REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 98 OF 2010

WILLIAM KINYANJUI

SIMON NDUNGU KINYANJUI

(Suing as the legal representatives of the estate of

JANE FLORENCE NJERI KINYANJUI (deceased)**.....APPELLANTS**

VERSUS

BENARD M. WANJALA.....1ST RESPONDENT

MARGRET TONUI.....2ND RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable C.G MBOGO (CM), in ELDORET CMCC No. 612 of 2008, dated 12th May, 2010)

JUDGMENT

1. The appellants are aggrieved by the judgment and decree of the Chief Magistrate's court at Eldoret dated 12th May, 2010.

They had sued the respondents in the lower court seeking general damages under the Law Reform Act and the Fatal Accidents Act on behalf of the Estate of *Jane Florence Njeri Kinyanjui* and her dependants following a fatal road accident on 17th May, 2008. They also sought special damages in the sum of Kshs. 69,200, costs of the suit and interest at court rates.

2. In the course of the trial, the parties recorded a consent on liability on a ratio of 90:10 in favour of the appellants against the respondents. Hearing then proceeded for assessment of damages.

3. Judgment on quantum was entered for the appellants as follows;

i. Loss of dependacy – Kshs. 383,360
ii. Pain and suffering – Kshs. 10,000
iii. Special damages – Kshs. 59,030

Less 10% of liability apportioned to the plaintiffs.

The net amount awarded to the appellants was therefore Kshs. 407,151 together with costs and interest.

4. The learned trial magistrate refused to make any award for loss of expectation of life under the Law Reform Act arguing that such an award would amount to double compensation in view of the damages available under the Fatal Accidents Act.

5. The appellants were aggrieved by the learned trial magistrate's decision on quantum hence this appeal. In their memorandum of appeal, the appellants listed four grounds of appeal which are as follows;

i. *The learned Chief Magistrate erred in law and fact in applying the wrong principles in assessing damages both under The Law Reform Act, Cap 26 Laws of Kenya and The Fatal Accidents Act Cap 32 Laws of Kenya.*
ii. *The learned trial magistrate erred in law and fact in the exercise of his judicial discretion as to amount to abuse and improper exercise of a discretion.*
iii. *The learned trial magistrate erred in fact and law in awarding damages that were inordinately low as to amount to gross underestimation of the loss suffered by the estate of the deceased and her dependants.*
iv. *The learned trial magistrate erred in law and fact in failing to award damages under The Law Reform Act Cap 26 Laws of Kenya notwithstanding that the appellants were the personal representatives of the deceased.*

6. The appeal was prosecuted by way of written submissions; those of the appellants were filed on 28th October, 2015 while those of the respondents were filed on 9th November, 2015.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. As can be seen from the grounds of appeal and the submissions filed on behalf of the parties, the appeal is only limited to the quantum of damages awarded by the trial court. I am aware of the duty of the first appellate court which is to re-evaluate and consider afresh the evidence tendered before the lower court to draw my own conclusions remembering that unlike the trial magistrate, I did not have the benefit of seeing or hearing the witnesses.

> See: ***Mwana Sokoni V Kenya Bus Service Ltd (1985) KLR 931; Selle V Assoicated Motor Boat company ltd (1968) EA 123.***

8. I have considered the evidence on record, the judgment of the trial court, the submissions filed by the parties and the authorities cited. I find that the only issue that arises for my determination in this appeal is whether the learned trial magistrate erred in arriving at his decision on quantum of damages under both the Law Reform Act and the Fatal Accidents Act.

9. Before embarking on the task of resolving the above issue, I wish to observe that the principles which guide an appellate court in deciding whether or not to interfere with the award of damages made by the trial court have been established in various judicial pronouncements.

