REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 70 OF 2018

KYOGA HAULIERS(K) LTD.....APPELLANT

VERSUS

KENNEDY SIMIYU (Suing as legal representative of the estate of EVANS

WANJALA LUMUNYASI).....RESPONDENT

(Being an appeal from the judgement of Hon. Mutai

SPM in Bungoma CMCC No. 195/2017 delivered on 28/9/2018)

JUDGEMENT

The appellant herein filed a memorandum of appeal dated 22nd October, 2018 raising the following grounds;

> **1. That the learned trial magistrate erred in law and in fact in applying the wrong principles of law in the assessment of damages.**
>
> **2. That the learned trial magistrate erred in law and in fact in awarding damages that were so inordinately high as to amount to a gross overestimate of the loss suffered by the estate of the deceased.**

In light of the above, the appellant urges this court to set aside the award of damages by the trial magistrate and in place thereof does make a fresh assessment of damages with costs to the appellant. Liability having been agreed in the ratio of 80:20 in favour of the respondent against the appellant.

Directions were given in this matter and parties proceeded to file their submissions. The appellant filed theirs on 20/7/2020 where they urged this curt to determine the twin issues of; whether the trial court erred in awarding quantum on loss of expectation of life and loss of dependency and secondly whether the appellate court can interfere with the discretion of the trial court on assessment of quantum and reviewing it.

On the first issue, counsel argues that the trial courts calculation of the loss of dependency using the multiplicand of Kshs 15,000 for 35 years multiplier and 2/3 all totaling Kshs 3,600,000 was erroneous and unreasonably high. That the figure of Kshs 200,000 for loss of expectation is equally high.

Counsel has argued that there was no evidence of earnings in the form of pay slip, that paternity of the children was not proved, that the birth certificates were obtained after the death of the deceased and lastly that there was no proof of the support rendered by the deceased o his children. Counsel argues that the award on this heading is speculative and unreasonable.

Counsel in support of this argument has referred to the cases of ***Sheikh Mushtaq Hassan Vs Nathan Mwangi Kamau Trasnporters and 4 Others (1986) KLR 457, Mwanzia Vs Ngalali Mutua and Kenya Bus Services (Msa) Limited & Anor.***

On the second issue, counsel has submitted that that this court is justified to interfere with the discretion of the trial court on the loss of dependency and the loss of expectation of life. Counsel urges this court to apply the global award of kshs 700,000/=. Counsel in support of this proposition has cited; **Chabhadiya Enterprises Ltd & Anor Vs Sarah Alusa Mwachi (suing as the legal administrator and personal representative of the state of late Faiza Musa-Deceased) (2018) eKLR**

The respondent in their submissions filed on 16/7/2020 has urged this court to uphold the trial magistrate's award, counsel has argued that the award was well within the Law Reform Act and the Fatal Accidents Act. He referred to the cases of ***Daniel Kuria vs Nairobi city council (2013)*** **eKLR**, ***Titus Ndungu Njuguna & anor Hanna waruguru gichuhi & Anor*** **(2019) eKLR** and ***Florence Mueni Mbuva vs***

China Wu Yi Limited and Wilson Githu(2014)eKLR

This being a first appeal, I am minded to set out the guiding principles while determining this appeal;

In S***elle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*** the court framed the rule in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally***

From these cases, the appropriate standard for review to be established can be stated in three complementary principles:

i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

In **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** it was observed:

> ***"In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."***

In this case, the deceased was an adult aged 22 years old and was employed as a driver earning Kshs 30,000/= per month. A driving licence was produced but no evidence supporting his earnings was produced. The trial magistrate in absence of proof of earning a earnings of Kshs 15,000/= per month which compared well with the minimum wages under the Minimum Wages Regulations obtaining at the time of death of the deceased.

On the second issue of whether the court can interfere with the discretion of the trial court on quantum and review it, I must first state the legal principles which guides courts in exercising discretion.

In Mbogo & Another versus Shah [1968] E.A. 93, it was held at page 96 that:-

> ***"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice".***

If this court must interfere with the award, the appellant must satisfy the conditions set in ***Butt v Khan (1977) KAR 1***, thus; the aggrieved party satisfies one of the two conditions:

1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

I do not find that the trial magistrate erred in the manner he assessed the damages as he alleged by the appellant.

The upshot of the above is that the appeal has no merit and is dismissed with costs to the respondent.

DATED and DELIVERED at BUNGOMA this 5th day of February, 2021

S. N. RIECHI

JUDGE