REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 309 OF 2013

DAVID KIMATHI KABURU.....APPELLANT

VERSUS

GERALD MWOBOBIA MURUNGI (SUING AS LEGAL

REPRESENTATIVE OF THE ESTATE OF JAMES MWENDA MWOBOBIA(DECEASED)

JUDGMENT

1. The appellant was the defendant at the lower court. The respondent had been sued by the appellant as a legal representative of the estate of James Mwenda Mwobobia claiming General Damages under both the Law Reform Act and the Fatal Accident Act. Special damages of Ksh. 83,410/= with costs and interest. That on 3rd April, 2013 the parties ***recorded a consent on liability under the following terms:-*** "By consent judgment on liability against the defendant at 90:10 in favour of the plaintiff".

That after respondent giving evidence and calling one witness the appellant opted not to give evidence. The trial court after considering the evidence awarded the respondent a total sum of Ksh. 2,009,826/= with costs and interest.

2. The Appellant being aggrieved by the learned trial magistrate's judgment preferred this appeal on quantum of damages setting out 8 grounds of appeal which are all interrelated as they all deal with the assessments of damages. The grounds of appeal are listed as following:-

1) THAT the Learned Magistrate erred in law and in fact in making a finding that the Defendant/Appellant had not proved his defence on quantum to the required standard.

2) THAT the Learned Magistrate erred in Law and in fact in making a finding that the Defendant/Appellant had not proved his defence on quantum yet the Plaintiff/Respondent did not produce any pay slip or any document to show that the deceased was earning.

3) THAT the Learned Magistrate erred in Law and in fact in making a finding that the Plaintiff/Respondent had proved his claim on quantum on Loss of Dependency/Lost years whereas the Plaintiff did not produce any documents to show the deceased's earnings.

4) THAT the Learned Magistrate erred in Law and in fact in relying on the uncorroborated evidence of PW2 (DONISIUS MBURUGU ITIRAI) when making a finding that the deceased

earned between Kshs. 18,000/= and Kshs. 26,000/= per month.

5) THAT the Learned Magistrate erred in Law and in fact in relying on the uncorroborated evidence of PW2 (DONISIUS MBURUGU ITIRAI) and erroneously adopting Kshs. 18,000.00 as the multiplicand.

6) THAT the Learned Magistrate erred in fact and in Law in failing to consider the Defendant/Appellant' Submissions.

7) THAT the Learned Magistrate erred in Law and in fact in making a finding that the Plaintiffs had proved their case on a balance of probability in view of the evidence before court that the deceased was not earning.

8) THAT the Learned Magistrate decision is contrary to and against the weight of the evidence.

3. The court ordered that this appeal be determined by way of written submissions. The Appellant's counsel filed his submissions on 25th August, 2014 with no authorities in support thereof whereas the respondent's counsel filed his submissions on 6th October, 2014 with several authorities in support. That when the appeal came up for hearing both counsel relied on their written submissions.

4. The Appellant's submission in this appeal is that he relies on the submission filed in the trial court and further on submissions in this appeal. The Appellant submitted that the burden of proof lied on the respondent to prove his case referring to section 107(I) and (2) of the Evidence Act which states:-

"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts while he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

The appellant in emphasizing that point referred to the case of:- ***TIMSALES LTD VERSUS STEPHEN GACIE NAKURU C.A. NO. 74 OF 2000*** where the state court held:-

"A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if the was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so. An exception may be in a case where the circumstances under which the accident occurred are such that the doctrine of re is a coquitor can be drawn on."

The appellant faulted the learned trial magistrate in law and fact in his finding that the deceased was earning a salary of Ksh. 18,000/= per month while no document was produced in evidence to support that allegation and further in adopting the salary of Ksh. 18,000/= and a multiplier of 30 years resulting to an award of Ksh. 2,160,000/=. The appellant refereed to the case of:- **NEW LEATHER MANUFACTURING FACTORY LIMITED VERSUS JOHN MBUVI MBITI (2013) eKLR** in which Hon Lady Justice H.M. Okwengu, as she then was, relied on the case of **BUTLER VERSUS BUTLER (1984) KLR 228** which provides that:

"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

The Appellant having referred to the above mentioned case has in this appeal urged the court not to interfere with the award under the Law Reform Act as the learned trial magistrate's award is reasonable under that sub-heading, however on the award under the Fatal Accident Act the Appellant submitted that the deceased at the time of his death was aged 28 years and was unmarried and supported his siblings and his parents. PW2 testified that whenever opportunity arose he could make an average of Ksh. 18,000/= to Ksh. 26,000/= but no evidence was adduced in support and no proof of earnings was produced. The appellant attacked the evidence of PWI and said it was short of proving the deceased earnings urging that earnings could have easily been proved by production of copies of records even on ownership of motorcycle urged to belong to the deceased. He also urged the respondent purportedly to have been a farmer earning Ksh. 300,000/= he could not be a dependant of the deceased earning Ksh. 18,000/=. The appellant urged court in view of evidence of PWI and PW2 to treat the figure of Ksh. 18,000/= as alleged by PW2 as unreasonable, uncorroborated, untrue and contrary to the weight of evidence and reduce the amount. The Appellant urged that he is not ignorant of the training the deceased had undergone and the fact that he could have earned not less than Ksh. 10,000/= however he was not in a continuous employment and only earned when there was an opportunity of work available as per evidence of PW2. He urged court for the purpose of calculating the loss of dependency to adopt a figure of Ksh. 6,000/= being minimum wage to accommodate the irregular trend of work by the deceased. The Appellant further urged as the deceased was not married and his father had a stable income the appellant implored the court to find he was spending almost 1/3 of his earnings on his dependants if at all he did. The Appellant further submitted the deceased had no stable job that could be decisively be determined by retirement age and sought that the court find that the multiplier of 30 years adopted by the lower court to be too high in the circumstance and reduce the same to 20 years as the deceased was 28 years at the time of his death and that it is not practical that the deceased could have supported the dependants for 30 years adopted by the trial court. The Appellant refereed to the case of:- **JACINTA WANGARI VERSUS KENYA BUS SERVICES LTD (1996) eKLR** where the court adopted a multiplier of 18 years for a deceased who was aged 28 years at the time of death. The Appellant therefore sought the re-assessment of damages under the **Fatal Accident Act** as follows:-

6,000 x 20 x 12 x 1/3 – 480,0000/= and special of ksh. 73,140/= as proved all in all being Ksh. 613,140/=. The Appellant further argued that both awards were computed together and none was deducted thereby resulting to a double award to the Respondent. The Appellant referred to the case of **KEMFRO AFRICA LTD VERSUS A.M. LUBIA (1982 – 88) IKAR 727** as referred to in **LOISE WAIRIMU MWANGI & ANOTHER VERSUS JOSEPH WAMBUA KAMAU (2006) eKLR** in which it was observed that:-

> ***"when the people entitled to the deceased's estate are the same persons of whose benefit the action under the Fatal Accidents Act is brought, the award for loss of expectation of life is deductible".***

In light of the above mentioned authority the Appellant sought to have Ksh. 50,000/= awarded for loss of expectation of life under the **Law Reform Act** deducted from the sum the respondent proposes of Ksh. 480,000/= to leave a balance of Ksh. 430,000/= and same be subjected to the liability as agreed in the ratio of 90:10 percent. The Appellant prayed that the appeal be allowed with costs.

