REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 70 OF 2019

JOYCE MEDZA MANGALE & MUSA ROCHA MANGALE (both suing on behalf

of the Estate of EMMANUEL MASUDI MANGALE (Deceased).....APPELLANTS

VERSUS

EDEN TRANSPORTERS & LOGISTICS LIMITED.....1ST RESPONDENT

FUSTUM TEKESTE DEBESAI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Wanjiru Njuguna – Resident Magistrate delivered in Kaloleni PMCC No. 114 of 2018 on 3rd September 2019)

CORAM: Hon. Justice R. Nyakundi

Njoroge Mwangi Advocates for the Appellants

Eno Advocates for the respondents

JUDGMENT

At the bottom of this appeal as it appears from the Memorandum of Appeal filed in court on 17.9.2019, every such damages proportioned and awarded by **Hon. Wanjiru Njuguna** in her Judgment of 14.9.2019 in **SRMCC NO. 114 OF 2018** is under attack by the appellant.

Litigation history

The substance of the claim is as pleaded in the plaint filed in court on 24.4.2018 alleging that on 16.12.2016, the deceased was on board moto vehicle registration number UAT 758H CE793D owned by the 1st respondent and insured in the name of the 2nd respondent was on the material time being driven along Meru-Nanyuki road and upon reaching Subuiga, the motor vehicle and the trailer got disconnected and as a consequence it overturned and on impact the deceased sustained fatal injuries.

According to the appellant, the respondent jointly and severally by acts and particulars of negligence under paragraph 6 wholly caused the accident and the resultant death.

The respondents in their statement of defence denied occurrence of an accident, ownership and particulars of negligence as alleged in the plaint. Further, the respondents pleaded particulars of contributory negligence on the part of the deceased under paragraph 10 of the defence. On the pleadings, the appellants case was based on the testimony of **Rocha Mangale (PW1)** and that of **(PW2) PC Maurice Juma Male.**

From the evidence, doing the best in the circumstances, held the 1st respondent to be vicariously liable in negligence and breach of the duty of care at a ratio of 100% in favour of the appellants.

On her part, Learned trial Magistrate assessed the state of damages as follows:

(a). Pain and suffering Kshs. 10,000/=

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

(c). Loss of dependence Kshs.434,880/=

(d). Special damages Kshs. 15,000/=

(e). The appellant was also awarded costs and interest on the total sum.

The grounds of appeal are as follows:

(1). The Learned Magistrate erred in Law and in fact when assessing the damages under the Fatal Accidents Act relating to loss of dependency by adopting the global sum approach in the absence of any basis or submissions flowing from the pleadings or evidence in determining the same hence arrived at an erroneous estimate or estimate of damages that was inordinately too low.

(2). The Learned trial Magistrate erred in law and fact by failing to consider the submissions by the parties as a result of which she made an award under the Fatal Accidents Act relating to loss of dependency that was inordinately too low.

(3). The Learned trial Magistrate erred in law and fact by holding that the spouse of the deceased person must be an administrator for him or her to be considered as a dependent.

(4).The Learned trial Magistrate erred in law and fact by considering extraneous factors in the proof of dependency as a result of which she disregarded the deceased's spouse and child as dependants as a result of which she made an award under the Fatal Accidents Act relating to loss of dependency that was inordinately too low.

On appeal, Learned counsel **Mr. Njoroge** put up spirited written submissions on the misdirection and errors committed by the Learned trial Magistrate in assessing general damages under the Fatal Accident Act. In this case it was his contention that the widow and son of the deceased were left out of the benefit on the basis that they missed out being administrators to the Estate of the deceased, Learned counsel invited the court to find support on this ground from the evidence of **PW1 Rocha Mangale.** That in ruling out inclusion of the widow and the son for reason that no marriage certificate or birth certificate were produced, Learned counsel argued that it led to an erroneous decision on assessment of the amount on dependency.

According to Learned counsel the paramount issue which emerged in the final decision was the wrong exercise of discretion. The various settled factors to keep in mind on assessment of fatal injury compensation. That the Learned trial Magistrate chose a global approach to assess damages contrary to the evidence expressed by the appellant and her witnesses at the trial. In demonstrating that the decision to determine damages was wrong. Learned counsel referred to the principles to in a number of cases **Franco Mwirigi v Patrick Musyoki & Anor Malindi HCCA No. 17 of 2018, Richard Omeyo Omino v Christine A. Onyango {2009} eKLR, Kenya Ports Authority v Beryl Beth Malowa Were (suing as the administrators of the estate of the Late John Paulo Lubalo Were – Mombasa CA No. 244 of 2011 {2014} UR, Hellen Waruguru Waweru v Kiarie Shoe Limited {2015} eKLR,** with this the court was called upon to establish the correct principles of Law applicable and to reassess the damages in cases as this one drawing a multiplier and multiplicand approach and not on account of global guidelines.

