REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 39 OF 2018

GEORGE KAINDA.....1ST APPELANT

ASTRIA INDUSTRIES LIMITED.....2ND APPELANT

VERSUS

JUDITH KATUMBI KATHENGE

VINCENT MUSYIMI MWONGE (Suing as legal

representatives of the of

MUSYIMI PETER MWONGE (deceased).....RESPONDETS

(Being an appeal from the ruling and order in Machakos CMCC No. 654 of 2018, delivered by Hon. C.K. Kisiang'ani, Resident Magistrate on 7th March, 2018)

BETWEEN

JUDITH KATUMBI KATHENGE VINCENT MUSYIMI

MWONGE (Suing as legal representatives of the estate of PETER

MWONGE MUSYIMI(deceased).....PLAINTIFFS

VERSUS

GEORGE KAINDA.....1ST DEFENDANT

ASTRIA INDUSTRIES LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Appellants herein are the legal representatives of the estate of **Musyimi Peter Mwonge** who died on the 4th March, 2016 following injuries received in a road traffic accident the same day involving the 1st Respondent's motor vehicle registration no. KBP 208Q and the deceased who was a pedal passenger on motor cycle registration no. KMCX 781L. The suit was in respect of a claim for compensation for damages under both the ***Fatal Accidents Act*** and the ***Law Reform Act*** in which the Respondent claimed General Damages, Special Damages in the sum of Kshs 46,645/=, Costs and Interests.

2. At the trial only the plaintiffs, the Respondents herein called evidence and at the close of the plaintiff's case, the defendant, the Appellant herein, opted not to call any evidence. At the close of the case, the learned trial magistrate found that the 1st Appellant who was driving the suit vehicle was solely to blame for the said accident and held the 2nd Appellant vicariously liable for the negligence of the 1st Appellant. She accordingly found both appellants 100% jointly liable for the accident. As regards the quantum, she awarded Kshs 10,000/- under pain and

suffering and Kshs 100,000/- under loss of expectation of life for the deceased who was 49 years old. As for the award for loss of dependency the learned trial magistrate applied a multiplier of 13 years with a multiplicand of Kshs 30,000/- per month and dependency ratio of 2/3rds. In total she awarded Kshs 3,120,000/- under that head of damages.

3. According to the plaint, the deceased was survived by a widow, the 1st Respondent herein, a son aged 20 years, the 2nd Respondent herein and another son aged 15 years. It was pleaded that at the time of his death, the deceased was aged 49 years and was enjoying good health and lived happily and had normal expectations of life. He was a contractor with a monthly income of about Kshs 300,000/- and the family was dependent on him.

4. This appeal is restricted to the award under loss of dependency. The only evidence regarding that award was from PW2, **Judith Katunge Nthenge**, the widow of the deceased. According to her, they got married in 1998 and she produced their marriage certificate. According to her statement, their marriage was blessed with two sons and the deceased was the sole breadwinner of the family. In her oral evidence, she produced he death certificate, limited grant of letters of administration ad litem, copy of the records and receipts, demand letter, receipts for funeral expenses, a copy of the certificate of registration of a company, post mortem report and copy of the ID. It was her evidence that the deceased was an engineer.

5. In cross-examination she reiterated that they had two children and admitted that though she had their birth certificates, she had not produced them. She explained that the deceased was an engineer and not a contractor though to her the two terms were the same. It was her evidence that the deceased used to undertake construction of houses, roads and drilled water. He was however self-employed though he had a company called Ungengi Hygiene Co. At the time of her testimony, their first born had joined Technical University of Kenya while the other son was in Form 1.

6. In re-examination she stated that the deceased was earning about Kshs 150,000/- and used to tell her to prepare a budget of between Kshs 50,000/- and Kshs 200,000/- for rent, fees and other expenses. It was her evidence that the deceased also used to do other works and would have worked for more than 20 years up to 69 years.

7. In this appeal it is submitted on behalf of the appellants that the learned trial magistrate misdirected herself by assuming that the deceased's earning was Kshs 30,000/- without any documentary evidence to that effect. Based on **Kemfro Africa Ltd T/A Meru Express & Another vs. A M Lubia and Another [1982-88] 1 KAR 727**, **Mwita Nyamoganga and 2 Others vs. Joseph Tagere Mwita and Anor. [2014] eKLR**, **Arthur Nyamwate Omutondi & Others vs. United Millers Limited & 2 Others [2009] eKLR** and **Evans Muthaita Ndiva vs. Father Rino Meneghello & Another HCCC No. 1319 of 1992** it was submitted that since the Plaintiffs did not tender any evidence in support of their claim that the deceased was a contractor save for a copy of the certificate of registration of a company, no proof of earnings for example by way of statements of accounts or annual returns filed with Kenya Revenue Authority was adduced.

8. It was therefore submitted that the trial court's judgement offends the laid down guiding principles on what to do when proof of earning is not provided as was laid down in **Paul Ouma vs. Rosemary Atieno Onyango & Peter Juma Amolo Civil Appeal No. 6 of 2016**. According to the Appellants, in the absence of proof of earning the trial court ought to have been guided by the ***Regulation of Wages (Agricultural Industry) (Amendment) Order, 2015*** which stipulates the minimum wage for general labourers as Kshs 10,954.70 per month based on the decision in **FMM & FKS vs. Joseph Njuguna & Another Civil Appeal No. 9 of 2013**.

