REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 55 OF 2019

NYAMAI PETRONILA.....1ST APPELLANT

PETER KIMANTHI.....2ND APPELLANT

VERSUS

MONICA USYOKI

FESTUS NGONYO MUIA (both suing as Administrators

& Legal Representatives of the Estate of SIMON MUSYOKI

MUIA (DECEASED).....RESPONDENTS

(Being an appeal from the judgement and decree in Machakos CMCC No. 956 of 2015, delivered by Hon. A. Kibiru, Chief Magistrate on 29th January, 2019)

BETWEEN

MONICA USYOKI

FESTUS NGONYO MUIA (both suing as Administrators

& Legal Representatives of the Estate of SIMON MUSYOKI

MUIA (DECEASED).....PLAINTIFFS

VERSUS

NYAMAI PETRONILA.....1ST APPELLANT

PETER KIMANTHI.....2ND APPELLANT

JUDGEMENT

1. The Respondents herein are the legal representatives of the estate of **Simon Musyoki Muia** who died on the 15th December, 2012 following injuries received in a road traffic accident the same day involving the deceased who was a pedestrian and the 1st Respondent's motor vehicle registration no. KBJ 040H. 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 167,750/=, Costs and Interests.

2. After hearing the suit, the learned trial magistrate in his judgement delivered on 29th January, 2019 apportioned liability in the ratio of 80:20 in favour of the Respondents as against the Appellants and awarded damages in the sum of Kshs 1,122,558.00 being Kshs 60,000.00 for pain and suffering, Kshs 100,000.00 for loss of expectation and Kshs 162,585.00 being special damages. After being subjected to 20% contribution, the court awarded Kshs 898,068.00 with costs and interests.

3. The Appellant herein is only aggrieved with the quantum of damages.

4. At the trial, PW1, **Monicah Musyoki**, the deceased's wife testified that the deceased was aged 49 years and was a plumber and they had 5 children. According to her she paid legal fees in the sum of Kshs 35,000/- in order to obtain the grant of letters of administration and exhibited a receipt for the same. She also incurred Kshs 82,500/= being burial expenses and exhibited receipts for the same.

5. In cross-examination she stated that she had no evidence that the deceased was a plumber. She clarified that the deceased was casual labourer and had no payslips or evidence of income. It was her evidence that only two children were below 18 years at the time of her testimony though at the time the deceased died 3 children were under 18 years.

6. According to PW2, **Festus Ngonyo Mula**, the deceased's brother, the deceased who was aged 49 years old was a plumber and they used to work together. It was his evidence that the deceased was earning Kshs 5,000/= per day and had a wife and 5 children. He was however unaware if the deceased had a bank account and whether he was paying tax. Though the deceased informed him that he was earning Kshs 5,000.00 and above, he had no evidence to prove the deceased's income since there were no formal arrangements.

7. In his judgement, the learned trial magistrate found that the decease died instantly and based on **Alice O. Alukewa vs. Akamba Public Road Services Ltd & 3 Others [2013] KLR** where an award of Kshs 50,000/= was made under the head of pain and suffering, the learned trial magistrate awarded Kshs 60,000/=. He also found that the Courts have been awarding a conventional figure of Kshs 100,000/= under the head of loss of expectation of life. As regards the loss of dependency he adopted a multiplier of 10 years while on the multiplicand he applied the salary of unskilled labourer with dependency ratio of 2/3rds and arrived at the sum of Kshs 800,000.00. Having perused the receipts produced, the court awarded Kshs 162,585/- as special damages, totalling Kshs 1,122,585.00 which was discounted by 20% leaving Kshs 898,068.00.

8. In this appeal, the appellant contends on the loss of dependency that though the certificate of death shows that the deceased was aged 49 years old and was a plumber, there were no records to show previously his monthly earnings. On multiplicand, it was submitted that the court erred as it used a multiplicand of Kshs. 10,000/- since there was no evidence of the deceased's earnings and there was no evidence of the deceased's employment. The court was urged to use the Multiplier approach in assessing damages which is a useful and practical method where factors such as age of the deceased, amount of annual month dependency are known. The Court was urged to assess the deceased income using the minimum wage of Kshs. 4,854/- which was the applicable minimum wage at the time of his death as published under ***Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013***. In this regard, the Appellant relied on **HCCA No. 108 of 2008 – Machakos Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR** where it was noted that

> **"... on the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate is usually like a wage if an unskilled employee."**

9. According to the Appellants, the Plaintiffs failed to prove that the deceased loss of plumber or any documentation that the deceased was a plumber by profession. The Appellants while having no problem with the award for pain and suffering, loss of expectation of life and special damages, was of the view that the award works out as follows:-

Kshs. 4,854 x 10 x 12 x 2/3 = Kshs. 388,320/-

10. It was therefore the Appellant's view that the court ought to make the following award:-

i. Pain & Suffering – Kshs. 60,000.00

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

iii. Loss of dependency – Kshs. 388,320.00

iv. Special damages – Kshs. 162,585.00

Total – Kshs. 710,905.00

Less 20% (as per the test suit) – Kshs. 142,181.00

Amount awarded – Kshs. 568,724.00

Determinations

11. 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."**

12. 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…"**

13. 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."**

14. As regards the claim for loss of dependency, the general the law is that 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."**

15. However as was held by the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR**:

> **"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."**

16. 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/-."**

17. 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 898,068.00 leaving a balance of Kshs 798,068.00 plus costs and interests.

18. As none of the parties can be said to have been wholly successful, each party will bear own costs of the suit.

19. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 3rd February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Lema for Mr Kiminza for the Respondent

CA Geoffrey