In a twist to the appellants' submissions, Learned counsel for the respondent however put up grounds in opposition and authorities cited by the appellant in support of appeal.

Further Learned counsel stated that what was at stake before the trial court was whether evidence produced established dependency of the widow and son to the estate of the deceased. That being said, Learned counsel contended that the widow was stated to be out of jurisdiction of the court which the reason for non-petition of grant of letters of administration.

Learned counsel argued and contended that substantively from the evidence it was not probable to apply a multiplier and multiplicand approach to enable the appellant general damages for loss of dependency. Under these submissions Learned counsel cited and place reliance in the cases of **David Mbuba & Another v Victoria Mwongeli Kimwalu & Another {2018} eKLR, Jacob Ayiga Maruja & Another v Simeane Obayo, Civil Appeal No. 107 of 2002 {2005} eKLR, Albert Odawa v Gichimu Githenji Nakuru HCCA No. 15 of 2003 {2007} eKLR**.

In this situation where it appears multiplier and multiplicand is not tenable. It was Learned counsel submissions that the global approach carries the day. Learned counsel did contend that there was no misdirection nor error of Law to warrant an appeal or setting aside the Judgment.

Analysis and determination

The key issue in this appeal discernible from the grounds of appeal is whether, the appellant has availed settlement evidence for the court to interfere with assessment of the damages to which the respondent was entitled. The basic principle on appeal duty and jurisdiction of the court is as well spelt out in **Mwana Sokoni v Kenya Business Limited 1985 KLR 931 and Abok James Odera T/a A. J. Odera & Associates v John Patrick Michira T/a Michira and Co. Advocates {2013} eKLR.** The object of these authorities is to restate the Law that the duty of an appeal court is to rehear the case afresh, dealing with questions of fact and Law and the evidence as a whole with greater care to make appropriate conclusions on the matter. However, in doing so the court should bear in mind that it does not have the advantage of hearing and seeing witnesses as to the evidential status of the facts in issue. Therefore, allowance should be given for this on demeanor and credibility of witnesses for existence and non-existence of a fact. **(See Section 107 (1) of the Evidence Act)**.

To the same effect in **Karisa v Solunki {1969} EA 318, 320** the onus is on the appellant to show that in exercising discretion there was insufficient material, evidence or legal principles to support the decision. In addition to the arguments advised by the appellant counsel and

contested by the respondent the interference with the awards of a trial court is manifold as illuminated by the court in **Butt v Khan 1982 – 1988 1 KAR, Southern Engineering Company Ltd v Muzunga Mutia 1985 KLR 730 Vol 1 KAR 878 [1986 – 1989] and H. West** and **Son v Shephard [1964] AC 326 – 353**:

> ***"taking on the principle in H. West (Supra), damages due in tore are damages which so far as money can compensate will give the injured party reparation for the wrongful act…." "and in calculating damages the award can only be interfered by an appellate court if it shown that the trial court in its assessment arrived at an inordinately high or low as to represent an entirely erroneous estimate of the compensation to which the respondent is entitled."***

The weight to be accorded the evidence on the measurement of damages in personal injury claims was propounded by **Lord Blackburn** in **Livingstone v Rawyards Coal Company 1880,5 APP, as 25** in his own words:

> ***"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for repudiation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or ….."***

In considering the peculiar facts of each claim **Lord J in Butt case (supra)** characterized the factoring of discretion instructive of the following principles:

> ***(1). An award of damages in any injury should not be misery nor extravagant. It should be realistic and satisfactory. It must be a reasonable award. It is not always altogether logical that general damages should be assessed in relation to the situation in life of the victim inflation is no longer a temporary phenomenon. It is a permanent structural change and we should be able to convince the people to stop thinking of the good old days. We are operating in a most uncertain world with inflation finding us in the middle of this uncertainty."***

The effect of any of the above instances is that the power conferred upon the trial court is to be exercised at least in part and substance to the facts and circumstances of the case.

