REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 62 OF 2018

ACCELER GLOBAL LOGISTICS CO. LTD.....….....APPELLANT

VERSUS

BEATRICE SYONZAU MWASYA & MUTHAMA MUNGUTI

(Both suing on behalf of the Estate of

MWANZIA MUTHAMA MUNGUTI (Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. D. M. Ndungi,

Senior Resident Magistrate delivered in Mariakani SPMCC NO. 188 OF 2017

on 21st November 2018)

CORAM: Hon. Justice R. Nyakundi

Hamilton Harrison & Mathews Advocates for the Appellant

Njoroge Mwangi Advocates for the respondent

JUDGMENT

This appeal by the appellant is directed against the findings and assessment of damages awarded by the Learned trial Magistrate **Hon. Ndungi (SRM)** in a Judgment delivered on 21.11.2018 in **SPMCC NO. 188 OF 2017.**

Introduction

On or about 13.2.2016 **Mwanzia Muthama Munguti** herein referred as the deceased was lawfully and carefully driving his motor vehicle registration number KCC 135R along Mombasa – Nairobi highway. In the course at Bonje area a collision occurred involving motor vehicle registration KBP 476A ZC2679 owned by the appellant/defendant which was averred as so negligently driven that it left its lane in the dual carriage way to the side of the deceased's side, hitting the aforesaid vehicle and did occasion fatal injuries, loss and damage. It was the respondents case that the said accident was caused by negligence on the part of the appellant's driver. The claim for damages was filed by **Beatrice Mwasya** and **Muthama Munguti** as administrators and on behalf of the Estate of the deceased.

At the initial stage, the appellant had filed statement of defence denying the accident any particulars of negligence stating that the collision was caused by the respondents own acts of omission and commission.

The issue on liability at the trial was determined at 100% as against the appellant agent, servant, driver or employee duly authorized and on behalf of his master and owner of subject motor vehicle.

After carefully reviewing the evidence that was availed, the Learned trial Magistrate assessed quantum as follows:

(a) Pain and suffering ***Kshs. 50,000/=***

(b) Loss of expectation of life Kshs. 150,000/=

(c) Loss of dependency Kshs.3,719,000/=

(d) Loss of consortium Kshs. 150,000/=

(e) special damages Kshs. 75,000/=

Total net compensation assessed at Kshs.4,144,000/= plus and interest.

Being aggrieved with this assessment, the appellant in the Memorandum of Appeal challenged the decision of the trial court by asserting interalia:

(a) That the Learned Magistrate erred in Law and fact in the assessment of the damages awardable to the respondent when the deceased died on the spot therefore no basis for Kshs.50,000/= for pain and suffering.

(b) The Learned Magistrate erred in Law and fact in the assessment of the damages awardable to the respondent leading to excessive amounts contrary to the well established principles in Law.

(c) The Learned trial Magistrate erred in Law and fact in awarding the respondents Kshs.150,000/= as damages for loss of consortium when loss of consortium is not among the general damages awardable under the Law Reform and Fatal Accidents act.

(d) The Learned trial Magistrate erred in Law and fact in failing to discount the multiplier under the loss of dependency, the Magistrate failed to appreciate the vagaries, vicissitudes and contingencies of life when awarding under the head loss of dependency.

The prayer was for the appeal be allowed and an appropriate quantum be substituted by this court.

On appeal the appellant five grounds were further supported with written submissions properly evaluated and which placed reliance on the following cited authorities: **Meshack Njema Odongo v West Kenya Sugar Co. Ltd {2009} eKLR, Kimunya Abednego alias Abednego Munyao v Zipporah S. Musyoka & Another {2019} eKLR, Chege Kimotho & others v Maria Vesters & another {1988} eKLR, Jeremiah Njuguna & another v Anagleta J. Yator & Edel J. Biwott {2016} eKLR, Innocent Ketie Makaya Denge v Peter Kipkore Cheserek & another {2015} eKLR.** On this vital grounds and the principles, appellant urged this court to allow the appeal.

