REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 180 OF 2015

MULTIPLE HAULIERS (E. A) LIMITED.....APPELLANT

VERSUS

JOSPHINE WAYUA NDOLA (Suing as the Administrator of the Estate

of the Late RACHEAL MWENDE NDOLA) ..... RESPONDENT

(Being an Appeal against the judgement dated 30th October, 2015 delivered by the Hon. Mwangi Senior Principal Magistrate in Machakos CMCC No. 736 of 2009).

BETWEEN

JOSPHINE WAYUA NDOLA (Suing as the Administrator of the Estate

of the Late RACHEAL MWENDE NDOLA) .....PLAINTIFF

VERSUS

MULTIPLE HAULIERS (E. A) LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL APPEAL NO. 179 OF 2015

MULTIPLE HAULIERS (E. A) LIMITED.....APPELLANT

VERSUS

JULIUS NZIOKA KYULWA (Suing as the Administrator of the Estate

of the Late **WELLINGTON MUTUKU.....RESPONDENT**

(Being an Appeal against the judgement dated 30th October, 2015 delivered by the Hon. Mwangi Senior Principal Magistrate in Machakos CMCC No. 735 of 2009).

BETWEEN

JULIUS NZIOKA KYULWA (Suing as the Administrator of the Estate

of the Late WELLINGTON MUTUKU.....PLAINTIFF

VERSUS

MULTIPLE HAULIERS (E. A) LIMITED.....DEFENDANT

JUDGEMENT

1. The Respondents through their respective Plaints filed sued the Appellant for negligence and sought for general damages under the Fatal Accidents Act, and under the Law Reform (Miscellaneous Provisions) Act, special damages and costs of the suit.

2. The Trial Court concluded that the Appellant was responsible for the accident that occurred on or about 11th June, 2006 and judgement on liability was entered in favour of the Respondents against the Appellants at 100% with the trial court awarding a net of Kshs 730,000/= to the estate of the late Wellington Mutuku and Kshs 880,000/= to the estate of the late Racheal Mwende Ndola.

3. The Appellant being aggrieved and dissatisfied by the part of the said respective judgements appealed against the same on the following grounds: -

> **1. The Learned Magistrate erred in law and fact in failing to appreciate the evidence of the Appellant's witnesses DW1 and DW2 with regard to how the accident occurred.**
>
> **2. The Learned Magistrate erred in law and fact in finding the Appellant 100% liable for the accident.**
>
> **3. The Learned Magistrate erred in law and fact in failing to attribute liability to the deceased driver of the motor vehicle registration KAT 197Z.**
>
> **4. The Learned Magistrate erred in law and fact in failing to apply the minimum wage applicable by law at the time the deceased passed away while assessing the loss of dependency.**
>
> **5. The Learned Magistrate erred in law and in fact in applying Kshs 7,500/= as multiplicand while assessing loss of dependency.**
>
> **6. The Learned Magistrate erred in law and fact by not considering the Appellant's submissions and authorities attached thereto in relation to liability and the applicable multiplicand.**

4. Looking at the grounds for appeal raised by the appellant, I feel that they are mostly centered on liability and quantum.

5. This being a first appeal I am guided by the principle in ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123***.I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusions.

6. The appeal was canvassed by way of written submissions.

7. The Appellant filed its submissions dated 21.12.2020 and filed on 26th of January, 2021. They indicated that grounds 1-4 of both filed Memorandum of Appeals set out the Appellant's grounds of Appeal with regard to liability. It was the Appellant's submission that the Respondents did not prove that the Appellant's driver was completely to blame for the accident. It was submitted that the Respondents failed to prove liability at 100% against the Appellant's driver and failed to attribute liability to the Deceased driver. It was their submission that the trial court proceeded on the wrong principles when it decided to apply a multiplicand of Kshs 7,500/= indicating the same figure as the minimum wage for an unskilled laborer while the prescribed minimum wage for an unskilled laborer was Kshs 4, 792/=. Counsel added that it is trite law that the law does not allow for prescribed minimum wage for unskilled labourer not living in Nairobi, Mombasa or Kisumu to be more than Kshs 4, 792/=.

8. The Appellant's counsel placed reliance on **Butt vs Khan (1977)1KAR** where Law JA stated that: -

> **"An appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low"**

Also in the case of **Kenya Breweries Ltd (1991) eKLR** it was held that,

> **"…. It is now well established that this Court can only interfere with a trial judge's assessment of damages where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred…"**

9. It was their submission therefore that the same principles enunciated in the above quoted cases are also applicable in the case at hand and that this Honourable Court do reverse the finding of the Learned Magistrate in as far as the multiplicand is concerned praying that the loss of dependency be awarded as **Kshs 383,360/=** to the **Estate of Wellington Mutuku** and **Kshs 479,200/=** to the **Estate of Racheal Mwende Ndola**.

