REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 99 OF 2012

JEMU GABRIEL MAZERA …… 1ST APPELLANT

OMAR ABUBAKAR ……. …..... 2ND APPELLANT

-V E R S U S-

HUSSEIN JAMA ……..... 1ST RESPONDENT

ADEN JUMA (suing as the Administrators of the Estate

Of IBRAHIM HUSSEIN JAMA**) ……...……..…….. 2ND RESPONDENT**

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Voi delivered by Hon. S. M. Wahome (PM) on 10th May, 2012)

JUDGMENT

1. Respondent filed before the Principal Magistrate's Court **Voi Civil Case No. 97 of 2010**. His claim against Appellants was for award of damages in respect to the Estate of his late son Ibrahim Hussein Jama (**Deceased**). He sought damages under the Law Reform Act and the Fatal Accident Act. Before the hearing of that case parties consented on liability of 45% against Respondent and 55% against Appellants.

2. The Learned Trial Magistrate after receiving evidence only from Respondent made the following awards:

- **Loss of dependency Kshs. 500,000/-**
- **Pain and suffering Kshs. 10,000/-**
- **Loss of expectation of life Kshs. 100,000/-.**

That amount was then calculated on the agreed liability ratio.

3. This appeal was filed by the Appellants based on one single ground; that the Learned Magistrate erred in awarding excessive damages.

4. Respondent filed a Cross Appeal based on the following grounds-

- **That the Learned Principal Magistrate erred in law and in fact in finding that the**

dependency ratio was one-third not two-third.

- **That the Learned Principal Magistrate erred in law and in fact in awarding loss of dependency using the dependency ratio of one-third.**

- **That the Learned Principal Magistrate erred in law and in fact in awarding a sum of Kshs. 500,000/- as loss of dependency and not Kshs. 1,000,000/- as proposed.**

- **That the Learned Principal Magistrate misapprehended the evidence and so arrived at a figure of loss of dependency that was inordinately low as to represent an erroneous estimate.**

APPELLANT'S SUBMISSIONS

5. On loss of dependency Appellants submitted that the Trial Magistrate erred to have taken Deceased earning as Kshs. 5,000/- per month. Appellants' Learned Counsel submitted in writing:

> **"The Court (Magistrate's Court) only indicated that the Deceased was a casual labourer but did not establish what kind of casual labourer he was."**

On that submission Learned Counsel proposed that the trial Court should have chosen Kshs. 3,000/- as the earning of Deceased. On lost years Appellants submitted that the trial Court erred in law and fact by adopting a multiplier of 25 years, Appellants submitted that the lost years ought to have been 12 years. In that regard Appellants relied on the case **ROGER DAINTY –Vs- MWINYI OMAR HAJI & ANOTHER (2004)eKLR**, where the Court stated-

> **"Regarding lost years there is no guarantee of life for any period of these days (sic) an expectation of life is reduced by the many risks now to be encountered within modern living. The multiplier proposed is quite high then and it is my view that for a 27 years old person he could have been expected to continue in life for perhaps a further 15 years. Therefore I find the multiplier of 10 would be reasonable."**

In addition Appellants submitted that dependency ratio that the lower Court considered of $^1/_3$ should not be interfered with.

6. On the award under the head of pain and suffering Appellants relied on their submissions before the Magistrate's Court where they relied on the case **KINYOSI KITUNGI –Vs- SIMON OKOTH OBOK & ANO. HCCC No. 1202 of 1992** where it was held-

> **"I would not have awarded any award under this head. The reason being that the Deceased died instantenously …."**

7. On special damages Appellants submitted that Respondent only proved the amount of Kshs. 10,180/- out of the amount pleaded in the plaint. On this submission Appellant relied on **ZACHARIA WAWERU THUMBI –Vs- SAMUEL NJOROGE THUKU [2006]eKLR** where it was held-

> **"This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test."**

ANALYSIS OF APPEAL

8. On loss of dependence I am in agreement with the submissions made by Respondents' Learned

Counsel that the Respondents having given evidence that Deceased was 24 years, which evidence was not challenged by any contrary evidence the trial Court did not err to have determined that age. It is important to remember that Respondent was the father of the Deceased and he, more than any one else, was well placed to testify on the age of Deceased.

9. Respondent also gave evidence which was not contradicted by defence that Deceased was earning Kshs. 5,000/- per month as a casual labourer. In my view that evidence, in the absence of any other contrary evidence, was sufficient to prove Deceased's earnings on a balance of probability.

10. Having considered the evidence on record I also find that the trial Court cannot be faulted on using multiplier of 25 years. Being a casual labourer, that is being employed in informal sector, in all probability Deceased would not have retired at the age of 60 years. It is possible that he could have continued to work until his health gave in. It is for that reason I do not fault the use of that multiplier.

11. On pain and suffering award by the Learned Magistrate I am of the view that even if the death of Deceased was not referred to by Respondent, I find that the award of Kshs. 10,000/- cannot be interfered with. On this I rely on Appellants' own authority **HASSAN A. DERA –Vs- SONI FUEL INJECTION CO. LTD (2006)eKLR** where the Court held-

> **"There is evidence that the Deceased died instantly. I award the Plaintiff Kshs. 10,000/-."**

12. Similarly I decline to interfere with the award on loss of expectation of life.

13. Contrary to what was submitted by Appellant, Respondent by his Plaint pleaded under the head of special damages Kshs. 80,800/-. Out of that amount the Court only found the amount of Kshs. 71,800/-. Respondent produced receipts for the amount in excess of the amount awarded but because some of the receipted had not been specifically claimed, the Learned Trial Magistrate only awarded for the amount prayed for and for which receipts were produced. I cannot fault that award. That finding is in keeping with the holding of **ZACHARIA WAWERU** (supra).

RESPONDENTS CROSS APPEAL

14. Although Respondent presented 4 grounds in his cross appeal in essence he was only aggrieved, according to his submissions, with the trial Court's use of multiplier of $^1/_3$. This is what the trial Court stated in reaching that conclusion-

> **"The Plaintiff has proposed a multiplier of 25 years which is acceptable to the Court. However, the dependency rate cannot be $^2/_3$. It is most improbable that the Deceased's earning that used to go his parents were at two-thirds. In the view of the court $^1/_3$ would be appropriate since the 1st Plaintiff told the court that he even sold his camels to pay the funeral expenses. The foregoing shows that the 1st Plaintiff also earns some livelihood for himself."**

The Court in the case **JOSEPH WACHIRA MAINA & ANOTHER –Vs- MOHAMMED HASSAN (2006)eKLR** considered the principle that should guide the Appellate Court in considering trial Court's assessment of damages as follows-

> **"The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of ALI –Vs- NYAMBU T/A SISERA STORES [1990]KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in NANCE –Vs- BRITISH COLUMBIA ELECTRIC RAILWAYS CO. LTD [1951]AC 601 at page 613 where it held that:**

'The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –Vs- Lovell [1935] IKB 354) approved by the House of Lords in Davis –Vs- Powell Duffryn Associated Collievers Ltd. [1941]AC 601."

With that principle in mind and noting that the Learned Magistrate gave a basis for finding the multiplier I cannot say that the trial Magistrate was wholly erroneous as to attract interference of this Court. There is no merit, therefore in the Cross Appeal.

CONCLUSION

15. In the end the Appeal and the Cross Appeal are hereby dismissed.

Each party shall bear their own costs.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE