REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 46 of 2005

(Arising from Nyeri C.M.'s Civil Case No. 435 of 2003)

PAULINE NJERI MUTURI …….……....…APPELLANT

Versus

JOHN HIUKO MWANGI

(suing as the legal representative of the ESTATE OF

JOHN KAMAU MWANGI - DCD ……RESPONDENT

JUDGMENT

This is an appeal against the judgment and decree of R. Nyakundi, learned Chief Magistrate, sitting at Nyeri vide Nyeri C.M.C.C. No. 435 of 2003 delivered on 3rd August 2005. In the Memorandum of Appeal dated 2nd September 2005, Pauline Njeri Muturi, the appellant herein, put forward the following grounds of appeal:

(a) ***That the learned trial magistrate misapprehended the applicable law in assessing damages for the estate of the deceased and in compensation to the Dependants under the head "loss of dependency" and exercised his discretion wrongly in computing the amount available to the plaintiff.***

(b) ***That all factors held constant, the learned trial magistrate erred in law by making an award which was manifestly excessive in the circumstances.***

When the appeal came up for hearing, learned counsels appearing herein agreed by consent to file written submissions which they did to dispose of the appeal. Before delving into the merits and the demerits of the appeal let me give the brief background of the facts leading to the filing of this appeal.

By the plaint dated 12th June 2002, Jane Hiuko Mwangi (the Respondent herein) in her capacity as the legal representative of the estate of John Kamau Mwangi, deceased, sued Pauline Njeri Muturi (the appellant herein) for damages under the Fatal Accidents Act in respect of the death of her son as a result of injuries sustained on a road traffic accident which occurred on 6th January 2002 along Othaya-Kiriani road. The recorded evidence show that John Kamau Mwangi, deceased was a pillion passenger on a bicycle ridden and or controlled by one Paul Macharia along Othaya-Kiriani road when motor vehicle

registration No. KAL 290W driven by the appellant knocked down the bicycle and as a result the deceased sustained fatal injuries. It is stated in the plaint that the deceased was a class six pupil aged 17 years at the time of the accident. It is said he was in good health and that he had high prospects of getting a good job at the end of his studies. The defendant (now appellant) denied the plaintiff's allegations of negligence. In fact she attributed the accident to negligence on the part of the cyclist. At the end of the trial, the learned chief magistrate delivered his judgment on 27th July 2005 where upon he apportioned liability on a 50% ratio between the plaintiff and the defendant. In quantum the trial magistrate gave the following awards.

- Pain and suffering - Kshs. 5000/=
- Loss of expectation of life - KShs 100,000/=
- Loss of dependency - Kshs. 500,000/=
- Special damages - Kshs. 13,000/=

The appeal before this court is basically as against the award of Kshs. 500,000/= on loss of dependency.

Having given in brief, the history behind this appeal, let me now address my mind on the appeal. It is the submission of the appellant that the trial magistrate failed to appreciate the evidence tendered by the defendant (appellant) hence he proceeded to award an inordinately high amount in terms of general damages for loss of dependency. The plaintiff (Respondent) is of the view that the trial magistrate appreciated the applicable principles hence he arrived at an award which was not exaggerated. It is a well settled principle of law that an appellate court will not disturb an award of damages unless it is shown that the award is inordinately high or low as to represent an erroneous estimate or that the magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low. I have reconsidered the evidence, the submissions and the authorities relied by the parties and the trial magistrate. The trial magistrate stated in his judgment that it was difficult to make an award in respect of loss of dependency because the deceased was not earning an income. In fact he was in school. The learned trial magistrate appreciated the fact that it was difficult to assign a multiplication and a multiplier in calculating the lost years. He proceeded to award a lump sum for loss of pecuniary benefit which was reasonably expected from the deceased upon completing his studies. The trial magistrate relied on the decision of the court of Appeal in the case of Kenya Breweries Ltd =vs= Ali Mahindu saro C.A. No. 144 of 1990.

After a careful consideration of the issue in dispute I am convinced that the learned trial Chief Magistrate applied the correct principles in assessing damages under the Fatal Accidents Act in situations where the deceased was not an income earner. The question which remains to be answered is whether the lump sum of kshs. 500,000 was inordinately high. It is on record that the court of Appeal in Kenya Breweries Ltd =vs= Mohamed Saro [1991]K.L.R. 408 stated inter alia that:

"***Damages awarded on this head must be kept relatively low.***"

It is the appellant's argument that the trial magistrate did not take into account the deceased's age at the time of the accident as well as the income he earned and the academic performance of the child at school. It is also stated that the trial magistrate did not look at the previous awards of similar cases. There is evidence before the trial court that the deceased did well in school. There was no mention as to what the deceased dreamt to be. The deceased's academic performance were given to be good at the prompting of the appellant in cross examination. In order to determine whether or not an award is inordinately high, a court will look at the past awards and at times use hypothetical situations. I have considered the past decisions of this court and it is apparent that this court gave awards ranging between Kshs. 70,000 to Kshs. 252,000/=. It is not in dispute that the deceased was a good student. Assuming that the deceased at the end of his studies becomes a primary school teacher earning an average monthly income of kshs. 15,000/=, if a multiplier of 20 years is applied, the following figure will be the loss of dependency i.e. 20 x 15,000 x 12 x $^1/_3$ = Kshs. 1,200,000/=

It is obvious from the above that the figure given by the learned trial magistrate cannot be said to be inordinately high. Consequently I find no merit in the appeal. It is dismissed with costs to the Respondent

Dated and delivered this 13th day of November 2009.

J.K. SERGON

JUDGE

In open court in the presence of Miss Muchoki for Appellant and Ombongi h/b Wagiita for the Respondent.

Muchoki: I apply for stay of execution for 30 days.

Court: The appellant is given an of stay for 21 days.

J.K. SERGON

JUDGE