Pursuant to the appeal respondent counsel also filed a reply by way of written submissions dated 20.9.2019. On the question of jurisdiction, respondent counsel argued and submitted that the court should not depart from the well settled principles in the cases of **Hellen Waruguru Waweru suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Store Ltd {2015} eKLR, Kimatu Mbivu T/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko {2006} eKLR, Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR.**

It was also argued by Learned counsel that the choice of multiplier was appropriate and within the personal circumstances of the deceased. On this proposition, Learned counsel cited the following authorities: **Mary Nekesa v George Muhichu Mwaura & another {2015} eKLR, Meshack Njema Odongo(supra), Cecilia Wanja Maina & 2 others v Reme K. Ltd & 2 others {2015} eKLR.** Learned counsel further cited the case of **Kenya Kazi Services Limited & another {2014} eKLR.**

The respondent counsel contention was that the Kshs.18,595.20 was appropriate multiplicand as also stated in the Judgment of the trial court. Learned counsel also submitted and pointed out on the award of damages under pain and suffering, loss expectation of life, loss of consortium and special damages, the Learned trial Magistrate carefully dealt with the evidence and arrived at a correct decision. On the whole, respondent counsel urged the court to dismiss the appeal.

Analysis

The Law and case authorities

As the Law stands Section 2 of the Law Reform Miscellaneous Act provides interalia that:

"where a cause of action survives as aforesaid for the benefit of the Estate of a deceased person, the damages recoverable for the benefit of the Estate of that person. Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss given to an estate consequence upon his death except that a sum in respect of funeral expenses may be included."

Section 4 (1) of the Fatal Accidents Act provides:

"that every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall subject to the provisions of Section 7 be brought by and in the name of the executor or administrator of the person deceased, and in every such action, the court may award such damages as it may think

proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought and the amount so recovered, after deducting the costs not recovered from the defendant shall be divided among those persons in such shares as the court by its Judgment shall find and direct."

This is a first appeal court and its jurisdiction is clear as in **Selle v Associated Motor Boat Company Ltd {1968} EA 123 and Williamson Diamonds Ltd v Brown {1970} EA 1,**

"The first appellate court in exercising jurisdiction over appeals, the duty is to rehear the matter a fresh, assess it and make its own conclusions remembering it has neither seen nor heard the witnesses and hence due evidence must be made for this."

The appellate court has therefore discretion to evaluate and assess whether the damages being challenged by the appellant were predicated on the evidence and the guiding principles on the doctrine of Stare decisis. Its again clearly the Law that the appeal court is only entitled to disturb an award of damages as **Law J. A.** rightly put in **Butt v Khan Civil Appeal {1981} KLR 349:**

"Where it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and has arrived at a figure which was either inordinately high or low."

In the instant appeal, Learned counsel for the appellant major attack is on punitive and excessive nature of the awards on the various limbs itemized in the impugned Judgment.

In as far as possible, it was submitted by Learned counsel that there was no adherence to similar circumstances and awards with those of the deceased, hence the misdirection led to an erroneous decision.

As I ponder on these grievances raised by the appellant on each of the assessment, the essential principles, pursuant to the Fatal Accidents Act and Law Reform Act can be deemed to be in consonant with the dictum in **Berham v Gambling {1941} 1 ALL ER 7** where **Viscount Simon S. C.** stated:

"I am of the opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at form a vast mass of vital statistics. The figure is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be varied is not the prospect of length of days, but the prospect of predominately happy life. The age of the individual may, in some cases, be a relevant factor for example, in extreme old age, the suavity of what life may be left may be relevant but as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures all that makes up life's fitful fever, have to be alluded for in the estimate. In assessing damages, for shortening of life, therefore, such damages should not be calculated solely, or even mainly on the basis of the length of life which is lost. Asquith J appreciated this view, as his Judgment shows, but I think that, in the light of large amounts, awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it. The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the Judgment of a Court of Law, but, in view of the easier of the earlier authorities we, must do our best to contribute to its solution. The Judge observed that the earlier decisions quoted to him assumed that human life is, on the whole good I would rather say that before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendants negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness, or despondency, that would be a circumstances justifying a smaller award. It is significant that, at any rate in one case of which we were informed the jury refused to award any damages under this head at all. As Lord Wright said in Rose v Ford special cases suggest themselves where the limitation of a life of constant pain and suffering cannot be regarded as inflicting injury, or at any rate, as inflicting the same injury s in more normal cases. I would further lay it down that, in assessing damages for this payment, the question is not whether the deceased had the ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on objective estimate of what kind of future on earth the victim might have enjoyed whether he had justly estimated that future or not of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects. The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree achieved to an established character and to a firmer hopes, his or her future becomes more definite and the extent to which good future may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult. I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possession are greater in one case than another. Lawyers and Judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status. It remains to observe, as Goddard L. J pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth of course, is that, in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lured the Jury or Judge of fact is attempting to equate, in commensurable. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead out to the conclusion that, in assessing damages, under this head, whether in the case of a child or an adult, very moderate figure should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in

Rose v Ford, the danger of this head of claim bearing unduly prominent and leading to infliction of damages in cases which do not really justify a large award."

These principles would form the model in which to review, evaluate and examine the trial court Judgment and how it does relate with the guidelines. I now revert to the disputed items in the main appeal particularly on loss of dependency, pain and suffering, loss of consortium and lost years.

(a) General damages under the Fatal Accidents Act

The deceased **Mwanzia Muthama Munguti** died at early age of 31 years leaving behind a widow of the same age and two minor children of tender years of three each. At the hearing **(PW2) Beatrice Mwasya** clarified that prior to the deceased death he was a driver by occupation earning a daily income of Kshs.2,000/= a portion of which was used to support the family. Apparently, the father **Muthama Munguti** was one of the dependants of the deceased. The other expenses incurred for purposes of the Estate of the deceased was funeral expenses, money for petitioning for grant of letters of administration.

The Learned trial Magistrate in approaching the evidence he applied a multiplier of 25 years and multiplicand of Kshs.18,595/= as monthly income for the deceased after expenses. The estimate of Kshs.2,000/= per day as income earned for a matatu driver is a sold fact which was not controverted by the appellant. Secondly, the age of the deceased was also a solid fact as a measure of prospective loss of earnings. The circumstances of each individual cases ought to be taken into account when it comes to assessment of damages under the Fatal Accidents Act. The question is for this appeal court. Did the Learned trial Magistrate error in applying the multiplier of 25 and multiplicand of Kshs.18,595/=. It behoves on this court to be guided by recent awards in comparable cases **(See the principles in Tayab v Kinamu {1983} KLR 114)** to demonstrate whether primafacie in exercise of discretion the Learned Magistrate himself and as such arrived at an erroneous award. It is proper also to bear in mind the principles in **Marko Mwenda v Bernard Mugambi & another Nairobi HCCC NO. 2343 OF 1993.** In **JNN** suing as the administrator of the estate of the deceased **SMM v Kassam Hauliers Ltd {2020} eKLR** the Court adopted a multiplier of 29 years for the deceased who died at the age of 31 years. In **Easy Coach Bus Services & another v Henry Charles Tsuma & another suing as the administrators and personal representatives of the Estate of Josephine Weyanga Tsuma {2019} eKLR**. The court adopted a multiplier of 27 years for a deceased aged 33 years.

Whilst considering the facts of this case, I am unable to accept the appellants counsel argument that the Learned trial Magistrate misdirected himself in adopting a multiplier of 25 years . I am of the view that the fact of actual dependency and the deceased dependency was proved on a balance of probabilities. Therefore, I find no grounds to fault the multiplier of 25 years as appropriate in this case when it comes to the multiplicand, the deceased was employed as a driver of public service motor vehicle. From the record, I take cognizance that the respondent did not manage to produce any documentary evidence on employment terms and remuneration.

I have considered the rival contentions on this aspect and do attach credence to the respondent submissions in accordance with the principles in **Jacob Ayiga Maruja & another v Simeane Obayo Civil Appeal No. 107 of 2002 {2005} eKLR**.

