REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO 136 OF 2014

JAMES MULANDI.....1ST APPELLANT

LOCHAB BROS LIMITED..... 2ND APPELLANT

VERSUS

PETRONILA NGINA MAKAU

(Suing as the Legal Representative of the Estate

of Japheth Mwendwa Makau (Deceased).....RESPONDENT

(Being an appeal from the judgement and decree of the Chief Magistrates Court at Machakos by the Hon. Patrick Wangige (SPM) dated the 19th June, 2014 in CMCC No. 496 of 2012)

BETWEEN

PETRONILA NGINA MAKAU

(Suing as the Legal Representative of the

Estate of Japheth Mwendwa Makau (Deceased).....PLAINTIFF

VERSUS

JAMES MULANDI.....1ST APPELLANT

LOCHAB BROS LIMITED.....2ND APPELLANT

JUDGEMENT

1. By an amended plaint dated 25th February, 2013, the Respondent herein instituted a suit as the legal representative of the estate of **Japheth Mwendwa Makau** (deceased) against the Respondents herein claiming Special Damages in the sum of Kshs 53,300/- General Damages, Costs and interests.

2. The Respondent's suit was premised on the fact that on or about 15th November, 2009 the deceased was lawfully driving motor vehicle registration no. KBJ 350V owned by the 1st Appellant along Mombasa-Nairobi Road when at Lukenya due to the negligence, recklessness or carelessness of the 2nd Appellant, its driver, agent or servant the two vehicles collided as a result of which the deceased suffered fatal injuries.

3. It was pleaded that the deceased was a hardworking and diligent young man aged 23 years, in robust health who was working part time at Joelma Alarms & Accessories as a shop attendant earning an average of Kshs 10,000/= per month which he used to maintain himself and

take care of his siblings. Apart from that the deceased was a student at the Nairobi Institute of Business Studies pursuing Diploma in Tourism Travel and Business Studies and had only 10 days to graduate before he met his death.

4. It was pleaded that as a result of the deceased's death his life was shortened and his family and dependants suffered loss and damage being Kshs 53,300/- as special damages and general damages under ***Fatal Accidents Act*** and ***Law Reform Act*** which he claimed from the Appellants jointly and severally.

5. Though the record of the proceedings does not reflect that there was judgement on liability, from the judgement and the submissions made on behalf of the parties herein, it has been disclosed that on the 18th February 2014, parties recorded and filed a consent in which judgement was entered for the Respondent against the 2nd Appellant in in the ratio 80%:20% in favour of the Respondent. From the judgement, it would seem that the parties then annexed documents to their submissions and based thereon the learned trial magistrate arrived at his judgement in which awarded Kshs 30,000.00 as damages for pain and suffering, Kshs 100,000.00 for loss of expectation of life and Kshs 2,400,000.00 for loss of dependency. He also awarded Kshs 53,000.00 as special damages.

6. It was submitted on behalf of the 2nd Appellant that from the Respondent's witness statement, the accident occurred on or about 15th November 2009 where the deceased died on the spot. The Appellants therefore relied on **Philomena Mutheu Nzyoka –vs- Transpares Kenya Limited [2016] eKLR** and **Florence Mumbua Ndoo & Francis Kioko (suing as the administrators of the Estate of the late Alfred Safari) vs. Ezra Korir Kipngeno & Another [2017] eKLR** for the position that higher damages for pain and suffering are awardable where the deceased dies long after the accident, whereas minimal damages under this head are awarded where the deceased dies on the spot and 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 for pain and suffering the awards range from Kshs 10,000/' to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. Based on the decision in the case of **Charles Masoso Barasa & Another vs. Chepkoech Rotich & Another [2014] eKLR,** where **Wendoh, J** awarded the Plaintiff who had died a few hours after the accident Kshs. 15,000/- as damages for pain and suffering, it was submitted that since the deceased herein died on the spot as a result of the road accident, an award of Kshs. 30,000/- is excessive as the pain felt by the deceased was not prolonged before his demise. It was therefore proposed that the damages for pain and suffering be reduced from Kshs. 30,000/- to Kshs. 10,000/-.

7. With respect to loss of dependency, it was noted that the judgement delivered by Hon. Learned Magistrate adopted the multiplier of 30 years and a dependency ratio of $^2/_3$ calculating it with the salary the deceased earned before his demise. While appreciating that dependency is a matter of fact and must be proved, it was submitted that it must be demonstrated that persons for whose benefit the proceedings are brought under the ***Fatal Accidents Act*** were dependent on a deceased person prior to his death. This submission was based on the decision of **Ringera, J** (as he then was) in **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1998** as cited in the case of **Florence Mumbua Ndoo & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) vs. Ezra Korir Kipngeno & Another [2017] eKLR**.

8. According to the Appelalnts, in **David Kajogi M'mugaa vs. Francis Muthomi [2012] eKLR**, Makau, J adopted the multiplier of 25 and dependency ratio of $^1/_3$ where the deceased was a farmer aged 27 years old at the time of his death noting that:

> **"He would have worked beyond the conventional age now of 60 years old. On the other hand, life being what it is, he would and without a guarantee on one side have worked for less period than 60 years or on the other hand for more and even beyond 70 years as a farmer. I think a multiplier of 25 years would be reasonable in this case."**

9. The Appellants similarly relied on the case of **Chania Shuttle v Mary Mumbi [2017] eKLR,** where **Kamau, J** reduced the dependency ratio from $^1/_3$ as the respondents did not provide any proof of showing how they were dependent on the deceased. They also cited the decision of **Majanja, J** in the case of **Mini Bakeries (Nairobi) Limited vs. Oscar Ogada Orengo & Another [2018] eKLR** where the ratio was reduced from $^2/_3$ to $^1/_3$ as there was no proof showing that the siblings were the deceased dependants. It was therefore submitted that the multiplier ratio be 27 years and the dependency ratio be $^1/_3$.

