REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 4'B' OF 2017

RUTH NGOKI PETER & JOSEPH NGEI MWOKI

(Suing as the Legal Representatives and Administrators of the

Estate of the late PETER MWOKI MUTISYA (Deceased)......................APPELLANTS

VERSUS

TOP CARRIERS LIMITED..1ST RESPONDENT

REUBEN NDUNGU' NJOROGE..2ND RESPONDENT

(Being an appeal from the whole judgement and order of Hon. Mrs. C. A Ocharo (P.M) in Machakos Chief Magistrate's Court in Civil Case No. 181 of 2010 delivered on 13th December, 2016)

BETWEEN

RUTH NGOKI PETER & JOSEPH NGEI MWOKI

(Suing as the Legal Representatives and Administrators of the

Estate of the late PETER MWOKI MUTISYA (Deceased)......................PLAINTIFFS

VERSUS

TOP CARRIERS LIMITED..1ST DEFENDANT

REUBEN NDUNGU' NJOROG..2ND DEFENDANT

JUDGEMENT

1. The deceased herein was lawfully travelling as a fare paying passenger aboard the First Respondent's motor vehicle registration number KAZ 790L on the 19th day of January 2009 along Mombasa-Nairobi Road. The First Respondent's motor vehicle collided with the Second Respondent's motor vehicle KBB 469 F/ZC 8146 thereby fatally injuring the deceased that led to his demise on the spot. The Appellant vide the Plaint dated 3/2/2010 sought for damages under the Law Reform Act, Cap.26 and Fatal Accident Act Cap.32. The Plaint is contained in pages 11 to 14 of the Record of Appeal.

2. The First Respondent filed its Memorandum of Appearance and Defence on 14/6/2010 while the Second Respondent filed his on 7/10/2010. The First Respondent blamed the Second Respondent and particularized the blame in paragraph 6 of its defence while the Second Respondent blamed the deceased Peter Mwoki Mutisya and First Defendant, his driver and/or agent for largely contributing to the accident and particularized the blame in paragraph 5 of his defence. I note Equity Bank Limited had initially been sued as a Third Defendant but vide a Notice of Motion dated 25/7/2013 filed by Muriithi & Ndonye Advocates, the Third Defendant was struck out from the suit as a party.

3. Through a test suit in the Chief Magistrate's court at Mombasa, Civil case number 1462 of 2009 liability was apportioned against the Respondents in the ratio of 50:50. It is appropriate at this juncture to go straight to the evidence tendered before the trial court before proceeding to analyze the same.

4. On 6/9/2016 **PW.1 Chrispinus Mwenesi Mwatekwa** adopted his witness statement dated 24/8/2016 and filed on 26/8/16. He testified that he knew the deceased as one of the church ministers. He stated that the deceased had been an overseer of four churches in Mombasa. On cross examination, he testified that the church did not employ ministers but gave them a monthly allowance that depends on the offerings and tithes. I note PW.1 stated in his witness statement that the church used to pay the deceased allowances of between Kshs. 20,000/- and Kshs. 25,000/- per month depending on monthly collections and added that the allowance was a regular monthly support to the church ministers. He produced the letter from the Pentecostal Christian Fellowship Church as Exhibit No.14.

5. **PW.2 Ruth Ngoki Peter** adopted her witness statement dated 24/8/2016. She stated in her witness statement that the deceased had been her late husband with whom they had been blessed with eight children with the deceased being the sole breadwinner. She produced a copy of the Chief's letter indicating the names of the children and dates of birth. She testified that she was a famer in Mwingi and went on to produce the list of documents dated18/7/2016 as *Exhibits No.1 to 13* and 15. According to her, the deceased died on the spot. She stated that she did not have any document to show that the deceased earned income but she maintained that Exhibit No.14 proved that the deceased had been earning from the church but never earned below Kshs.20, 000/-. The Appellant's case was closed. The First Respondent's case was closed without calling any witnesses while the Second Respondent or his advocate were absent in court. The learned trial magistrate directed parties to file submissions. The Appellants and First Respondent filed written submissions on 28/9/2016 while the Second Respondent filed on 11/10/2016. The Appellants relied on P. Exhibit No. 14 to prove income earned by the deceased to be Kshs.25, 000/-. The First Respondent submitted that Exhibit No.14 was not sufficient to prove income and urged the court to use the minimum wage. The First Respondent relied on the Regulation of Wages (General) Amendment Order 2009 that prescribed a minimum wage of Kshs.6,130/-.The Second Respondent also took a similar approach by relying on the Regulations of Wages (Agricultural)(Amendment) Order 2009 but proposed a wage of Kshs.3000/- for unskilled labourer.

6. On 13/12/16, the learned trial magistrate awarded the Appellants damages as follows-

a. Pain and suffering	***Kshs 20,000/-***
b. Loss of expectation of life	***Kshs. 250,000/-***
c. Special damages	***Kshs. 40,200/-***
d. Loss of dependency	***Kshs. 612,720/-***
Total	***Kshs. 922,920/-***

The learned trial magistrate subjected the total award to 50% contribution hence the judgement sum came to **Kshs.461,460/-** plus costs and interest at court rates.

7. Being aggrieved by the said decision, the Appellants lodged their memorandum of appeal dated 8/03/2019 where they raised the following grounds of appeal:-

> ***(i) That the learned trial magistrate erred in law and in fact in deciding the case totally against the weight of the evidence.***
>
> ***(ii) That the learned trial magistrate erred in law and fact when she misdirected herself to use a Multiplicand of Kshs.6,130/- to calculate the loss of dependency instead of Kshs.25,000/- totally against the weight of evidence and for making a wrong finding that there had been no evidence to confirm employment and earning.***
>
> ***(iii) That the learned trial magistrate erred in law and fact in failing to bring her award within the ambit of awards for such fatal injuries and even failed to be bound by the High Court authorities on assessment of quantum in such a case.***

The Appellants now seek the following reliefs:

> ***(a) The judgement Order and Decree of the learned magistrate be varied and/or set aside.***
>
> ***(b) The court do assess and make a proper award of quantum/damages for loss of dependency payable based on proper, reasonable, considerate and supportable multiplicand as proved at the hearing of the case being Kshs. 25,000/- or a reasonable sum thereof.***
>
> ***(c) Court do maintain the other limbs of the judgement as awarded.***
>
> ***(d) The Respondents herein do equally bear the costs of this Appeal.***

8. This being a first appeal the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of **Selle –vs- Associated Motor Boat Co [1986] EA 123 as follows:-**

> "***The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the***

evidence, evaluate it itself and draw its own conclusions through 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 the 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."

9. It was agreed that the appeal be disposed of by way of written submissions. It is noted that it is only the Appellants submissions dated 19/1/21 that are on record. I note that the Appellants major grouse is on the multiplicand used by the learned trial magistrate to calculate loss of dependency. I note the Appellant is not contesting the award for loss of expectation of life as well as pain and suffering. Hence, the only issue for determination is ***whether the learned trial magistrate misdirected herself IN using a multiplicand of Kshs. 6,130/- to calculate loss of dependency instead of Kshs. 25,000/-.***

10. The Appellants submit that the learned trial magistrate failed to take into consideration the deceased's monthly income of Kshs.25, 000/- which was confirmed by Pw2 who had stated that the amount ranged from Kshs 20,000/----25,000/ as per the letter from the church. The learned trial magistrate placed reliance on the minimum wage of Kshs.6, 130/- as the multiplicand an amount which the Appellants assert was erroneous.

As stated by the former Court of Appeal for Eastern Africa in ***Chunibhai J Patel & another v. PF Hays & others [1957] EA 748*** followed by this Court in ***Vincent Sululu & another v. Rose Wanjiru [2016] eKLR*** the formula for assessing damages under the Fatal Accidents Act is as follows:-

> ***"The court should find the age and expectation of the working life of the deceased and consider the ages and expectation of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants."***

11. It is clear in ***Chunibhai J Patel case*** (supra) that proof of earning by the deceased is a factor to consider in assessing damages under the Fatal Accident Act. At page 6 of the Judgment, contained in page 159 of the Record of Appeal, the learned trial magistrate used the minimum wage of Kshs.6, 130/- that had been proposed by the First Respondent. The Appellants had proposed Kshs.25, 000/= while the Second Respondent had proposed Kshs.3, 000 on the basis that the deceased was to be treated as an unskilled laborer. The learned trial magistrate held that the Appellant's claim of Kshs.25, 000/= as deceased income was not supported with evidence. The learned trial magistrate noted that the only evidence adduced to prove income was the letter from Pentecostal Christian Church contained in page 40 of the Record of Appeal. The letter stated that the deceased was an overseer of four churches in Mombasa earning an allowance of between Kshs.20, 000/= and Kshs.25, 000/- that fluctuated depending on the monthly church collections. Further, the learned trial magistrate stated at page 5 of her judgement that there was no evidence that the deceased was an overseer. However, I note the Court of Appeal in ***Jacob Ayiga Maruja & Anor vs. Simeon Obayo [2005] eKLR***, where the plaintiff had no documentary proof of the deceased's earning, stated as follows:-