9. In opposing the appeal, the Respondents submitted that the plaintiff's testimony that the deceased was a contractor is confirmed by the fact that he had incorporated two companies, **Mwambetu Enterprises Limited** and **Ungengi Hygiene Co.** According to the Respondents, the deceased would not have incorporated a company and carried out construction businesses with third parties if he was not skilled in the engineering field. There is unchallenged evidence on record that in the year 2008 the deceased worked with British American Tobacco where he was earning Kshs. 86, 378/-. That in the year 2016 his monthly rent was Kshs. 21,000/-. That through one of his firms **Mwambetu Enterprises Ltd** he could contract with Kangundo Constituency Development Fund and he could be paid Kshs 785,017 for the work done and that the Respondents did not call any witness to rebut this evidence.

10. While the Appellants submit that the court misdirected itself in making a finding that the deceased's monthly earning was Kshs. 30,000/- without any documentary evidence, the Respondents submitted that there was enough evidence to prove that the deceased was earning far much more than 30,0000/- based on the decision in **Jacob Ayinga Maruja and Another vs Simeon Obay [2005] eKLR**.

11. In a nutshell, it was submitted that the Court of Appeal rejected the contention that only documentary evidence can prove ones earning. There are other factors that the court should consider, for instance the injustice a party may suffer if such an approach is taken. It was contended that from the Respondent's case, the court had sufficient evidence on record to entitle her to find that the deceased's monthly salary was at the least, Kshs 30,000/-. First the testimony of the 1st Plaintiff that she was a house wife and the deceased was the sole bread winner. Second, her testimony that her two children were school going but had since dropped out of the school for lack of the school fees. Third, the testimony of the 1st plaintiff that the deceased was a contractor. Fourth, documentary exhibits produced in court which included the pay slip of the deceased in the year 2008, the monthly rent receipts, the certificates of registration of the two companies of the deceased, the payment vouchers to the deceased by the CDF Kangundo constituency.

12. Clearly from all these evidence, it is clear that the 1st Plaintiff proved that the deceased's income per month was far beyond Kshs. 30,000/-. However, in her wisdom, the learned magistrate was convinced that at the bare minimum, the monthly income of the deceased at the time of his death was Kshs. 30,000/-. In the Respondents' view, the court arrived at the correct conclusion, having carefully exercised its judicial discretion and analysed the evidence before it.

Determinations

13. In this appeal, the appellant is only 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."

14. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

15. 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."

16. As regards the claim for loss of dependency, the oral evidence was that the deceased was an engineer who was earning Kshs 150,000.00 per month out of which he would defray the household budget of between Kshs 50,000/- and Kshs 200,000/- for rent, fees and other expenses. Obviously, if the deceased was earning Kshs 150,000.00 per month he would not spend more than 2/3rds and surely not more than his earnings on the family. However, the learned trial magistrate adopted Kshs 30,000.00 as his monthly earnings. This figure was based on the fact that though there was no proof of earning, it was on record that he was a contractor. However, there is no evidence showing that the deceased was a contractor. There is however evidence that the deceased had registered accompany known as Mwambetu Enterprises Limited and a firm known as Ungengi Hygiene Services. Though the nature of its business does not appear on the face of the certificate, there is evidence on record that in 2008, he was earning a salary of Kshs 86,378.00 from BAT Kenya. There was also evidence that in January and February, 2015, he undertook some work for the Constituency Development Fund, Kangundo for which he was entitled to be paid Kshs 857,207.80 and Kshs 130,653.00 respectively. Though there was no evidence as to how much he was actually earning, it is clear from the evidence on record that the deceased could not be termed as an unskilled labourer. In fatal accidents claim, it is what the deceased has lost that determines an award under loss of dependency rather than merely what the deceased was earning. It may well be that the deceased was earning a lot of money but spending very little on the family. That is why it has been held that the 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 dependants 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 dependants such an award as would when wisely invested be able to compensate the dependants 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 dependants, 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."

17. To say that the deceased's dependants are only entitled to nominal award even where they have placed evidence showing that the deceased's earnings were not nominal would result in grave injustice to the deceased's dependants. I therefore associate myself with the opinion of the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

18. I therefore, have no reason to interfere with the figures proposed by the learned trial magistrate. However, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) the capital sum arrived at by applying the multiplicand to the multiplier is to be 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 dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. Similarly, the Court of Appeal in **Eliphas Mutegi Njeri & Another vs.**

Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004 held that:

"As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards…Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-."

19. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award of Kshs 3,120,000/- leaving a balance of Kshs 3,020,000.00. plus costs and interests.

20. As the appellant has succeeded on a point which was not seriously argued by them but which this court is bound as a matter of law to take into account, there will be no order as to costs of this appeal.

21. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 16th day of January, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for Ms Musyoka for the Appellant

Ms Ndegwa for Nyangena for the Respondent

CA Geoffrey