5. The Respondent is opposed to the appellant's appeal. The Respondent in his arguments merged the Appellant's ground of appeal numbers 2, 3 and 7 submitting that the learned magistrate did not error in law and fact in relying on the evidence placed before him by the respondent in making a finding that the deceased earned between Ksh. 18,000/= and Ksh. 26,000/= per month. The Respondent submits that the Appellant failed to rebuilt the Respondent's evidence. The Respondent relied on evidence of PW2. PWI Gerald Mwobobia M'Murungi father to the deceased produced exhibit P8 showing motorcycle registration No. KMCM 997 Q belonged to the deceased. That the deceased was trained in Electrical Engineering at Kabete Training Institute. He produced exhibit P9, P10 and P11 on the deceased education and training. He also produced letters from KPLC and Chloride Exide to confirm of the deceased training as exhibit P12 and P13. PWI adduced evidence that the deceased used to work for KPLC and thereafter became self-employed and also used to work with one Mr. Mburugu. He was also a farmer with cows and

goats. That the deceased owned a motorcycle which was used in boda boda business and was making an income from the business of about Ksh. 20,000/=. That the deceased used to assist PWI care for his own siblings and that plaintiff also depended on the deceased. PWI testified the deceased died at the age of 28 years. PW2 Dionisius Mburugu Itiari, testified that the deceased was his foreman and he had a bike of his own which he used in his work as an electrician. That PW2 and the deceased had registered their own business in the name and style of Nkubu Electricals and produced exhibit P14. PW2 testified that he used to pay the deceased Ksh. 700 – 1,000 per day on the days he was on duty. The trial court in its judgment found that from evidence of PWI and PW2 the deceased was qualified technician with a diploma from Kabete Technical Training Institute in electronics Engineering. This fact was supported by respondent's exhibits, though the deceased was not formally employed he earned his living from private engagements as well as working with PW2 on available assignments. The Appellant contended that the learned trial magistrate was in error in adopting an income of Ksh. 18,000/= in absence of any payslip or documentary evidence on earnings. The Respondent in support of his contention that the trial court did not error refereed the court to the case of ***ESTHER NYAMBURA VERSUS CARNOS RASHID CHEPAURENGE AND ANOTHER (2008) eKLR*** where Hon. D. K. Maraga, J, and he then was stated:-

"Oral evidence is the testimony of a living person examined in court or before commissioner appointed by.....oral evidence if credible is sufficient to prove a fact. It is only where there are contradictions in oral evidence which occurs in most cases that documentary evidence must be looked for in order to see on which side the truth lies".

6. I have carefully considered the evidence of PW1 and PW2 on the deceased occupation. He was a trained electrician and used to get assignments from PW2 at a daily pay of Kshs. Between 700-1000/=. He was a farmer and certainly used to get an income from the farming business. He was further to the above a boda boda cyclist. The evidence of PW1 and PW2 on the deceased earnings was not controverted by the appellant. The job the deceased was engaged in are not jobs by which one is expected to have a payslip or a voucher to prove earning. It is not hard from the kind of jobs the deceased was doing to earn between Kshs.700-Kshs.1000/= per day. I therefore find the learned trial magistrate applied the facts before him correctly and took into account the existing trend as of the time of the deceased and in arriving at an income of Kshs.18,000/- per month the court did error nor did the court need a payslip or document evidence to arrive on the deceased earnings the evidence of PW1 and PW2 was sufficient and was not contradicted or challenged by the appellant. The amount proposed by the appellant of Kshs.6000/- per month is not supported by any evidence on record and no basis has been laid in support of that figure. This court was yet referred to the case of **ALBERT ODAWA V GICHIMU GICHENJI(2007) eKLR** in which Hon. Martha Koome, J***(as she then was), stated"*** On the issue of loss of dependants, no evidence whatsoever was adduced before the trial court on the deceased's earnings and the multiplier of Kshs.8,100 was without basis. In absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased income by applying the basic salary which is paid to unskilled workers".

7. In the instant case, evidence was laid before the court on the deceased earnings. The earnings was given as between Kshs.700-1000/= per day for electrical workers. There was no estimation of income from farming and bodaboda business but there was no evidence to controvert the respondent's evidence that the deceased made additional earnings from boda boda business and farming. There was evidence of the deceased being a skilled worker and trial court took that fact into account. The appellant's submissions that the court applies the salary of unskilled worker is untenable as the deceased was skilled worker. That there was evidence to guide court on the deceased earnings and as such the trial court was property guided on deceased income of between Kshs.18000.- and Kshs.26,000/- per month and in taking the lowest figure the court did not error after all. The figure was based on evidence on record.

The court is alive of the fact that in Kenyan Society, that most of the individual earnings need not be proved by production of documents such as banking statements or payment vouchers or payslips. Further to the above with the modern technology in whichever payments are to be effected through use of mobile phones or where payments can be made by cash without requirements of payments by cheques or

execution of documents to confirm payments it is not necessary to produce documentary proof. The court of appeal in the case of ***JACOB AYIGA MARUJA – VS SIMEON OBAYO (2005 eKLR*** the Court of Appeal stated:-

> ***" in our view, there was more than sufficient material on record from what the learned Judge was entitled to and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Ksh. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things".***

In light of the above mentioned case and in view of the evidence adduced by the respondent I find no merit in the Appellants ground of appeal No's 2, 3, 4, 5 and 7 of appeal and the same are dismissed.

8. The Appellant on ground No. 6 of the appeal has faulted the trial court in failing to consider his submission. The learned trial magistrate in his judgment considered the evidence adduced before him as well as the parties submissions before arriving at his judgment. The trial court in his judgment took into account of the authorities laid before it and took into account the rate of inflation. The trial court was bound to base its judgment on evidence before him and as such I find that no error was made by the trial court; consequently I find no merits in appellant's ground No. 6 of appeal and the same is dismissed.

9. The appellant under grounds No. 1 and 8 faulted the trial magistrate's judgment on the grounds that it was contrary to and against the weight of evidence. The only evidence on record and adduced before the trial court was that of the respondent and his witness. The Appellant did not adduce any evidence or call any witness to rebut the Respondent's evidence adduced before the court. The appellant in his submission attempted to challenge the multiplier of 30 years adopted by court, yet in his grounds of appeal, that is not one of the grounds of appeal. The trial court correctly observed that the deceased was in private business, was aged 28 years and that the maximum retirement age in Kenya is now 60 years. The court in applying a multiplier of 30 years took 60 years retirement age of civil servants but failed to note the deceased was in private sector where the retirement age of 60 years do not apply as one can continue working even beyond 60 years and generally retirement depend on the nature of the business and health of the individual.

10. The position is that in private business retirement is by far beyond 60 years and comes when one is unable to carry out any activities. I note that the multiplier of 30 years was not challenged in this appeal and no leave was sought to include and argue that ground and as such the court deems and finds that the multiplier of 30 years is not challenged at all. On the Respondent's earnings the appellant submitted that he was not a dependant of the deceased but deceased ought to have been the one who PWI was supporting. PWI's evidence is that the deceased was supporting his siblings and PWI. The deceased income aside he confirmed he used to get assistance from the deceased. The fact that PWI was earning Ksh. 300,000/= is not an indicator that the deceased with his small salary he was not assisting him. That further to the above, that is not a justification to say that the deceased did not have dependants. The appellant did not prove before the initial court the deceased had no dependants. The trial court heard the deceased had his parents and three siblings as his dependants. The trial court applied 1/3 ratio of the deceased earnings at arriving at the sum of loss of dependency. The trial court acted correctly and made no error. The sum awarded under the Law Reform Act was deducted from the sum found due and both awards under the Fatal Accident Act and in Law Reform Act were not computed together. I find that there was no double award to the respondent as per trial court's judgment. In addition to the above, the appellant had not raised in his appeal that as one of the grounds that the award under Law Reform Act had not been deducted from the cumulative award under the Law Reform Act and the Fatal Accidents Act. I find no merits in ground No's 1 and 8 of the appeal and the same are dismissed.

11. The upshot is that the appellant's appeal has no merit in all the grounds of appeal and the same is dismissed with costs of the appeal to the Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF NOVEMBER, 2014

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Kiogora holding brief for M/s Kairu & MC. Court Advocates for Appellant

2. Mr. Mwirigi for Respondent

J. A. MAKAU

JUDGE