10. The Respondent, Josphine Wayua Ndola, filed her submissions in Court on 9th October, 2018 and on record we don't have the filed submissions of the Respondent, Julius Nzioka Kyulwa. On the issue of liability, it was their submission that the court was right in holding the Appellant vicariously liable at 100%. The court was urged to dismiss the appeal on the grounds of liability. On the aspect of liability on the

third party, it was submitted that the Appellant failed to seek leave to enjoin the third party after close of pleadings and it is unprocedural for them to raise the issue on Appeal.

11. On the issue of quantum, it was submitted that the deceased was earning Kshs 10,000/= which the Appellant submitted as sufficient. It was submitted that under the **Regulation of Wages (General) (Amendment) Order, 2013, the minimum wage of a waiter (see Colum 1 part (b))** working within a city or municipality is approximately Kshs 9,000/= therefore, the trial's court's calculation of the special damages to be awarded was apt and this Honorable Court need not interfere with it as was decided in the Case **of Mbogo v. Shah (1968) EA 93.**

12. In conclusion it was submitted that the Appellant's Appeal lacks merit and ought to be dismissed and costs of the Appeal be awarded to the Respondent.

13. Having considered the rival pleadings in the trial court, the evidence therein, the memorandum of appeal and the respective submissions of counsel, the issues for determination relates to the propriety of the procedure in the trial court as against the consent that was adopted and whether there has been a case made for disturbing the award of the trial court.

14. I note that there was a consent that was adopted with regard to liability in both cases and after the consent was recorded, there was no formal proof hearing and there was nothing much to enable this court conclude that there was evidence in trial that would support the decision that was made. However, I have considered **Order 25 Rule 5** of the **Civil Procedure Rules** that states as follows:

> **"Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith"**

15. This would mean that the procedure had been compromised by the conduct of the parties and as such the issue of liability is deemed closed. The failure to conduct formal proof hearing was an infraction whose effect was compromised by the parties and as such the same cannot be said to negatively affect the outcome of the case. The entry of the consent on liability left no doubt that the conduct of the parties was deemed to imply that their respective cases had been closed at the stage they had reached leaving only the parties to submit on the remaining issue of quantum. Further, it is noted that the appellant herein vide its memorandum of appeal has not raised any issue with the failure to conduct formal proof hearings. It is not in dispute that the respondents herein were passengers in the ill-fated vehicle and were not in control over the manner in which they were driven, managed and controlled. The respondents were owed a duty by the appellants and their drivers. The appellants attempt to enjoin a third party did not bear fruit and hence the appellants must shoulder full liability for the accident. In the premises I do not find merit in the appellant's late claim that liability should be shared equally between the drivers when no third party proceedings took place. As a consent on liability had been entered into, I find that the parties herein are bound by the same and hence the appeal against liability lacks basis.

16. The aspect of quantum was canvassed by way of submissions that have been analyzed above. The law is now well settled that an Appellate Court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled.

17. In this appeal, the Appellant is also challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "**It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

18. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47,** the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

19. The Appellant argued that the trial court proceeded on the wrong principles when it decided to apply a multiplicand of Kshs 7,500/= indicating the same figure as the minimum wage for an unskilled laborer and therefore the prescribed minimum wage for an unskilled laborer ought to be Kshs 4,792/=. Section 2(5) of the Law Reform Act (Cap 26) provides:

> "(5**) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act….". (Emphasis added)**

20. The general position of the law is that dependency ratio is a matter of fact to be determined on case to case basis as was appreciated by **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** where he held that:

"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependents 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 dependents such an award as would when wisely invested be able to compensate the dependents 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 dependents, 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."

21. In the present case, I have carefully examined the judgment of the trial court. Having considered the fact that the Deceased were innocent passengers who also had dependents and if not for their death they would still be operating their respective businesses. Whether the deceased would be in employment or not it did not take away the fact that they were young, still supported their families even in all other ways not quantifiable and therefore were a great pillar in their family. The multiplicand of Kshs 7,500/ adopted by the trial court for the respondent in **HCCA 179/2015** was reasonable in the circumstances of the case as the deceased persons were placed in the category of unskilled laborers as he worked as a farmer and a hotel waiter and who was depended upon by his family. In **HCCA 180/2015** the Respondent also worked as a hotel waiter and hence the same multiplicand applies. I am unable to see any irrelevant factor said to have been taken into account by the trial court and further note that the awards were not inordinately high as to represent an erroneous estimate of the damages. I therefore do not see any reason to interfere with the awards. The ground of appeal on quantum must therefore fail.

22. In view of the foregoing, I find and hold that the Appellants' appeals in **HCCA 180** and **179** all of **2015** have no merit and are dismissed with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE