REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 147 OF 2018

R. K. SANGHANI.....APPELLANT

VERSUS

SERRAFINER MBITHE MUSYOKA *alias* **SLAFINA MBITHE MUSYOKA** *alias*

SARAFINA MBITHE MUSYOKA, MIRRIAN KAKUVI (*Suing as next of Kin to and on*

*behalf of the Estate of***PHISTON MATELI KAVILU (**Deceased)**.....1ST RESPONDENT**

NYINGI PETER & FRANCIS MBOYA WAMBUA.....2ND RESPONDENTS

(*Being an appeal from the judgment of Hon. C.A. Ocharo (PM) delivered on 23rd October 2018 in Machakos Chief Magistrate's Court CMCC No.1087 of 2011*)

BETWEEN

SERRAFINER MBITHE MUSYOKA *alias* **SLAFINA MBITHE**

MUSYOKA *alias* SARAFINA MBITHE MUSYOKA, MIRRIAN

KAKUVI (Suing as next of Kin to and on behalf of the Estate of

PHISTON MATELI KAVILU (Deceased).....PLAINTIFFS

VERSUS

R. K. SANGHANI.....DEFENDANT

NYINGI PETER

FRANCIS MBOYA WAMBUA.....3RD PARTIES

JUDGEMENT

1. By a Plaint dated 9.7.2011 and filed on 5.12.2011, the 1st Respondents herein sued the Appellant for the death of ***Phiston Mateli Kavilu*** who is said to have been aboard motor vehicle registration number KBJ 775R as a lawful fare paying passenger along Nairobi-Mombasa Road when the said motor vehicle was involved in an accident at Stony Athi/Mto wa Mawe area.

2. In the Plaint, the 1st Respondents sought general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 100,965/- plus costs and interest of the suit. The 1st Respondents filed list of witnesses, statements and list of documents dated and filed on the same day as the Plaint. The Appellant filed his defence dated 6.1.2012 on 10.1.2012 together with list of witnesses, driver's witness statement and list of documents. The 3rd Parties filed their defence and list of witnesses both dated 24.7.2018 on 26.7.2018.

3. According to the parties, it was agreed that civil suit namely ***Machakos CMCC No.856 of 2011 Benard Nzioka Nzalu vs Nyingi Peter & 3 Others*** be adopted as a test suit for purposes of the present case wherein judgement was delivered on 29.8.2017 and in which liability was apportioned against the Appellant at 15% while the 3rd parties were to shoulder 85% of the liability. The learned trial magistrate awarded a total sum of Kshs 6,030,965 to the respondents from which the appellant was to pay Kshs 904,644/75 while the 3rd parties were to pay Kshs 5,126,320/25. Liability is not contested as the appellant is appealing against quantum only.

4. On 23.7.2018 ***PW1 Serrafine Mbithe Musyoka,*** testified in court. She stated that she was a business lady. According to her the deceased herein was her husband. She stated that the deceased was involved in an accident while travelling to Nairobi. She adopted her witness statement dated 9.7.2011. She produced a copy of the letters of administration in the estate of the deceased as *Plaintiff's exhibit 1*. According to her, the deceased was 48 years old at the time of his demise. She produced a copy of the death certificate as *Plaintiff's exhibit 2*. She testified that they had been blessed with nine children and produced copies of the birth certificates as *Plaintiff's exhibits 3(a) to (e)*. Among the said children, six were minors whom she stated were in school at the time of deceased's death. She further stated that two are in secondary school while one was in college. According to her, the deceased was a businessman operating a shop and timber yard where he earned Kshs. 150,000/- per month. In support of the earnings, she produced bank statements from Co-operative and Family Bank as *Plaintiff's exhibits 4(a) and (b)*. She produced receipts which she said amounted to Kshs. 117,000/- incurred in the funeral expenses as *Plaintiff's exhibits 5*. According to her, a postmortem was conducted. She produced the report as *Plaintiff's exhibit 6*. She produced a demand letter and statutory notice dated 15.6.2011 as *Plaintiff's exhibit 7(a) and (b).* She informed court she was aware of the existence of a test suit 856/2011. She produced a copy of judgement as *Plaintiff's exhibit 8.* She closed the 1st Respondents case while the Appellant's and 2nd Respondents case were closed without calling any witness. The Appellant and 1st Respondents filed written submissions on 27.8.2018.

5. In a judgement delivered by the trial court on 23.10.2018 where this appeal arises from, upon hearing the evidence of the deceased's wife ***PW1, Serrafine Mbithe Musyoka***, the trial court awarded the 1st Respondents damages as follows:-

(a) Pain and suffering	**Kshs. 20,000/-**
(b) Loss of Expectation of life	**Kshs. 150,000/-**
(c) Special damages	**Kshs. 100,965/-**
(d) Loss of dependency	**Kshs. 5,760,000/-**
Total	**Kshs.6,030,965/-**

6. Aggrieved by the Judgement, the Appellant appealed citing the following grounds:-

(1) THE learned trial magistrate erred in law and in fact in her interpretation of the evidence adduced as proof of income of the deceased.

(2) THE learned trial magistrate erred in law and in fact by awarding exorbitant and excessive quantum of damages not based on any judicial authorities or precedence.

(3) THE learned trial magistrate erred in law and fact by proceeding on wrong principles when assessing the quantum of damages and failed to apply precedents and applicable tenets of law.

(4) THE learned trial magistrate erred in law and fact in erroneously evaluating the evidence on quantum and thereby arriving at a decision unsustainable in law.

(5) THE learned trial magistrate erred in law and in fact in awarding damages which were inordinately high in the circumstances that represented an entirely erroneous estimate in comparison with the Respondents claim.

(6) THE learned trial magistrate grossly misdirected herself in treating the appellant's submissions on quantum superficially thus arriving at an erroneous decision on quantum.

(7) THE learned trial magistrate erred in law and fact by making award based on the deceased's large family and inconclusive evidence on proof of earnings.

7. In addition, the Appellant filed supplementary Record of Appeals dated 17.3.2020 and 14.6. 2021. The Appellant prays for orders that:-

(a) The appeal be allowed.

(b) The Judgement of the learned trial magistrate on quantum of damages be set aside, varied or reviewed.

(c) The Appellant be awarded costs of this appeal.

Determination

8. I have considered the evidence tendered before the trial court as well as the submissions filed herein.

9. This being the first appellate court, I am therefore required to re-evaluate and subject the evidence before trial court to afresh 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. See ***Selle –vs- Associated Motor Boat Co [1986] EA 123.***

10. In ***Peters vs. Sunday Post Ltd [1958] EA 424***, the Court held that:-

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"**

11. The appeal herein is against quantum of damages awarded by the trial court. It is trite that award of damages is a discretion of the trial court hence the appellate court would hesitate to interfere with that discretion unless there is evidence that wrong principles were applied to award the damages. The Appellant faults the learned trial magistrate for awarding damages which according to him were inordinately high as a result of applying wrong principles. The Appellant calls upon this court to set aside, vary or review the trial court award.

12. This court is cautioned as held in the case of ***Bashir Ahmed Butt vs. Uwais Ahmed Khan [1977]1KLR 1*** where principles that guide an appellate court in handling a complaint on the award of damages are clear and well settled by the Court of Appeal, thus:-

> **"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (magistrate) proceeded on wrong principles, or that the misapprehended the evidence in some material aspect and so arrived at a figure which was inordinately high or low."**

13. I will render myself on the disputed damages awarded sequentially as awarded by the trial court.

14. As regards the award on pain and suffering, the learned trial magistrate awarded Kshs. 20,000/-. The award is not challenged hence I will not disturb the same.

15. On Loss of expectation of life, the learned trial magistrate awarded Kshs. 150,000/-. It is submitted by the Appellant that the deceased died instantly or within the same day hence an award of Kshs. 100,000/-is reasonable and not Kshs. 150,000/- while the 1st Respondents contends that the award of Kshs. 150,000/- was not inordinately high or based on wrong principles. According to the Appellant in the cases of ***James Gahinya Karienye & Another (Suing as legal representatives of the Estate Of David Kelvin Gakinya(Deceased) vs. Perminus Kariuki Githinji*** and in ***Kenya Wildlife Services vs. Geoffrey Gichuki Mwaura (2018) eKLR*** the court awarded ***Kshs. 80,000/-*** where the deceased died immediately after the accident and ***Kshs. 100,000/-*** was awarded after Kshs. 150,000/- was reduced respectively. According to the 1st Respondents, loss of expectation of life is awarded based on the principle that the deceased had been deprived of normal expectation of life due to the wrongful act of the tort feasor. Reliance was placed on the case of ***Caroline Leah Owino vs. Francis Kipsang Ngetich (Suing as Personal Administrator ad litem and/or personal Representative of the Estate of Mary Jepkurgat (Deceased) Eldoret Civil Appeal No.35 of 2014*** where the court awarded Kshs. 150,000/-

16. In my view the award of Kshs. 150,000/- was reasonable on loss of expectation of life. In ***Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR*** the court observed that:-

> **"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while pain and suffering the awards range from Kshs. 10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."**

17. However, I note in the case of ***Moses Akumba & Another vs. Hellen Karisa Thoya (2017) eKLR Chitembwe J.*** held that an award of Kshs. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In ***Petronila Muli vs. Richard Muindi Savi & Catherine Mwende Mwindu [2021] eKLR Limo J***. held that he was 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. According to ***Limo J.*** inflation was a factor to consider hence I see no reason to disturb the award of Kshs. 150,000/-. As the same is not excessive.

18. As regards the award for loss of dependency, it is submitted by the Appellant that the income of Kshs. 60,000/- said to have been earned by the deceased was not proved. The bank statement found at pages 49 to 52 of the Record of Appeal have been disputed by the Appellant. According to The Appellant, the learned trial magistrate was not convinced in the proceedings found at page 104 of the Record of Appeal by the bank statements hence stating ***'I shall therefore do the best that I can in the absence of profits generated in the business…'*** hence it is submitted by the Appellant that the 1st Respondents never proved earnings. According to the Appellant, the trial court should have applied the minimum wage of Kshs. 7,000/-. Reliance was placed on the case of ***Beatrice W. Murage vs. Consumer Transport Ltd & Another (2014) eKLR.*** The Appellant further contends that taking into account the uncertainties of life, the learned trial magistrate ought to have used a multiplier of 7 years and not 12 years. I note the Appellant has not challenged the 2/3 dependency ratio. According to the Appellant the computation ought to be ***Kshs. 7,000/- X 12 X 7 X 2/3= Kshs. 392,000.00/-.***

19. The 1st Respondents submitted that the deceased operated a timber yard and shop business. According to the 1st Respondents the learned trial magistrate was right to rely on the bank statements produced in court hence a proper finding that Kshs. 60,000/- per month would have been a reasonable proof of deceased's earnings. The deceased had 9 children hence a dependency ratio of 2/3 was appropriate. According to

the 1st Respondents, the deceased who was 48 years at the time of his death was healthy hence likelihood of living up to 60 years. A multiplier of 12 years is reasonable. Reliance was placed on the case of ***George Moga (Suing on his behalf and that of the Estate of the late JOYCE ADEMA in his capacity as the legal representative as well as on behalf of the named Defendants of the said Deceased) vs. The Nairobi Women's Hospital & 3 Others***. According to the 1st Respondents, the learned trial magistrate award of ***Kshs. 5,760,000/-*** was not inordinately high.

20. **Ringera J.** in the case ***Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR)*** stated as follows:-

> **"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."**

21. PW1 stated in her evidence that the deceased was a businessman earning Kshs. 150,000/ per month. In the death certificate (*Exhibit 2)*, it was indicated that the deceased was businessman. PW1 produced bank statements in support. The learned trial magistrate was of the view that the bank statements did not prove the exact profits generated in the business while on the other hand she stated that there was no basis to apply the minimum wage since there was evidence of steady deposits into the deceased's accounts hence she felt that Kshs. 60,000/- as earnings is reasonable.

22. The Court of Appeal in ***Jacob Ayiga Maruja & Another vs. Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR*** stated that:-

> **"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."**

23. In the same vein, ***Nyakundi J***. in the case of ***Joseph Mwangi Wanyeki vs. Alex Muriithi Mucoki & another [2019] eKLR*** stated that:-

> **"I take judicial notice that is not every man or woman in an income generating venture has the ability to keep proper book of accounts, track daily sales, profit and loss account or even own a bank account. In so much as it may sound popular and an ideal approach as a model of business accountability, the level of financial illiteracy among our citizenry are factors that should not be used against any claimant in calculating the average net income to assess damages under the Fatal Accident Act."**

24. It is trite that the court will apply the minimum wage where earnings have not been proved. However, that will only be when there is absence of income that the court will apply the Regulations of Wages Order as held by ***Asike-Makhandia J.*** in ***Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR.*** PW1 produced deceased's bank statement which to me prove that the deceased earned during his life time. It will be expected that the deceased who had nine children and a wife had to generate income in any possible way to take care of the family. It will be unfair to treat the deceased as any other lay about in the village yet he had a large family to provide and had a thriving business to boot. There is evidence that the deceased was a businessman operating a shop and timber yard which appears to me to justify the sum of Kshs. 60,000/- being considered as it is a reasonable figure. I find no reason to disturb the amount.

25. On the choice of multiplier, it is submitted by the Appellant that the learned trial magistrate would have applied 7 years and not 12 years while the 1st Respondents are in agreement with the trial court. I am guided by ***Ringera J.*** in ***Leonard Ekisa & Another vs. Major Birgen [2005] e KLR*** where the learned Judge stated that in determining the right multiplier, the right approach is to consider *the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the viscisittudes of life and factor accelerated by payment in lump sum.*

26. During, the trial, PW1 stated that at the time of the deceased's death, they had nine children; six minors who were in school, two were in secondary school and one in college. However, she did not state the level at which the children were in school but in my view the deceased had a huge responsibility to take care of the children but the accident robbed him that opportunity. I note that there was no evidence of ill health by the deceased. In my view the learned trial magistrate exercised her discretion judiciously to use 12 years as the multiplier. She took into account the uncertainties of life. I am satisfied that the learned trial magistrate did not consider irrelevant factors in arriving at her award on the damages. I will not disturb the multiplier.

26. As regards the claim for special damages of Kshs 100,965/, it is noted that the same is not challenged by the Appellant. PW1 produced receipts in support of the pleaded special damages and hence the same will not be interfered with.

27. It is noted that the 3rd parties did not participate both in the trial court or even in this appeal despite the fact that the determination on liability in the test suit namely M**achakos Cmcc No. 856 of 2011 Benard Nzioki Nzalu Vs Nyingi Peter and 3 Others** expressly affected them.

28. In the result, it is my finding that the appeal herein is devoid of any merit. The same is dismissed with costs to the 1st Respondents.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 13TH DAY OF OCTOBER, 2021.

G. V. ODUNGA

JUDGE