REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 336 OF 2016

BETWEEN

SAMUEL KURIA KUHUNYA .....APPELLANT

AND

LAURA WANGUI KAHUHO & JOSEPHSON NJUGUNA MWANGI

(Administrators of the estate of

STANLEY MBURU MWANGI) .....**RESPONDENTS**

(Being an appeal from the judgment of Hon. Kassan (SPM) in the Chief Magistrate's Court at Nairobi Milimani Commercial Courts dated on 14th June 2016 in Civil Suit No. 4331 of 2014)

JUDGEMENT

1. Aggrieved with the trial court's assessment of damages, the appellant filed his memorandum of appeal dated 24th June 2016 setting out the following grounds of appeal;

a. That the learned magistrate erred in law and in fact in awarding loss of dependency at Kshs. 2,720,000/= which award was excessive and unwarranted in light of the evidence adduced;

b. That the learned magistrate erred in law and in applying a multiplicand of Kshs. 20,000/= as the deceased's earning which amount was unwarranted in light of the evidence adduced;

c. That the learned magistrate erred in law and in fact in not finding that the loss of expectation of life of Kshs. 100,000/= was excessive and unwarranted in light of the evidence and cited authorities;

d. That the learned magistrate erred in law and in fact in not taking into account an award made under the Law Reform Act when making an award under the Fatal Accident Act;

e. That the learned magistrate erred in law in not taking into account entirely the written submissions of the appellant;

f. That the learned magistrate's finding and decision were against the weight of the evidence adduced.

2. The parties entered consent on liability in the ratio of 80:20 in favour of the respondents and had the respondents' documents admitted without calling the makers.

3. The case before the trial court was that Stanley Mburu Mwangi, (*"the deceased"*), was driving motor vehicle registration number KAW 532 R along Mombasa Road on 1st August, 2011. At about 12:30 hrs, at Mlolongo area in Nairobi near KAPPA Oil, the appellant drove motor vehicle registration number KBM 858S in a negligent manner causing an accident from which the deceased sustained fatal injuries.

4. The respondents pleaded that the deceased was aged 43 years old at the time of his demise and was in good health. They claim that he was a PSV driver earning an income of Kshs. 1,000/= daily. He was survived by his wife and two minor children who suffered loss as a result of his death. The respondents claimed damages for the loss and a sum of Kshs. 98,750/= for funeral expenses and other costs expended in

prosecuting the suit.

5. The respondents also filed the statement of the deceased's wife, Laura Kahuho, who reiterated the contents in her pleadings. They also filed the statement of the deceased's employee, Titus Kalingi, who recounted the events that led to the accident and stated that he had also sustained injuries as a result of the accident.

6. The parties elected to file submissions in support of their rival positions in this appeal.

7. In his submissions, the appellant's advocate argues that the trial court applied a multiplier of 17 years without any justifiable reason in support thereof. The appellant argues that the court did not factor in the nature of the work done by the deceased and urges the court to substitute the multiplier of 17 years with a multiplier of 8 years.

8. The appellant also contests that the respondents did not prove that the deceased earned an income of Kshs. 30,000/=. He questions the adoption of an income of Kshs. 20,000/= by the trial court in the absence of proof and sufficient reason in support of its decision. He therefore urges the court to adopt the minimum wage of Kshs. 10,239/= for the year 2011.

9. The appellant also argued that the award of Kshs. 100,000/= for loss of expectation of life was excessive and urged the court to deduct the award made under the Law Reform Act from the award under the Fatal Accidents Act as it amounted to double compensation.

10. In opposing the appeal, the respondents' counsel in his written submissions argues that the trial court's decision to adopt an income of Kshs. 20,000/= was well reasoned and supported by the evidence on record. They argue that the witness statements supported the income of Kshs. 1,000/= per day for the deceased and contended that it was not out of the ordinary for a PSV driver to earn Kshs. 1,000/= per day from the common experience of the labour force prevailing in the market.

11. On the multiplier, the respondents submitted that in the lower court, they relied on the cases of ***Paulina Chepngetich & Anor vs Samuale Kiplagat Bore & Anor [2014]eKLR*** where the court upheld a multiplier of 17 years for a deceased aged 43 years old and the case of ***Apha Plus (Programme for Appropriate Technology Health)vs Cephas Owuoth Naujuma & Anor [2015]eKLR*** where the court upheld a multiplier of 17 years for a deceased who died aged 43 years.

12. As for the award of loss of expectation of life, the appellants submit that the respondents have themselves conceded that the sum of Kshs. 100,000/= is the conventional award hence the same should be upheld.

