REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 41 OF 2014

CHARLES KABURU.....APPELLANT

VERSUS

HELLEN CHESANG & WILSON K.

KORIR (suing as the legal representatives of

REUBEN KIPKURURI BETT – Deceased).....RESPONDENTS

(Appeal from the Judgment and Decree of the Chief Magistrate's

Court in Sotik (Hon. P. Olengo, PM) in Sotik Chief

Magistrate's Court Civil Case No. 16 of 2013)

JUDGMENT

1. This appeal arises out of the judgment and decree of the Principal Magistrate's Court in Sotik in **CM CC No.16 of 2013- Hellen Chesang & Wilson K. Korir (suing as the Legal Representative of Reuben Kipkurui Bett- deceased) versus Charles Kaburu**.

2. In the suit, the plaintiffs, who are the respondents in this case, had lodged a claim against the defendant, the appellant in this case, in respect of fatal injuries sustained by the deceased following a road traffic accident along the Litein - Kaplong road on the 12th of November, 2012. A consent on liability was entered on 3rd July, 2014 in the ratio of 60:40, the defendants bearing 60% liability for the accident while the plaintiffs accepted 40% liability on belief of the estate of the deceased.

3. In his judgment dated 3rd October, 2014 in the matter, the Learned Principal Magistrate, Hon. P. Olengo, made an award in damages as follows:

a) Pain and suffering – Kshs. 20,000.00

b) Loss of expectation of life – Kshs. 80,000.00

c) Loss of dependency – Kshs. 2,000,000.00

d) Reasonable funeral expenses – Kshs. 40,000.00

e) Special Damages – Kshs. 20,000.00

Less double entitlement a+b _ Kshs. 100,000.00

_ Kshs. 2,060,000.00

Less 40% contribution _ Kshs. 824,000.00

Net _ Kshs. 1,236,000.00

4. The appellant was aggrieved by the judgment of the trial court on quantum of damages and he has filed the present appeal to this Court.

In his undated Memorandum of Appeal filed in this Court on 29th October, 2014, the appellant raised the following grounds of appeal:

*1. **The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.***

*2. **The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.***

*3. **The Learned Trial Magistrate erred in not sufficiently taking account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.***

*4. **The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.***

*5. **The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.***

5. In a consent entered into writing on 15th July, 2016, the parties hereto agreed to canvass their appeal by way of written submissions. The appellant filed submissions dated 27th July, 2016, while the respondent filed submissions dated 14th August, 2016 and filed on 16th August, 2016. On 18th August, 2016, the parties asked the Court to rely on their respective submissions in rendering its judgment on the matter.

Analysis and Determination

6. The appellant is aggrieved by the award made by the trial magistrate in respect of three heads:

i. **Pain and suffering**

ii. **Loss of dependency**

iii. **Special damages**

Pain and Suffering

7. With respect to this item, the appellant is aggrieved that the Court made an award of kshs.20,000/-. His argument is that an award of kshs.10,000/- would have sufficed, his argument being that this is the conventional figure.

8. The respondents have not addressed themselves to this limb of the appellant's appeal. However, I note that they have relied on the decision of the court in **Butt vs Khan Civil Appeal No.40 of 1997 [1982-88] 1 KAR 1** for the proposition that an Appellate Court will not disturb an award in damages unless the award is so inordinately high or low as to represent an entirely erroneous estimate, or it is shown that the Judge proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure that was inordinately high or low.

9. Can the award of kshs.20,000/- made in this case be deemed to be so inordinately high as to warrant interference by this Court? The appellant argues that the deceased died instantly. The basis of this argument is that the plaintiff stated in her evidence that she went to the scene of the accident one hour later and found the body of the deceased at the scene. However, in my view, other than indicating that we have a lamentable manner of abandoning persons presumed to have died in traffic accidents, with no medical proof that they have indeed succumbed to their injuries, this evidence does not confirm that the deceased died instantly. In any event, I am not satisfied that the award of kshs.20,000/- in respect of pain and suffering is so inordinately high as to warrant interference by this Court. I would therefore dismiss this ground of appeal.

Loss of Dependency

10. The appellant is aggrieved by the award made under this head on two limbs: The multiplier used by the trial court and the amount of earnings used in the absence of proof of actual earnings.

11. On the multiplier, the appellant argues that the Court should have used a multiplier of 12 years instead of the 25 years used. According to the appellant, as there was no medical proof that the deceased was in good health before his death, and taking into account the vagaries and vicissitudes of life, and considering that the death toll on young adults had risen, a multiplier of 12 was, in his view, more appropriate. The respondent's argument on this limit is that the trial court was correct in using a multiplier of 25 years.

12. I have considered the law with respect to this item. In **Civil Case No. 373 of 2008 - Benedeta Wanjiku Kimani (suing as the administrator of the estate of Samwel Njenga Ngunjiri vs Changwon Cheboi & Another** the Court expressed the following view:

> ***"I have considered the Defendant Counsel's submissions together with cited authorities in support of the theory of imponderables of life. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of farm manager would remain in active work and retire. That period was acknowledged to be 60 years of age."***

13. The Court then went on to cite the words of Ringera J (as he then was) in the case of **Beatrice Wangui Thairu vs. Hon. Ezekiel Barng'etuny & Another** *(Nairobi HCCC No. 1438 of 1998 (unreported)*, as cited in the case of **Rev. Fr. Leonard O. Ekisa & Another vs. Major Birgen [2005] eKLR**, in which he stated:

> ***"....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 (Hannah Wangaturi Moche & Another Vs. Nelson Muya (Nairobi HCCC No. 4533/1993)."***

14. In the present case, the deceased was aged thirty two at the time of his death. No evidence was adduced by the defendant/appellant with respect to his state of health, nor was there evidence of the vicissitudes of life that would reduce his life expectancy to 42 years as opposed to 60. Given, in fact, that he was operating his own business and there was nothing to suggest that he would encounter anything that would reduce his lifespan or require his retirement, I am satisfied that the trial court was correct in using a multiplier of 25 years.

Earnings

15. With respect to the earnings of the deceased, the appellant takes the view that the amount of kshs.10,000/- used by the trial court was too high and excessive. In his view, given that the minimum wage between 2011 – (2012) was kshs.6,000/- the trial court should have used the lower figure of Kshs.6,000/-. The respondents counter that the Court took into account that the deceased was running a bar, and adopted an amount slightly higher than the minimum wage.

16. I agree with the respondents that I have no basis for interfering with the decision of the lower court on this head. The deceased was operating a bar, and while there was no proof of earnings, it seems to me that an amount of kshs.10,000/-, slightly above the then minimum wage of kshs.6,000/- is a reasonable amount. I am not satisfied therefore, that there is a basis for interfering with the decision of the lower court on this limb.

Special Damages

17. The tenor of the appellant's submissions on this head suggests that he was aggrieved with the trial court's decision on special damages and funeral expenses. However, it would appear from the conclusion in his submissions that the awards made in respect of these items was acceptable to him. I therefore need not address myself to these items.

18. Having come to the conclusions set out above, it is my finding that there is no basis for interfering with the decision of the lower court. I therefore find no merit in this appeal, and it is hereby dismissed with costs to the respondents.

Dated, Delivered and Signed at Kericho this 28th day of October, 2016.

MUMBI NGUGI

JUDGE