As a first appellant, I am entitled to evaluate the evidence with hindsight that in reversing the decision, due regard should be given to the impression made at the trial based on the demeanor of material witnesses and the evidence as a whole. The respondent did establish that the deceased earned a minimum wage of Kshs.2,000/=. That was bound to go due to the wrongful act of the appellants. This income was already discounted by the Learned trial Magistrate to a consolidated wage of 18,595. The earnings are to be annualized per annum which reflects the quantum arrived at by the Learned trial Magistrate. Hence, there is no evidence on appeal to show that the award of damages under the fatal accidents was inordinately high. The subjective test of vicissitudes of life as urged by the appellant counsel was a kind of speculative with no cogent evidence to go by in the circumstances of this case. In **Royal Trust Company v Canadian Pacific Railway Company {1922} 67 D. L. R. 518 Lord Parmoor** observes:

"When a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed."

(See also Davis v Powell Colhenes Ltd {1942} 1ALL ER 657 (AC601) in which the **House of Lords** stated:

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value."

Apply all these to the evidence given by the respondent, the court has not been told that there is no justification for the award made by the Learned trial Magistrate.

The next concern raised was on loss of expectation of life. The respondent pleaded compensation under the Law Reform Act and on specials incurred arising out of the accident. The loss of expectation of life is a sum in our jurisprudence which more or else has been made conventional with variations to factor in inflationary trends.

Again I reiterate in **Cuossens v Attorney General {1999} 1EA 40:**

"It was stated the object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered and the heads of elements of damage recognized as such by Law are divisible into two main group pecuniary and non- pecuniary loss…."

There is one other point that was of concern to the appellant counsel damages awarded for loss of consortium. There are different approaches that have been taken by courts including the Court of Appeal in **Chege case (supra) t**o answer this question.

In dealing with this ground, I am oblivious of the fact that:

> ***"The Law is settled that a person is responsible for the natural and probable results of his or her wrongful act (See G. V. Odunga Digest on Civil Law and Procedure at pg 3693 paragraph D) There is a variant view that in death, the surviving spouse may not have a cause of claim for loss of consortium for the wrongful act of the tortfeasor. As alluded to in the case of Khungi v Schieler 1960 25 DLR the term consortium is not susceptible of precise or complete definition but broadly speaking, it means companionship, love, affection, comfort, mutual services, sexual intercourse all belonging to the marriage state taken together make up what we refer to as consortium."***

What is the claimant saying here she has lost a companion and it would not be reasonably possible to replace the loss on account of marriage which was precipitated by the negligence and duty of care by the appellant. She may no longer be capable of receiving love, affection, comfort and sexual intercourse provided solely by the deceased. In the ordinary currency of family life, such damages are not meant to restore the physical frame but as a token performed by the wrongdoer in personal injury compensation scheme. In view of the aforesaid analysis, the penultimate paragraph of the Judgment on loss of consortium remain undisturbed.

(b) Special damages

I think within the ambit of special damages the Law is settled over and over again that they must be pleaded and specifically proved. See **(Mariam Maghema Ali v Jackson M. Nyambu T/a Sisera Store Civil Appeal No. 5 of 1990).** As for this appeal, the evidence on the claim for specials has been reviewed by this court afresh. I am satisfied that special damages as pleaded were also strictly proved. I find nothing to show that the Learned trial Magistrate misdirected himself in arriving at a figure of Kshs.75,000/=.

Clearly in the case at hand and for reasons above stated, I do not find that the Learned trial Magistrate erred in any way whatever his Judgment does not call for interference by this appeal's court. Perusing Section 4(1) of the Fatal Accidents Act the trial court has an additional jurisdiction conferred on it to appropriate and apportion damages awarded. It follows that the trial court having missed out, this court has the power to remit the file for purposes of apportionment. This order has been informed as a reminder that courts below in most if not all cases shy away from complying with the provision. The burden is on the trial court to conclusively deal with the issue before penning his Judgment.

From first to last, the appeal as brought and argued is dismissed with costs save for the directions issued for compliance pursuant to Section 78 (1) of the Civil Procedure Act.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Kariuki for Njoroge Mwangi for the respondent