13. On the fourth ground of appeal, the respondent relies on the case of ***Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) CIVIL APPEAL NO 21 OF 1984 [1985]*** in support of the argument that an award under the Law Reform Act ought to be taken into account and not deducted from the award made under the Fatal Accidents Act. The Court of Appeal in the above case held as follows;

> *To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss.*

14. As this is an appeal on quantum, it is important to recall the guiding principle which was set out in ***Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) (supra)*** thus;

> *The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be wholly erroneous estimate of the damages.*

15. This was echoed in the case of ***Gitobu Imanyara & 2 Others vs. Attorney General Civil Appeal No. 98 of 2014 l [2016] eKLR***, where *the Court of Appeal held:*

> ***. . .*** *it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349...*

16. Starting with the award of loss of dependency under the Fatal Accident's Act, the appellant argues that the multiplicand and multiplier adopted by the trial court were excessive. In awarding the respondents a sum of Kshs. 2,720,000/= the trial court found as follows;

> *I have read statements by witnesses. It is said that the deceased used to earn a 1000 a day because he was a PSV driver. That would translate to 30,000 a day. It is not possible for the deceased to work from Monday to Sunday for years. I shall reduce his salary to Kshs. 20,000. I note the deceased was 43 yrs. I shall give him working life to 60 years.*

17. The respondents' assertion that the deceased was a driver was corroborated by the certificate of death, statement of his employee Titus

Kalingi and the copy of records which showed that he was the owner of vehicle registration number KBM 858S which he was driving at the time of the accident.

18. I find that an income of Kshs. 1,000/= for a driver who owned and operated his public service vehicle within Nairobi is reasonable. The trial court's reduction of his monthly income to Kshs. 20,000/= was equally appropriate and well reasoned. Though the respondents failed to produce documentary proof of his earnings, this did not disentitle them from the sums claimed. In the case of ***Jacob Ayiga Maruja & another v Simeon Obayo KSM CA Civil Appeal 167 of 2002 [2005] eKLR*** the Court of Appeal held that documentary proof was not the only way to prove earnings.

19. The appellant also contends that the multiplier of 17 years applied by the trial court was unjustified. In his written submissions before the trial court, the appellant relied on the case of ***Aphia Plus (Program for Appropriate Technology Health) v Cephas Owuoth Najuma & another Civil Appeal No. 2 of 2015 [2015] eKLR*** where the court held as follows;

> *The multiplier is a function of how long the dependants would rely on the deceased. The deceased's last born was 8 years old which means she would probably finish school at the age of 20 years. Having considered the decisions cited by the parties and the fact that the deceased would continue to carry on her business for her lifetime, I cannot say that the multiplier of 12 year was beyond what was reasonable.*

20. The respondents on their part proposed a multiplier of 17 years. They relied on the case of ***Aphia Plus (Program for Appropriate Technology Health) v Cephas Owuoth Najuma & another (supra)*** and also cited the case of ***Paulina Chepngetich & another v Samuel Kiplangat Bore & another Civil Suit No 1222 of 2004 [2014]eKLR*** where the court found a multiplier of 17 years reasonable for the deceased who died aged 43 years and worked as a mason.

21. The deceased in this case was survived by minors aged 14 years and 9 years. He was self employed and would probably have earned his living past the retirement age of 60 years. However considering the authorities cited by the parties before the trial court, I am of the view that a multiplier of 15 years would be more appropriate, considering the risky nature of the deceased's work and the usual vagaries of life.

22. I however find no reason to disturb the trial court's award of Kshs. 100,000/= which is the conventional award for loss of expectation of life under the Law Reform Act.

23. In support of the argument that the award made under the Law Reform Act ought to be deducted from the award made under the Fatal Accident's Act, the appellant cited a few authorities which I have duly considered. I am however bound by the decision of the Court of Appeal in ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –Vs- Kiarie Shoe Stores Limited [2015] eKLR*** which delivered itself as follows on the issue;

> *20. 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.*

24. In the end, I reduce the quantum of damages under the head of Loss of Dependency to Kshs 2,400,000/= as follows:

> 20,000 x 2/3 x 12 x 15 = 2,400,000/=

25. In the final analysis the total award is computed as follows:

a. Loss of dependency Kshs. 2,400,000/=

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

c. Pain and suffering Kshs. 30,000/=

d. Special damages Kshs. 98,270/=

e. Less contribution of 20 %

Kshs. 2,102,616/=

26. The respondent is to have half the costs of this appeal.

Dated, Signed and **Delivered** at **Nairobi** this **20th** day of **January, 2020**.

A. K. NDUNG'U

JUDGE