> ***In Kemfo Africa Limited t/a "Meru Express Services (1976)" & Another V Lubia & Another (1987) KLR 30*** the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge " ***it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…"***

10. Similarly in ***Butt V Khan (1977) 1 KAR*** the Court of Appeal held as follows;

> ***" An appellate court will not disturb an award of damages unless it is 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…."*** See also: ***Shabani V City Council of Nairobi Court of Appeal No. 52 of 1984 (1985) KLR 516.***

11. Turning now to the issue at hand, I wish to start by addressing the damages awarded by the trial court for loss of dependency under the Fatal Accidents Act.

It is not disputed that at the time of her death, the deceased was 26 years old; that she was not married but was a mother of two children and had been employed as a bar maid. The two appellants testified that the deceased had informed them that she used to earn a salary of Kshs. 4,000/- per month plus a daily allowance of Kshs. 200 bringing her total earnings to Kshs. 10,000 per month. The appellants did not however back up their claim with any documentary evidence or evidence from the deceased's employer.

12. Faced by lack of supportive evidence to prove the deceased's monthly earnings, the learned trial magistrate relied on the minimum wage guidelines in legal notice No. 38 of 2006 and adopted a multiplicand of Kshs. 4,792.

Though I wholly concur with the appellant's submissions that documentary evidence is not the only means of proving a deceased person's earnings and that as held by the Court of Appeal in ***Michael Hubert Kloss & Another V David Seroney & 5 others (2009) eKLR*** that a trial court ought to consider the evidence before it even if it did not include documentary evidence to determine what would reasonably be considered as the deceased's earnings, I am unable to fault the trial magistrate's reliance on the minimum wage guidelines in legal Notice No. 38 of 2008 since in this case, there was no credible or cogent evidence on the basis of which the deceased's earnings could have been determined. The evidence of PW1 and PW2 (the appellants) on the issue of the deceased's earnings in my view amounted to hearsay since the deceased's employer was not availed as a witness to testify on that point.

13. I have read Legal Notice No. 38 of 2008. I note that Kshs.4,792 was the minimum wage set for general labourers like cleaners, sweepers, gardeners, house servants, day watchman and messengers. The deceased having been a bar maid did not belong to this category of workers. I am in agreement with the appellant's submissions that the deceased would have fitted more in the other category of unskilled workers who included among others waiters for whom the minimum wage was set at kshs.4, 978. It is therefore my finding that the trial magistrate erred in using a multiplicand of Kshs. 4,792 instead of the one which was appropriate in this case which was Kshs. 4,978. I thus set aside the multiplicand of Kshs. 4,792 used by the trial court and substitute it with a multiplicand of Kshs.4,978.

14. The trial court used a multiplier of 20 years. In the learned magistrate's opinion, this was appropriate given the vagaries associated with the work of a bar maid. The appellants in their submissions in the lower court had proposed a multiplier of 30 years while the respondents had proposed a multiplier of 10 years. The appellants maintained their proposal on appeal but the respondents shifted their position and urged the court to uphold the multiplier adopted by the trial court as in their view, it was fair. They relied on the authorities of ***Jacinta Wangari V Kenya Bus Services Ltd (1996) eKLR*** and ***Dainty V Haji & Another (2003) 1EA 43*** where a multiplier of 18 years and 10 years was adopted for a deceased aged 28 and 27 years respectively.

Given that the deceased was aged 26 years at the time of her demise, I agree with the respondent's submissions that a multiplier of 20 years was fair and reasonable in the circumstances of this case. Besides, I am guided by the Court of Appeal in ***Kiruga V Kiruga & Another (1988) KLR 348*** where the court held *inter alia* that:

> ***"Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed".***

I therefore find no reason to disturb the trial courts finding on this point. I thus uphold the multiplier of 20 years.

15. On the dependency ratio, though it is clear from the evidence that the deceased was not living with her two children, there is evidence from the two appellants that she used to send each one of them between Kshs. 2,000/- and Kshs. 3,000/- monthly to pay school fees for her children. The 1st appellant, who was

the deceased's father testified that he also relied on some of these money for his own use. The respondents did not offer any evidence at the trial and therefore, these claims by the appellants were not controverted.