> ***"In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.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."***

I find that the letter from the church proves that the deceased earned an income. The letter is categorical that it was an allowance of between Kshs.20, 000/= and Kshs.25, 000. PW.2 testified that the allowance was a regular monthly support to church ministers. It is trite that the standard of proof required in civil cases is on a balance of probabilities and I opine that the letter was sufficient to prove the deceased income. If indeed the deceased was overseeing four churches, then it is apparent that he earned more than what was used by the trial court as a multiplicand. He could not have been surviving on a paltry sum of 6,000/ to support himself and eight children.

12. The Respondents submit that income was not proved. I am alive to instances where the deceased's income has not been proved but courts usually resort to the minimum wage reserved for unskilled labourers as held in **Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased) [2015] eKLR).** However, I find that it would be unfair to place the deceased earnings at Kshs.6,130/= noting that the deceased had 8 children and majority were dependent on the deceased. I find that the learned trial magistrate failed to see Exhibit No. 4 contained in page 23 of the Record of Appeal that listed the children of the deceased and dates of birth. It would not be reasonable to assess Kshs. 6,130/- or Kshs. 3,000 as the multiplicand when it was PW.1's evidence that the deceased had been an overseer of four churches in Mombasa. I opine that it would be reasonable to assess Kshs. 20,000 as the multiplicand that is capped as the minimum allowance that the deceased was earning. From the foregoing an appropriate tabulation for loss of dependency will be as - **Kshs. 20,000 x 18 x 12 x 2/3 = <u>Kshs. 2,880,000</u>**

13. Although not a ground of appeal, I note that the learned trial magistrate at page 6 of her judgment contained in page 159 of the Record of Appeal held that the total amount of Kshs. 270,000 awarded under Loss of expectation, pain and suffering should be deducted from the amount awarded under loss of dependency. For the avoidance of doubt and noting that the learned magistrate still awarded the amount having said that it should be deducted, I resonate with **Kamau J.** holding in the case **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] eKLR** at paragraph 21 where the Learned Judge stated:-

> ***"This court was fully aware that there seems to be two (2) schools of thought on this issue. However, this court therefore associated itself fully with the holdings of*** **Emukule J.**, **Karanja J.** and **Mativo J**. in the cases of ***Benedeta Wanjiku Kimani vs Changwon Cheboi &Another[2013] eKLR***, ***Richard Omeyo Omino vs Christine A. Onyango [2009] eKLR*** and ***David Kahuruka Gitau & another vs Nancy Ann Wathithi Gitau & another [2016] eKLR respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal***

Accidents Act but merely need to be taken into account.

Further in the case of ***Hellen Warunguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited, Nyeri CA Civil Appeal No. 22 of 2014 [2015]eKLR***, the court stated:-

> ***"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise"***

The award on loss of expectation of life in the sum of Kshs 250,000/ is found to be reasonable and likewise for pain and suffering as the cost of living has gone up over the years coupled with the effect of inflation. I also find that the said sums shouldn't be deducted from the total award ostensively to avoid double compensation to the claimants as they are not the same. As the appellant did not dispute the award on special damages as well as thee other heads of damages save only on the loss on dependency and since the respondents did not lodge a cross appeal or even oppose the appeal, the said awards must be left intact. It is instructive that the respondents did not bother to file submissions on the appeal.

14. In the result I find the appeal has merit and is allowed. The trial courts judgement dated 13.12.2016 is set aside and substituted with judgement being entered for the appellant against the respondents jointly and severally as follows:-

a) 100% against the Respondents jointly at 50:50

b). Pain and suffering.................Kshs. 20,000.00

c). Loss of expectation of Life.....Kshs. 250,000.00

d). Loss of dependency................Kshs. 2,880,000.00

e). Special damages....................Kshs. 40,200.00

Total..................Kshs. 3, 190,200.00

The appellants are awarded the costs of the appeal and in the lower court which shall be paid jointly and equally by the respondents. The general damages will attract interest at court rates from the date of judgement while special damages will attract interest from the date of filing suit.

It is so ordered.

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

D. K. KEMEI

JUDGE