REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 34 OF 2020

ISAAC MURIIRA M'MWANIE..... 1ST APPELLANT

RICHARD NKUNJA.....2ND APPELLANT

VERSUS

MISHECK MUTUMA M'KUCHINA (Suing as the legal representative of the estate of

Zakayo Kinyua Mutuma (deceased)..... RESPONDENT

(An appeal from the Judgment and Decree of Hon. Tito Gesora (S.P.M) in Maua CMCC No. 23 of 2019)

delivered on 09/04/2020)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaint dated 21/02/2019 in which the respondent sued the appellants seeking general and special damages said to arise out of a road traffic accident pleaded to have occurred on the 13/10/2018 along Maua Kiutine road. The claim was made pursuant to the provisions of the Law Reform Act and the Fatal Accidents Act. The plaint also claimed costs of the suit as well as interests on damages and costs.

2. The gist of the claim was that on or about 31/10/2018 the deceased was travelling along Maua-Kiutine Road, as a pillion passenger in a motor cycle when the 1st appellant so negligently drove motor vehicle registration number KXR 472, Toyota Hilux Pick-up, that it collided with the motor cycle thereby occasioning the deceased serious injuries which led to his demise. That the deceased was described as a young man aged 24 years enjoying robust health, had just started his adult life and had a long prosperous life ahead of him; he was a miraa farmer and a business man making an average of Kshs 30,000 per month. It was then pleaded that as a consequence of the accident he endured a lot of pain before he succumbed to the injuries and he lost expectation of life as a result of the said accident. By his death, his parents have lost the monthly support of Kshs 20,000 accorded to them by the deceased and his estate too has suffered loss.

3. The appellants vigorously denied the claim by their statement of defence dated 03/06/2019 in which the ownership of the offending motor vehicle; the occurrence of the accident, injury and damage were all denied with an alternative pleading that if any accident ever occurred as pleaded or at all, then the same was the consequence of part or sole negligence of the plaintiff. Particulars of negligence were then set out and a plea made that the suit be dismissed with costs. After the trial which ensued and in which the plaintiff called two witnesses while the defendant called one, the trial court found that the respondent had proved his case on a balance of probability, held the defendant 100% liable and assessed damages as :

a) Loss of dependency 30,000×12×30×½ = Kshs 5,400,000

b) Loss of expectation of life = Kshs 100,000

c) Pain and suffering = Kshs 50,000

d) Special damages = Kshs 145,535

Total = **Kshs 5,695,535**

4. Aggrieved by the said decision, the appellants filed their Memorandum of Appeal on 08/05/2020 listing five (10) grounds of appeal. I read and appreciate the grounds to project the appellant's complaint to be three pronged; -

a) That the trial court erred in holding them liable and apportioning to them 100% liability notwithstanding the cogent evidence on record.

b)The trial court applied the wrong principles without taking into consideration case law and submissions filed by the parties in awarding inordinately high and excessive sum of damages which offends the provisions of section 5(b)(iv) of the Insurance (Motor Vehicle and Third Part) Act.

c) The trial court erred in assuming the income of the deceased to be Kshs 30,000 when there was neither proof of earnings nor remittance of tax as per the Income Tax Act.

5. Based on that appreciation, I determine the issues for determination are whether the apportionment of liability at 100% finds support in the evidence on record and secondly, whether the award of damages under all the headings was inordinately high and excessive and third and lastly, whether the award in so far as it exceeded Kshs 3,000,000, violate and contravene section 5(b)(iv) of the Insurance (Motor Vehicle and Third Part) Act.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (see ***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212***).

7. In evidence, **PW1 Misheck Mutuma M'Kuchina,** the father to the deceased and the respondent herein, testified that the deceased was involved in an accident when knocked by a motor vehicle. Prior to his death, the deceased in addition to being in the miraa business, also ran a hotel and a shop at K.K where he would make about Kshs 30,000 monthly and that the deceased helped him a lot especially when he was sickly and in hospital by giving him about Ksh.500 each month. He said that the burial was at his home and the funeral cost was about Kshs 150,000. During cross examination, he confirmed that he was not present when the accident occurred. He further affirmed that the deceased owned Mbaiwe Hotel whose record book he did not have and would make about Kshs30,000 per month. He further stated that the funeral expenses were recorded in a book and he had produced the receipt. During re-examination, he affirmed that the deceased had a hotel and a shop which was not on his premises.

8. **PW2 Jonathan Gichunuku M'Aburuki,** recalled leaving a Njuri Ncheke meeting at Kawiru on 31/10/2018. When he got to the tarmac, a motor vehicle registration number KXR 472, Hilux Pick up, carrying power poles, emerged from Maua direction towards Kiutune at high speed hit the bump near Kawiru Primary School, lost control, veered off its lane into the oncoming lane where it knocked down two motor cycles in quick succession killing the two riders on the spot. The vehicle came off the road and went into a ditch on the side of the road where it stopped. The deceased, a pillion passenger in the 2nd motor cycle, was thrown onto the road on impact, and was alive when taken to hospital in Maua. The witness accompanied the bodies of the deceased riders to Nyambene Sub-County Hospital. He stated that children were going back to school and denied there being any cows on the road as alluded to by the 1st appellant in his statement. During cross examination, he maintained that he could see from outside that the vehicle was over speeding. He even confirmed that the 1st motor cycle was blue in colour while the second one was red in colour. He concluded that the riders of the motor cycles as well as the deceased pillion passenger could not do anything to avoid the accident as the motor vehicle is the one that had come to their lane.

9. **DW1 Isaac Murira M'Mwaine** testified that on the material day at around 2.00 o'clock, he was driving the 2nd appellant's motor vehicle registration number KXR 472, a Toyota Hilux Pick-up, headed towards Kawiru area from Maua, he was alone in the car, carrying electricity posts to be delivered at the 2nd appellant's site. He asserted to have been driving carefully at an average speed of around 40 kph on the flat and smooth tarmac road and that the weather was dry with clear visibility. At Kawiru area, he added, two cows suddenly entered onto the road from the left side forcing him to swerve onto the right side to avoid hitting them and in so doing collided with two oncoming motor cycles, registration numbers KMDJ 526Q and KMDE 575A, which he alleged were at a very high speed. He said that none of the riders and their pillion passengers had any protective gear on. Consequent to the head on collision, he lost consciousness and sustained other bodily injuries for which he was admitted at Muthara hospital. On being discharged he went to Maua police station to report the matter and subsequently learnt that the two riders and the pillion passenger had passed away as a result of the accident. He concluded that he was never arraigned in any court to answer to charges emanating from the accident to date. During cross examination, he stated that the accident occurred during the day on a straight and flat place namely Kamweri although there was a corner ahead. That a cow entered the road but when he swerved to the right to avoid it, he met the motor cycles which were far but fast. During re-examination, he stated that the cows caused him to swerve and that he had slowed because of the poles.

10. Upon the directions by the court on 14/07/2020, the parties filed their submissions in respect to the appeal on 10/08/2020 and 25/08/2020 respectively. The appellants, in their submissions, fault the respondent for his failure to either call the investigating officer or produce the sketch plans of the scene therefore leaving the trial court to speculate on crucial pieces of information. In that regard, the court is urged to attribute 50% liability to the deceased and also interfere with the amount of damages awarded by the trial court as it was so inordinately high. It was submitted that a sum of Kshs 400,000 under the Fatal Accidents Act and a sum of Kshs 60,000 under the Law Reform Act would have sufficed. In contesting the sum of Kshs 145,535 awarded for special damages, the appellants insisted that only Kshs 5,535 of the said sum was proved by way of evidence.

11. The appellants cited the decision in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro (2015) eKLR, Paul Ouma v Sarah Akinyi & Monica Achieng Were (suing as the legal representative of the estate of Paul Otieno Were (deceased) (2018) eKLR, Agnes Nduume Kioko v Alexander Njue (2019) eKLR, Roger Dainty (as the administrator of the estate of James George William Campell) v Mwinyi Omar Haji & anor (2004) eKLR Palace Investments Limited v Geoffrey Kariuki Mwenda & anor (2015) eKLR, Peter Kanithi Kimunya v Aden Guyo Haro (2014) eKLR, Lucy M. Njeri v Fredrick Mbuthia & anor (2006) eKLR, Joseph Kahiga Gathii & anor (suing as the administrators of the estate of Lydia Wanjiku Kahiga & Elizabeth Murugi Kahiga (deceased) v World Vision Kenya& 2 others(2014) eKLR and William Kabogo Gitau v George Thuo & 2 others (2010) eKLR** in support of their submissions.

12. On his part, the respondent submitted that the appellants had not challenged the award of special damages in their memorandum of appeal and were by virtue of order 42 Rule 4 of the civil procedure Rules, estopped from arguing the same. That after weighing the evidence by both

sides, the trial court found the appellants 100% liable for the accident and its decision in that regard should not be disturbed. The court is urged to find that the trial court did not apply wrong principles in assessing the damages payable to warrant its interference. The cases of **Joseph Kinyanjui Mwai t/a Sandworth Printing & Packaging v Kenya Power 7 Lighting Co. Ltd(2014) eKLR, Chiro Bandari v SSK(2020) eKLR, Alexander Okinda Anangwe (suing as the administrator of the estate of Patricia Kezia Anangwe-deceased) (2015) eKLR, Isaack Kimani Kanyingi & anor (suing as the legal representative of the estate of Loise Gathoni Mugo-deceased) v Hellena Wanjiru Rukanga (2020) eKLR ,Wilson Mwangi Kabiro (suing as the administrator of the estate of Stephen Irungu Mwangi-deceased) v Charles Nyamumbo Mageto (2015) eKLR among others** were relied on in support of his submissions.

Discussion and Determination

13. I propose to discuss the three identified issues in the order set out and seriatim. The starting point is the question on liability. The evidence by both sides agree that the accident indeed occurred on the date time and in the manner pleaded. The point of departure however is the contention by the appellant that he indeed swerved onto the way and path of the cyclists but attribute such to have been necessitated by bulls which suddenly ran onto the road and across his path. The trial court, in analyzing the evidence led on liability, in its judgement at page 67 of the record of appeal expressed itself in the following words: -

> **"There is nothing that the deceased could have done and did not do to avoid the accident. It is also not a defence that the 1st appellant was not charged or that the matter is pending under investigation. No negligence is proved against the deceased. I dismiss the defence and find that the allegations of negligence on the part of the 1st appellant has been proved. I hold him 100% liable and by vicarious liability the 2nd appellant."**

14. I totally concur with the trial court that the burden of proving contributory negligence on the part of the deceased lay squarely on the appellants, which in my view they utterly failed to discharge. The evidence that he swerved to the lane of the cyclists and could not avoid hitting them is a concession that he was not in full control of the motor vehicle. In my view, a properly functioning motor vehicle when driven at 40 kPH cannot render the driver helpless towards maneuvers to avoid hitting another road user. It cannot be true that the cyclists were themselves over-speeding. I find that the appellant was not in a position to assess the speed of the oncoming cyclists as he purported to have done and that to the contrary it was him at a speed at which he was unable to remain on his lane and avoid the collision. I find that had the appellant maintained his lane, there would not have occurred the collision and the death of the deceased. I find no fault with the finding by the trial court on that ground and I uphold the finding on liability.

15. This then brings me to the ground on whether the award was inordinately high to warrant interference by this court. It is firmly established that an appellate court will interfere with the trial court's discretion on the assessment of damages only if it is satisfied that the trial court took into account an irrelevant factor or left out of account a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence**.** *(See **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**).*

16. The appellants' contention is that the award was too high and that the assessment of damages for loss of dependency grounded upon the deceased's monthly income of Kshs 30,000 was erroneous as it was not supported by any evidence of proof of earnings. The determination of these issues call for the review and re-evaluation of the evidence led. In that very brief evidence tendered, the respondent said: -

> **"Zakayo Kinyua was my child. He was in the miraa business. He also had a hotel and a shop at K.K. He would make about Kshs 30,000. He helped me a lot especially when I was sickly and in hospital. He would give me about Ksh.500 each month. His mother is Angela Thirindi."**

17. The respondent affirmed that position even during cross examination. That evidence fell for evaluation by the trial court at page 67 of the record of appeal, and the trial court in its judgement observed: -

> **"On quantum, there is oral evidence that the deceased was a businessman. Though there was no documentary proof of income, I would and hereby take judicial notice of the fact that miraa farming and trade is the foremost economic activity of the area and no receipts are issued. There is no reason to doubt that the deceased was involved in it. Whereas I agree that determination of income is and should not be arbitrary, the income of Kshs 30,000 attributed to the deceased is reasonable. It is not farfetched. I so find. No doubt the deceased was buried. I give a general figure of Kshs100,000 for burial expenses. He lived in his father's homestead and that is where he was buried. I have therefore no doubt that he supported the parents. He was a young man with a whole life ahead of him. A multiplier of 30 years is fair."**

18. The burden upon the respondent was at all times within a balance of probabilities and no higher. The record reveals that the evidence by the respondent including that the deceased would support him and his mother was never meaningfully challenged even by way of cross examination. However, the proof availed was that the respondent would get a regular sum of Kshs 500 per month with nothing being said about what the deceased gave to the mother regularly.

19. The claim by the respondent was on for loss of dependency rather than lost years. While lost years go to the estate, lost dependency is due to the dependants who then must prove as a fact that they depended upon the deceased in his lifetime. In both situations however the principles of calculation remain the multiplier formula or a global award when the there are no firm facts as to earning. In the matter at hand the evidence adduced was not the kind that proved earning on a preponderance. It was not enough that he was a miraa trader with nothing to show just as it was not enough that the father said that he ran a shop. It would have been different if there had been produced the records said to have been in the shop. I find that there was no proof of monthly income to ground the application of the multiplier formula and that its application was thus erroneous for which reason I do set aside the award of damages for lost dependency.

20. Having set aside the award it then falls on my laps to undertake the duty of assessment and as said before, I am mandate to make a global award. In doing so I do appreciate that the deceased was aged 24 years and it is not the appellants case that no damages were due at all. I also

proceed from the stand point that assessment of damages is a discretionary matter for the court to exercise. I have tken notice of the decisions in ***Charles Makanzie Wambua vs. Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased)*** **[2020] eKLR,** upheld a global award of Kshs 1,320 ,000.00 for loss of dependency, in ***Twokay Chemicals Limited vs. Patrick Makau Mutisya & another*** **[2019] eKLR,** the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years and ***Zachary Abusa Magoma vs. Julius Asiago Ogentoto & Jane Kerubo Asiago*** **[2020] eKLR,** the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. Being cognizant of the principle that comparable awards are due for comparable injury, and while guarded that the awards must remain compensatory rather than punitive and capable of being viewed as a scheme to enrich, it is, therefore, my view, that a global sum of Kshs. 2,500,000.00 would suffice for the respondent's loss.