16. The trial court adopted a dependency ratio of 1/3 without giving any reason for his decision. Given that the deceased had two children and a father who depended on her income, it is my finding that a dependency ratio of 2/3 would have been more reasonable and most appropriate in this case. Consequently, I set aside the dependency ratio of 1/3 adopted by the trial court and substitute it with a ratio of 2/3.

17. In view of the foregoing, damages for loss of dependency would work out as follows;

4,978 x 12 x 20 x 2/3 = Kshs. 796,480.

I therefore set aside the award of damages awarded by the learned trial magistrate for loss of dependency and substitute it with an award of Kshs. 796,480.

18. Under the Law Reform Act, the trial court only awarded damages for pain and suffering. The same were awarded in the sum of Ksh.10,000 on grounds that the deceased had died instantly. Though there was evidence to prove that the deceased died on the same day of the accident, there was no clear evidence to confirm whether she died immediately on impact or later when undergoing treatment. PW1 only saw her body at the Moi Teaching and Referral Hospital on the day after the accident.

19. Damages for pain and suffering are meant to compensate the Estate of a deceased person for the pain and suffering the deceased had endured before succumbing to his or her injuries. Very nominal damages will be awarded under this head if the deceased died immediately after the accident. Damages would however vary depending on the time that lapsed before death occurred. In other words, if the pain and suffering was prolonged before death occurred, higher damages would be awarded. If death occurred immediately, only nominal damages would be awarded.

In the absence of evidence showing when exactly the deceased died after the accident, I am unable to disturb the award of Kshs. 10,000 given by the trial magistrate on the head of pain and suffering in this case. The same is consequently upheld.

20. As noted earlier, the trial magistrate declined to make any award for loss of expectation of life on grounds that such an award if made would amount to double compensation as an award had already been made under the Fatal Accidents Act.

This was clearly a misapprehension of the law on the part of the trial magistrate. The law is that damages can be awarded under both the Law Reform Act for the benefit of the Estate and under the Fatal Accidents Act to compensate the deceased's dependants for their loss of dependency provided that in assessing damages for loss of dependency, those awarded under the Law Reform Act must be taken into account – ***See Kemfro Africa Ltd t/a Meru Express Services & Another V Lubia & another (Supra).***

21. The ***Law Reform Act*** at ***Section 2(5)*** settles this point beyond any peradventure. The section is in the following terms;

> ***"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 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)".***

22. Given the foregoing, there is no doubt and I so find that the learned trial magistrate was clearly wrong

in declining to make any award for loss of expectation of life. The deceased's Estate which was represented by the appellants was entitled to damages for loss of expectation of life, her life having been abruptly cut short at the young age of 26 years by the road traffic accident. I find that a conventional sum of Kshs. 100,000 would be fair compensation under this head. In the circumstances, I reverse the trial magistrate's decision declining to award the appellant's damages for loss of expectation of life. For the reasons stated above, I award the appellants damages under this head in the sum of Ksh.100,000.

23. Special damages awarded by the trial court were not contested on appeal. The same were pleaded and proved. The learned trial magistrate was therefore right in awarding the said damages to the appellants. This award is consequently upheld.

24. In conclusion therefore, this appeal partially succeeds. I set aside the judgment of the lower court and in its place, I enter judgment in favour of the appellants in the following terms;

i. Loss of dependency - Kshs. 796,480.00
ii. Pain and suffering - Kshs. 10,000.00
iii. Loss of expectations of life - Kshs. 100,000.00
iv. Special damages - Kshs. 59,030.00

Total - Kshs. 965,510.00

Less 10% contributory negligence - Kshs. 96,551 .00

25. From the above calculations, the net amount awarded to the appellants against the respondents jointly and severally is Kshs.868,959. The amount will attract interest at court rates from today's date until full payment.

The respondents will bear the appellants costs in the lower court but each party shall bear his own costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 17th **day** of December 2015.

In the presence of:-

Mr. Apere holding brief for Mr. Omondi for the Appellants.

No Appearance for the Respondents

Ms. Naomi Chonde Court Clerk.