REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 41 of 2006

STEPHEN GITAU.....1ST APPELLANT

BENSON KIARIE KARANJA…….……2ND APPELLANT

VERSUS

MURAGURI NDUGIRE…….……...……RESPONDENT

JUDGEMENT

The court below entered judgment against the appellant in the sum of Kshs.455,445.00 representing the appellant's 60% liability in the road accident involving his motor vehicle Registration No.KAK 605F and the deceased.

Being aggrieved, the appellant has preferred this appeal on 6 grounds which are to the effect that the appellants' submissions on quantum were ignore as the lower court heavily relied on those of the respondents; that the judgment of the court below did not conform to the law; that the lower court took into consideration irrelevant factors not pleaded and that the award was inordinately high and not based on any material laid before the court.

Arguing these grounds, learned counsel for the appellant submitted that the judgment ought to be set aside as it does not conform to the law, ignored the appellants' submissions and based on facts not pleaded or submitted. The $^{2}/_{3}$ ratio ofdependency adopted by the lower was in error, it was further submitted: that the *H.C.C.A.NO.41/2006* deceased being a single man, the ratio ought to have been $^{1}/_{3}$; that the lower court also awarded Kshs.3,000/= the earnings of the deceased without any basis; that a multiplier of 20 years was high; that the lower court failed to reduce the award under the Law Reform Act from the award under the Fatal Accident Act.

Responding to these submissions, learned counsel for the respondent contended that there were no submissions by the appellants before the lower court; that the learned magistrate applied relevant principles in arriving at her decision.

I have considered the foregoing submissions which are based on written submissions and authorities filed by counsel for the parties in this appeal.

It is settled that an appellate court will not lightly interfere with the trial court's finding on quantum of damages unless the appellant court is satisfied that the trial court in assessing the damages took into account an irrelevant factor, or left out a relevant fact, or that the amount awarded is so inordinately low or high that it must represent a wholly erroneous estimate of the damages. See Kemfro Africa Ltd. t/a Meru Express Service Vs. A. M. Lubia & Olive Lubia (1982-88) 1KAR 727 at 730.

Parties have settled the question of liability at 60/40% as against the appellant and respondent respectively. What fell for consideration by the court below was the appropriate quantum, the following facts not being in controversy;

i) that the deceased was 20 years old at the time he met his death

ii) he was unemployed having just completed Form IV

iii) he was unmarried

Bearing these facts in mind the learned magistrate adopted a multiplier of 25 years, a ratio of $^{2}/_{3}$, awarded Kshs.120,000/= for loss of expectation of life, Kshs.600,000/= for loss of dependency using Kshs.3,000/= as the deceased person's monthly earnings, Kshs.29,075.00 as special damages and Kshs.10,000.00 for pain and suffering, making a total of Kshs.759,075 less 40% contribution (Kshs.455,445/=). The only question therefore is whether the learned magistrate in coming to the above awards took into account matters which she ought not to have considered and whether she failed to take into account what she ought to have considered and whether the amounts awarded are so inordinately high that they amount to an erroneous estimates of damages.

Before I answer these questions, I need to observe that initially the hearing proceeded *exparte* and judgment entered in favour of the respondent. By consent, the said judgment was set aside and matter heard afresh only on quantum after apportionment of liability. The learned magistrate observed in her judgment that although the
respondent's counsel had filed written submissions that of the appellant had not done so. She cannot therefore be blamed for not considering what was not before her.

Secondly, the judgment of the learned magistrate being only confined to the issue of quantum of damages fully complied with the provisions of Order XX rule 4 of the Civil Procedure Rules, as it has a summary of the events leading to the death of the deceased, the fact that the plaintiff obtained a grant of representation before instituting the suit and that liability had been apportioned. She gave reasons for her decision, albeit brief. The ground that the judgment does not comply with the law must also fail. The only finding that the learned trial magistrate made which was not supported by evidence is the monthly earning of Kshs.3,000/= but that is what the magistrate estimated to be what would be the earnings of the deceased after completing training as a clinical officer, the deceased's career aspiration. He obtained grade D+ in his Form IV national examination.

The father was in the process of arranging for him to attend a college in Uganda. The plaintiff, as a parent expected the deceased on completion of the course to assist him financially. It cannot be said therefore that the learned magistrate proceeded on a wrong principle when she awarded the damages. As a matter of fact, she was quite modest and was indeed guided by authorities cited by the respondent's counsel. Perhaps the only aspect of the judgment that ought to be disturbed is that the learned magistrate failed to apply the principle in Davies & Another Vs. Powell Duffryn Associated Collieries Ltd (1942) All ER 657. See also Asal Vs. Muge and Another, (2001) KLR 203 where it was held, *inter alia*, that the award of damages for lost years under the Law Reform Act would go to the same persons who had been awarded damages for loss of dependency under Fatal Accident Act. That being so, the court stated that it was entitled to interfere with the award so that the total award was reduced by the amount awarded under the Law Reform Act.

In this case Kshs.120,000.00 ought to have been taken into account in awarding the final figure which would now translate to Kshs.335,445.00. The appeal, to that extent succeeds but the adjustment being minimal, I awards costs of this appeal and in the lower court to the respondent. Those are the orders of the court.

Dated, Signed and Delivered at Nakuru this 5th day of February, 2010.

W. OUKO
JUDGE