REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO. 98 OF 2018

PETRONILA MULI..APPELLANT

-VERSUS-

RICHARD MUINDI SAVI & CATHERINE MWENDE MWINDU

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF

THE LATE AUGUSTUS MUINDI (DECEASED)..........DEFENDANT

The Appeal arose from Original Civil Suit -Kitui Chief Magistrate Court Civil Case Number 45 of 2017-Judgement that was delivered on 6th November, 2018 by Hon. M. Murage-Chief Magistrate.

J U D G E M E N T

1. This Appeal arose from the Judgement delivered in Kitui Chief Magistrate Court Civil Case Number 45 of 2017, the case of Richard Muindi and Catherine Mwende Mwindu (Suing as the Legal Representative of the Estate of the late Augustus Savi Muindi (deceased). In that case, the suit was based on a tort of negligence due to a road traffic accident where the deceased, a son of the Respondents, while riding a motorcycle Registration number *KMDH 096H* on 10th June, 2016, was involved in an accident at Kiini, Nzambani with Respondent's motor vehicle Registration *KAW 570K Mitsubishi Canter.*

2. The trial court after trial found the Appellant 70% liable for the accident and the deceased was 30% to blame. The trial court then awarded the Respondent as follows: -

a. Pain and suffering Kshs. 100,000.

b. Loss of expectation of life Kshs. 100,000

c. Dependency.

The trial held that the deceased was 19 years old at the time and used a multiplier of 36 years using a multiplicand of minimum wage of Kshs. 10,107 and upon calculations arrived at a figure of Kshs. 2,910,816.

d. Special damages Kshs. 28,999, subtotal Kshs. 2,939,807 less 30% contribution Kshs. (881,942).

The Respondents were then awarded Kshs. 2,057,865 plus costs and interests.

3. The Appellant felt aggrieved about the award given and lodged this appeal raising the following grounds namely: -

i. That the award on general damages for pain and suffering was excessive, noting that the deceased died 3 days after the accident.

ii. That the learned trial Magistrate, erred in law and fact in adopting a multiplier of 36 years in calculating loss of dependency without taking into consideration vagaries and uncertainties of life and the relevant law governing assessment of damages for loss of dependency.

iii. That the Learned Trial Magistrate erred by adopting a multiplicand of Kshs. 10,107 in calculating loss of dependency without taking into account that the deceased's place of residence was Kitui which is not designated as a city or municipality where the

minimum wage schedule applies.

iv. That the Learned Trial Magistrate erred in adopting a dependency ratio of 2/3 in calculating loss of dependency when the deceased was unmarried and without a child.

v. That the learned trial Magistrate, ignored the Respondent's written submissions and authorities cited in the assessment of damages.

4. The Appellant from the record, filed two sets of submissions one set dated 20th January, 2021 and the other set dated 4th February, 2020. The Appellant's Counsel on prompting by this court, informed this Court that he is replying on the submissions dated 4th February, 2021.

5. The Appellant submits that the award on pain and suffering was high and contends that an award of Kshs. 50,000 could have sufficed. She *relies on the case of* ***FMM and Another versus Joseph Njuguna Kuria 2016 eKLR.*** In that case, the court awarded Kshs. 50,000 pain and suffering. She also relies on ***Mary Nabwire versus Daniel Wachira 2011 eKLR*** where the Court awarded Kshs. 50,000 for pain and suffering.

6. On dependency, the Appellant has faulted the trial court on both the multiplier and Multiplan used.

She avers that, the trial court's adoption of 2/3 as dependency ratio was unjustified and erroneous in her view. She submits that, there was no evidence submitted to warrant 2/3 dependency, adding that the deceased was single with no wife or kids.

7. The Appellant further submits that, the deceased was 19 years old and the fact that he was involved as boda boda rider, was indicative of relatively low economic status which in her view, meant that the parents being the only dependants expected little support. She submits that, the evidence tendered at the trial court revealed that the deceased's parents were able bodied (45 and 39 years of age respectively) and that they are the ones who owned the motorcycle. It is submitted that in such scenario, the parents of the deceased were not so dependent on him as to justify the ratio of 2/3 adopted by the trial court. The Appellant contends that, that ratio only applies where the degree of dependency is high and has given examples of dependents who are minors or aged. She submits that, the appropriate dependency ratio is 1/3 and relies on the decisions of **Jeremiah Njaumbe versus Benson Ndiga (Nairobi High Court Civil Case** ***number 987 of 1989 and Sukari Industries Ltd. Versus John*** **Osodo 2015 eKLR** where both courts adopted a ratio of 1/3 as dependency.

8. On multiplier, the Appellant urges this court to use the age of the deceased as a factor. She faults the trial court for assuming that the parents could have enjoyed dependency on the deceased for 36 years. She contends that the deceased would have married had he lived and that, that would have meant that his focus would shift to his family thus reducing the support to his parents.

The Appellant submits that, there was every chance, the deceased being younger would ordinary have been expected to outlive his parents and that on that presupposition, the dependency period would have been shorter than the deceased's life span. She faults the trial court for adopting the deceased's remaining working life as a multiplier without taking into account the fact that the parents ordinarily had comparatively shorter period to live and would not depend upon the deceased for his entire working life.

9. The Appellant submits that, a multiplier of 20 years would have been more appropriate and relies on the decision of ***Wandu Kimeu versus Evanson Wamutti (Nairobi High Court Civil Appeal Number 1010 of 2005),*** where the court used a multiplier of 20 years for a deceased person who was aged 26 years at the time of his death.

10. The Appellant further submits that, in view of the fact that the earning of the deceased was not proven, it was correct for the trial court to adopt the statutory minimum wage guidelines but avers that the regulations of wages (General amendment) order 2015 classifies the Country into three (3) Regions namely; with the second column specifying Nairobi, Mombasa and Kisumu, the third former municipalities like Mavoko, Ruiru and Limuru Town and the Fourth column specifying ''all other areas''. She submits that, the deceased place of residence fell on ''other areas'' in her view which specifies the minimum wage as Kshs. 5,844. She contends that, going by the calculations, the loss of dependency should be Kshs. 467,536 that is a multiplier -20 years, multiplicand 5,844 (minimum wage) and dependency ratio of 1/3. She further submits that, Kshs. 50,000 for pain and suffering be added which translates to Kshs. 517,536.

11. The Respondents has opposed this appeal and the first ground of opposition is that, this appeal is incompetent for having been filed out of time. They contend that the appeal was filed without leave. This court however, notes from the record that the judgement in the trial court was delivered on 6th November 2018, while the appeal was lodged in this court on 16th November, 2018, which was timely and within time.

12. On pain and suffering, the Respondents submit that the deceased died three (3) days after the accident and therefore suffered pain and suffering for three (3) days. They rely on the decision of ***E.M.K & R.S.I. versus E.O.O (Machakos) High Court Civil Case Number 58 of 2015).***

13. On loss of expectation of life, the Respondents aver that, the conventional award for loss of expectation of life is Kshs. 100,000 due to the rate of inflation. They rely on the above cited case of *E.M.K & R.S.*I.

14. On dependency, the Respondents submits that the deceased was 19 years old at the time of his death. They support the trial court's adoption of Kshs. 10,107 as the minimum wage and using a multiplier of 36 years arguing that, the deceased retirement age was expected to be 60 years.

15. This court has considered this appeal and the submissions made. I have also looked at the response made. This is the first appeal and as a general rule, this court as the first appellate court has a duty to review the evidence tendered at the trial court and make its own conclusion regarding the matter in dispute.

In Selle & Another versus Associated Motor Boat Co. Ltd, & Others 1968 EA 123, this principle was well illustrated as***:*** -

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

16. This appeal raises three issues namely: -

i. Whether damages under ***Law Reform Act*** for pain and suffering was excessive.

ii. Whether the damages under Fatal Accidents Act (loss of dependency) were justified.

iii. Whether dependency ratio adopted by the trial court was correct.

17. Whether damages under Law Reform Act was excessive.

The Appellant under this head only raised an issue on the award on pain and suffering. There is no challenge on the award of Kshs. 100,000 for loss of expectation of life.

18. The Appellant has taken issue with the trial court's award of Kshs. 100,000 for pain and suffering. This court has considered the decision of the Lower Court and finds that the said court was guided by the decision in ***FMM & Anor versus Joseph Njuguna Kuria 2016 eKLR***, in awarding the Respondents Kshs. 100,000 under the head of pain and suffering. The trial court noted that, the decision in FMM above, was decided in 2016. The trial court exercised its discretion and considered the fact that the deceased died three days after the accident. The period between the date of when an accident occurs and the time of death is material because the court is then duly guided on the length of period a deceased person must have suffered pain and suffering fighting for life. A trial court is entitled to exercise its discretion and give an award and this court being an appellate court, cannot interfere unless it is shown that the discretion was exercised injudiciously or that the trial court took into consideration irrelevant factors and left out relevant ones. In ***Francis K. Righa versus Mary Njeri*** (***Suing as Legal Representative of the Estate of James Kariuki Nganga 2021 eKLR***, ***the C.A citing Butler 1984 eKLR***, restated the guidelines on the role of an Appellate Court on the question of reassessment of damages and states;

> **''….that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge's findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived as is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision…''**

19. In my considered view, the Appellant has not demonstrated that the trial Magistrate was wrong in principle in awarding Kshs. 100,000 for pain and suffering. I am also not persuaded that at this time, given the economic situation and the inflation in Kenya, an award of Kshs. 100,000 can be termed as excessive or too high to require an intervention of this court.

20. Whether the damages under Fatal Accidents Act was justified.

A claim of loss of dependency is anchored on ***Fatal Accidents Act, Section 4*** of the said Act provides:

> **''Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit action is brought''.**

21. The guiding principles of assessment of damages are age of deceased at the time of death, his income and dependency ratio. The assessment thereof is based on multiplicand, multiplier and dependency ratio.

In the case of ***Francis Righa verus Mary Njeri (Suing as the Legal Representative of the estate of James Kariuki Nganga (Supra),*** the court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages under ***Fatal Accident Act***;

> **''…on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of Roger Dainty versus Mwinyi Omar Haji & Another 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.''**

22. The same illustration was more elaborated in the case of ***Board of Governors Kangubii Girls High School & Another versus Jane Wanjala Muriithi & Another 2014 Eklr,*** where the court cited with approval, the reasoning in the case of ***Cornelia Elaine Wamba versus Shreeji Enterprises Ltd. & Others 2012 eKLR*** *and stated****,***

‘‘…..the choice of a multiplier or multiplicand is a matter of the Court’s discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere.

We have applied the above factors to the rival positions herein and find that the concurrent findings on the choice of multiplier, multiplicand and dependency ratio were well founded in law as they took into consideration the age of the deceased, nature of employment, earnings from the self-employed business of saw milling, probable length of time the deceased would have actively engaged in his business and pegged this at seventy years which we find reasonable. Lastly, the finding that the deceased had a family, a spouse with school going children was not disputed. He therefore, had dependants who were in law entitled to receive compensation for the loss of dependency…’’

23. Going by above decisions, the formula for assessment of dependency is the multiplicand that the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased as a result of premature death. The dependency ratio, is the fraction of the income that a person is expected to give to his dependents in his lifetime. If a person is married, it is expected that the person would spend 2/3 of his income to support his dependants but where the person unmarried it is accepted that 1/3 of his income is utilized to, in support of his dependants.

24. In this instance, the deceased was unmarried and the Appellant’s grievance that the trial court fell into error by adopting 2/3 ratio is well taken. The deceased was survived only by his parents who were said to be farmers. Going by the evidence of the first Respondent at the trial, he is in fact the owner of the motorcycle that the deceased rode and used for boda boda business. If he was able to purchase a motorcycle out of farming proceeds, then I am persuaded that the deceased’s parents were reasonably able to cater for most of their needs and therefore given that the deceased was a young man who had not married as observed above, a dependency ratio of 1/3 was fair in the circumstances.

25. On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income.

In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income. The trial court was correct in principle to adopt the guidelines as per the Regulations of wages ***(General Amendment Order (2015).*** It is apparent that the parties herein, did not canvas the question of the residence of the deceased and the applicable guideline but that notwithstanding, the adopted multiplicand by the trial court was anchored on the Regulations of Wages ***(General) Amendment) Order 2015*** which provides for a minimum wage for different categories of workers. The trial court in this instance adopted the category of ‘‘general laborer’’ that includes cleaners, sweepers, gardeners and maids living in areas that were previously designated as former municipalities, Mavoko, Ruiru and Limuru Town. The Residence of the deceased at time of his death or where he was operating his business is not disclosed. In the absence of prove the trial court in my view had one option and that is to presume that the deceased was resident in ‘‘other areas’’ or column 4 of the ***Regulations of Wages (General Amendment) Order 2015.*** I am not persuaded by the Appellant that the proper category of motorcycle cyclist or boda boda in Kenya should be categorized as ‘‘general labourers’’ because they are semi-skilled. I of course note from the schedule that boda bodas are not classified which is an anomaly that should be rectified by the Ministry of Labour in their next review, because motorcyclist commonly referred to as boda bodas in Kenya are now a major employer of many youths if the number of motorcycles in Kenyan roads is anything to go by.

26. Having said that, this court finds that the trial court fell into error by classifying the deceased’s profession as ‘‘general labourer’’. In my view, the appropriate category of boda boda riders is comparable to category of mechanist (motor vehicle repairers) laundry operators, light tractor drivers etc. Their minimum wage as per the schedule is kshs. 10,840.50 for workers living in ‘‘Other Areas’’ which is what I find ought to have been the finding of the trial given that the Respondents, did not discharge their burden of proving that the deceased resided or worked in an area that falls in the category of 3rd column (former municipalities, Mavoko, Ruiru, Limuru and comparable areas).

In this instance, the deceased’s father stated that he lived in Nzambani, which is a few Kilometres from Kitui Town, but where the deceased son resided was not disclosed. The trial court in my view, fell into error to presume that he resided in Kitui Town which falls within the 3rd column that is ‘‘former municipalities’’. The trial court ought to have made a presumption that the deceased resided in a place that is classified by the above cited schedule as ‘‘other areas’’ where the minimum wage applicable to him was Kshs. 10,840.50. This court upon re-evaluation of evidence tendered, finds that the minimum wage applicable in respect to the deceased was Kshs. 10,840.50

27. On the question of multiplier of 36 years used by the trial court, I am persuaded by the contention by the Appellant that using a multiplier of 36 was a bit high. The deceased was aged 19 years old and it is true that with time he would marry and the support extended to his parents would gradually reduce as that of his new family increased. There is very slim possibility or probability that he would have supported his parents until his expected retirement age of 60 years. I am persuaded that a multiplier of 20 years would have been more realistic and reasonable and I am satisfied that it was fair to use a multiplier of 20 years.

28. In the premises and for the aforetasted reasons, this court partly allows this appeal. The Lower Court’s judgement is set aside, in its place this court enters judgement and quantifies damages as follows: -

<u>i. Damages under Law Reform Act</u>.

a. Loss of expectation of life ……..Kshs. 100,000

b. Pain and Suffering ………….….Kshs. 100,000

<u>ii. Damages under Fatal Accidents Act</u>.

c. Loss of dependency

10,840 x 12 x 20 x 1/3 = Kshs. 867,240

d. Special damages Kshs. 28,991

Subtotal Kshs.1,096,231

Less 30% Contribution Kshs. 328,869.30

Total (Kshs.) 767,361.70

The Respondents are therefore awarded **Kshs, 767,361.70** and costs and interests of that sum from the date the judgement was entered in the trial court. The Appellant will have, half costs of this appeal to be agreed or taxed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MAY, 2021

HON. JUSTICE R. K. LIMO

JUDGE