The rule in support of general policy on how much the victim of an accident is entitled to is to be interpreted on the facts of each case and on its own merits. In **Derrick Munroe v Gordon Robertson {2015} JMCA** the court stated:

> ***"For instance that there are established principles and a process to be employed in among at awards in personal injury matters. In determining quantum, Judges are not entitled to simply "pluck a figure from the air", regard must therefore be had to comparable cases in which complainants have suffered similar injuries."***

In the instant case the Learned trial Magistrate in assessing dependency she departed from a multiplier and multiplicand model and resorted to a global approach as held in the case of **Albert Odawa v Gichuru Gicheni {2007} eKLR.**

This aspect of assessment is the one being challenged by the appellant. It was submitted that the facts of the case clearly could have fixed the multiplier approach and income earned within the minimum wage guidelines. It is important to note that the Learned trial Magistrate was well versed with the multiplier/multiplicand formulae of assessment of damages. She cast her doubt to appropriate a minimum wage on the basis that the deceased occupation during his lifetime empowered obscure.

I am also reminded of the principle in **Kassam v Kampala Aerated Water Co. Ltd {1965} EA 587** that dependency and compensation for pecuniary loss is a question of fact whose existence must be proved by way of cogent evidence. Under Section 4 (1) of the Fatal Accidents:

> ***"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if 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 benefits the action is brought, and the amount so recovered, after deducting the cost not recovered from the dependent shall be divided among those persons in such shares as the court by its Judgment shall find and direct."***

It would be helpful in this case to point out of the contentious issue whether deceased died single or married with children.

In support of this fact, the evidence of **PW1, Rocha Mangale**, a younger brother to the deceased was nicely balanced that the deceased was married to **Kaunga Kagande Kakala** and blessed with a son aged eight months.

It is further to believed that the chief's letter dated 5.4.2018 submitted and admitted in evidence was clear. It is unfortunate that the Learned trial Magistrate went out her way to take judicial notice on birth certificates, clinic cards and lack of the widow not able to petition for grant of letters of administration to disentitle them of the benefit under the Fatal Accidents Act. It is quite logical and beyond peradventure that absence of a birth certificate or clinic card of the minor and failure by the widow not to be the first in line to apply for grant of letters would in my view deny them damages due as of right under the stature. The discredited evidence of the key witness (PW1) who testified on behalf of the Estate by the Learned trial Magistrate and objection raised by the a respondent counsel lacks evidential basis. It cannot be said that the deceased was not married without rebuttal evidence of the chief's letter. A child does not lose his or her identity to a family because the guardian or parent has no birth certificate.

In considering the Judgment of the trial court, its apparent that the enabling provisions under Section 3 (1) ,54, 79 and 82, of the Law of Succession on the making of a grant and duties of an executor or administrator appear to have escaped her mind. Although, the necessity of Section 29 of the Act defines dependency its well settled that the wife/spouse need not be an executor or administrator to the estate to give them legitimacy. So ancient and noble is this rule that it cannot be taken away by judicial fiat.

In my respectful view this misdirection ought to be varied and set aside to reflect the trial position of the Law. What is the sufficiency and property of the evidence which supports the global approach. The appellant went to great lengths to explain the trial court on the personal circumstances of the deceased but was sketchy on the pecuniary earnings prior to his death. This was a young man stated to be 27 years thirdly, married and blessed with one issue of eight months old.

It may be well that the deceased would be classified among the minimum wage earners in Kenya but certainly that is a fact to be proved with evidence of the potential income he earned. Similarly, the estimate of the amount set aside for himself and dependants is normally the burden bearer in civil cases to discharge on a balance of probabilities.

The problem in this case the Learned trial Magistrate had no evidence to answer the complex question of multiplier and multiplicand in the case effectively.

The appellant contested this global approach but in my view the fundamental **Kemfro Africa Ltd v AM Lubia & Another {1987} KLR 1982 – 88 IKAR**, the discretion to award loss of dependency at Kshs.800,000/= cannot be faulted.

I have also carefully considered the assessment under lost years, pain and suffering and special damages awarded by the Learned trial Magistrate. The reasons underlying the assessment are germane to the proper exercise of discretion and the evidence showed the amount is not too high or inordinately low as the test for this court to interfere with the award.

In the light of the foregoing, there is no lacuna, exercise of discretion or material to enable me disagree with the trial court on all limits of the claim and damages assessed. The appeal fails on all grounds and the impugned Judgment affirmed with costs of this appeal shared with the respondent. Orders accordingly:

The nature of the claim demands of the court to apportion the damages under the statute which I hereby do as follows:

1. **Kenga Kagande Arua Kshs.500,000/=**
2. **Mangale Masudi Kshs.200,000/= held in trust by the mother**
3. **Joyce Medza Kshs.300,000/=**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Komora holding brief for Njoroge Mwangi for the appellants