21. I have decided the question of quantum awarded but I note that by their ground 7 of the Memorandum of Appeal, one other reason the appellant felt aggrieved was the fact that they contend that the award ought not to have exceeded the capping by section 5(b) iv, of the Insurance (Motor Vehicle Third Party Risks) act, which, it is contended that no policy shall cover damages in excess of Kshs 3,000,000 arising f a claim by one person. I note further that there were not submissions offered on that point a fact that leads me to think that it was either a wild card thrown at the court or counsel reappraised the law *and stare decisis* and considered the argument untenable. Because this a matter and argument that appears to keep coming up, I consider it important to make a comment. To be understood in that endevour, the statute was amended to provide as follows: -

> **"In order to comply with the requirements of section 4, the policy of insurance must be a policy which-**
>
> **(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily harm to, any person caused by or arising out of the use of the vehicle on a road:**
>
> **Provided that a policy in terms of this section shall not be required to cover-**
>
> **(i)…**
>
> **(ii)…**
>
> **(iii)…**
>
> **(iv) liability of any sum in excess of three million shillings arising out of a claim by one person**." [Emphasis Supplied]

22. To address the appellants' complaint, one needs to answer if the provision limits any damages that a court of law can award to a claimant. That debate has arisen before and it has now been established that the provision must remain what it says. It says unequivocally that an insurance policy shall be required to cover liability of any sum in excess of three million shillings. The provision must remain and be seen to regulate the relationship between the insurer and its insured away from any litigation that may be brought against the insured. More fundamentally, the provision cannot be construed to say that parliament has usurped the judicial duty of the court. All it does is to limit liability of the insured and not the award a court of law can make in its judicial discretion. In **Law Society of Kenya v Attorney General & 3 others [2016] eKLR, Onguto j,** when called upon to declare the provision unconstitutional rendered himself in the following words: -

> **"I am of the considered view that, where a dispute has been lodged in court, and the facts of the case have been presented before the court, nothing stops the court from coming up with an adequate remedy. In any event, the courts are in the business of dispute resolution. Where the court, awards damages to a party, it is with regards to the facts of a case and what the justice of the case demands. Therefore, I am of the view that, the judgments being rendered by the court are not in any way being legislated by Section 5(b)(iv) of the Principal Act.**
>
> **What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.**
>
> **I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy."**

23. The next ground touches on the award for special damages. my reading of the memorandum of appeal tells me that there is no challenge to the special damages awarded. The law mandates under order 42 Rule 1(2) that the memorandum of appeal be precise on the ground of appeal under separate heads and there is no advertence here to the award of special damages here. In addition, Order 42 Rule 4 provides that *the 'appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule'.* Clearly the appellants have introduced the ground on special damages in their submissions without the express leave of the court which I entirely agree with the respondent that it is manifestly unprocedural.

24. Nonetheless, I will proceed to consider the same on merit now that the respondent has had an opportunity to submit on it. According to the report from Maua Methodist Hospital (PExh 6b), the net total payable for the 7days mortuary storage charges was Kshs 11,061.12. The respondent proved that he paid a further sum of Kshs 13,150 to Amani Funeral Services for the hearse, coffin and cross (PExh.6c). The receipt for the acquisition of the letters of administration ad litem of Kshs 40,000 was adduced in evidence (PExh.6a) which brings the total amount of special damages proved to Kshs 64,211.12. I therefore hold the trial court took judicial notice and rightly so, that the body of the deceased must have been interred and some other expenses incurred. In my considered view therefore, the amount of Kshs 100,000 awarded for funeral expenses was reasonable. If I was to justify my agreement with the trial court in this regard I would only need to quote the

decision by the court of appeal in ***Premier Diary Limited vs. Amarjit Singh Sagoo & another*** **[2013] eKLR**, said as follows on the issue:

> **"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."**
>
> (emphasis added)

25. I find that even on the merits, the challenge on award of special damages lack merit and I dismiss that ground of appeal.

26. The upshot from the foregoing facts is that I have allowed the appeal on the limited ground challenging the quantum of damages assessed for loss of dependency only. Save for the deduction of the sum of Kshs 5,400,000 to Kshs 2,500,000, the rest of the grounds of appeal fail and is dismissed.

27. On costs, the appellant has partially succeeded and I award to them half costs.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS THIS 17TH DAY OF JUNE 2021

Patrick J O Otieno

Judge

In presence of

Sandra Kosgey for the appellant

No appearance for the respondent

Patrick J O Otieno

Judge