Appeal Judge in Kenya, and Chief Justice of Kenya

[23] [1942] 1 All ER, 657

[24] de Graft Johnson v. Ghana Commercial Bank (Royal Exchange Assurance Ltd 3rdParty) [1977] 1 GLR 179, Edusel, J

[25] (3rd Edition), pp 560 & 561, para. 909

[26]See the case of Daniels v. Jones [1961] 1 WLR 1103 @ 1110 – C.A.

[27] *Nairobi HCCC No. 1438 of 1998 unreported*

[28][2005] eKLR

[29] *Nairobi HCCC No. 4533/1993*

[30] Supra

[31] Supra

[32] 2nd edn. at p. 88

[33] {1982-1988} KAR 727

[34] Supra

[35] [2013]eKLR

[36] Supra

[37] Supra

[38] Kisumu Civil Appeal No. 61 of 2007

[39] Supra

[40] Ibid

[41] Supra

[42] Ibid

[43] Supra

[44] Supra

[45] Ibid

[46] Supra