10. The Appellants therefore submitted that taking into consideration that on the 18th February 2014, parties entered into a consent in which liability would be entered for the Respondent against the Appellants in the ratio 80%:20% the compensation for loss of life (sic) should be calculated as follows:

$^1/_3$ x 10,000 x 12 x 25 =1,000,000.00

11. They therefore prayed that the following should be the final award:

i) Damages for loss of pain and suffering..... Kshs. 10,000/-

ii) Damages for loss of expectation of life.....Kshs. 100,000/-

iii) Damages on loss of life.....Kshs. 1,000,000/-

Total.....Kshs. 1,110,000/-

Less 20% contributory negligence.....Kshs. 222,000/-

Grand Total.....Kshs. 888,000/-

12. In the Appellant's view the said award would adequately compensate the Respondent for the general damages suffered.

13. In opposing the appeal, the Respondent submitted that since the deceased was unmarried and his father had passed away. The Respondent his mother was unemployed and depended on her son and the deceased also took care of his siblings. According to the Respondent, the ratio of 2/3 was therefore rightfully applied based on **Eastern Produce (K) Limited & Another vs. Dominic Lokadogi Lokado (suing as the legal representative of the estate of the late Peter Ekuam Lokado(deceased) 2018 eKLR** where the deceased was unmarried but the Respondent his father used to depend on the deceased. The court awarded damages for loss of dependency using the ratio of 2/3 and a multiplicand of 25 years. The Appellant was aggrieved and filed an appeal challenging the ratio that was applied alleging that 1/3 would have been applied instead of 2/3 but the decision of the lower court was upheld. Reliance was also placed on the case of **Gachoki Gathuri (suing as legal representative of the estate of the late James Kinyua Gachoki (deceased) vs. John Ndiga Timothy & 2 others** where the deceased was aged 29 years at the time of his death and the court adopted a dependency ratio of 2/3 and a multiplicand of 25 years. The appellant was the father of the deceased. The decision of the lower court was set aside and a dependency ratio of 2/3 was adopted instead of 1/3 ratio.

14. According to the Respondent, taking into consideration the African set up and expectation of the family the son of the deceased being the eldest, it was expected of him to take charge of the family after the demise of his father. The Respondent in this case was entirely dependent on her son the deceased and hence the adoption of the dependency ratio of 2/3 was rightfully applied by the trial court. The multiplicand of 30 years was reasonable taking into account his age of 23 years.

15. It was therefore submitted that the trial court did not err in applying that ratio and the multiplicand at the time of demise. The Respondent prayed that the judgment of the lower court be upheld and the Appellants appeal be dismissed with costs payable to the Respondent.

Determinations

16. In this case, I am perturbed by the manner in which the proceedings before the trial court were conducted. Having consented to liability and properly so in my view, the parties adopted a strange way of assessment of damages. They decided to submit on quantum without producing any document. The documents seemed to have been annexed to the submissions instead.

17. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved. It is however unfair to the court to just throw all manner of documents at the court by way of annexures to the submissions and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by **Ringera, J** (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

> **"the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise."**

18. The same Judge in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** held that:

> **"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident."**

19. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

> **"The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."**

20. However, where the parties produce exhibits by consent the court has no option but to make the best out of them. In **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**, the Court of Appeal held that:

> **"The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as "No qualifications disclosed; the doctor is not a consultant". If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident."**

21. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

> **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."**

22. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

23. Similarly, in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

24. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

25. In this appeal, the appellants are 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."**

26. 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…"**

27. 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."**

28. As regards the claim for loss of dependency, the only challenge is with respect to the multiplicand and dependency ratio. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** 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."

29. I appreciate the views expressed in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) that:

> **"Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future.**"

30. However, in this case account must be taken of the fact that the deceased was unmarried and there was a possibility that he would with time marry and have his own family.

31. Accordingly, whereas parents have an expectation of being assisted by their children, 2/3rd dependency ratio is on the higher side. However, being unmarried it is not unreasonable to assume that he could have been contributing to his parents ½ of his income. Accordingly, I adopt the one half as the dependency ratio. As regards the multiplier, even from the Respondent's own submissions, it would seem that 25 years was reasonable.

32. It is therefore my view the award for loss of dependency ought to have been as hereunder:

10,000.00 x 25 x ½ x 12 = 1,500,000.00

33. I would also reduce the award for pain and suffering to Kshs 10,000.00 since there was no evidence that the deceased did not die immediately.

34. In the premises, the appeal is allowed, the award made by the learned trial magistrate set aside and substitute with the following:

Pain and Suffering.....Kshs 10,000.00

Loss of expectation of life.....Kshs 100,000.00

Loss of dependency.....Kshs 1,500,000.00

Special damages.....Kshs 53,000.00

Total.....Kshs 1,663,000.00

Less 20%.....Kshs 332,600.00

Total award.....Kshs 1,330,400.00

35. The costs of the proceedings before the trial court are awarded to the Appellant. The award on general damages will attract interest from the date of the judgement in the trial suit at court rates till payment in full while the interest on special damages will accrue from the date of filing the suit till payment in full at court rates.

36. Each party will bear own costs of the appeal.

37. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 4th day of February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Tum for Mr Muteti for the Respondent

Mr Munyao for Mr Katiku for the Appellant

CA Geoffrey