REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.197 OF 2018

TRAKANA MOMBASA LIMITED.....1ST APPELLANT

DEDA JAJI NZUYA.....2ND APPELLANT

VERSUS

GEORGE AMWAYI ISAYA.....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. Wahome, Chief Magistrate, Molo delivered on 11th December 2018 in Molo CMCC No.127 of 2018)

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed by the plaintiff in the lower court in his capacity as legal representative of **Wilson Kimutai Chepkwony (Deceased**) who died after being hit by the 1st defendant's vehicle which was being driven by the 2nd defendant. The plaintiff sought the following prayers: -

a. General damages under Fatal Accident's Act (Cap 32 of the laws of Kenya) for the benefit of the estate of the deceased, damages under Law Reform Act (Cap 20 of the laws of Kenya).

b. Special damages.

c. Interest on (a) and (b) above.

2. The plaintiff availed five witnesses. After hearing, by judgment delivered on 11th December, 2018, the trial magistrate apportioned liability at 10:90 in favour of the plaintiff. He assessed as follows: -

a. pain and suffering …….....kshs 50,000

b. loss of expectation of life…….....kshs 150,000

c. loss of dependency……...kshs 2,479,200

d. Subtotal……..…….....kshs 2,679,200

e. Less 10%.....kshs 267,920

f. Total…….kshs 2,411,280

3. The defendants/appellants being aggrieved by the said determination filed appeal against both liability and damages awarded on the following grounds: -

i. That the learned trial magistrate erred in law and fact in finding the Appellant 90% liable when there was evidence to support such finding on liability for the subject accident thereby imposing upon the appellant liability beyond the scope or magnitude envisaged or tenable in law.

ii. That the learned magistrate erred in law and in fact inholding the Appellant liable on the basis, not of evidence adduced by the parties, but rather on the basis of surmise and assumptions supported by the proceedings of the court and therefore the holding on liability is untenable.

iii. That the learned magistrate erred in law and in fact by disregarding the normal course of human event in finding without any evidential basis that the Appellant's motor vehicle would just leave the road, knock the respondent and go back to the road without any demonstrated cause.

iv. That the learned magistrate erred in law and in fact in seeming to import and apply the strict liability on the driver of the subject motor vehicle, the 2nd appellant when there was no pleading of that cause of action and imposing what appears strict liability and unnecessary burden on the appellants.

v. That the learned magistrate erred in law and in fact in making awards on damages for pain and suffering and other awards that are manifestly high, exaggerated, uneconomical, punitive, ruinous, unsubstantiated and in violation of principles of making an award of damages in cases of the nature of the instant suit.

vi. That the learned magistrate erred in law and fact by making award of damages for loss of dependenc on the presumption that the respondents were totally and/or only dependent on the deceased when there was no such pleading and or conclusive and reliable medical evidence in that respect.

vii. That the learned magistrate erred in law and fact in making duplicate award under Law Reform Act and Fatal Accident Act without taking the awards against each other.

viii. That the learned trial magistrate erred in making unsubstantiated special damages which were never pleaded and or proved as required in the circumstances and in law.

4. Parties agreed to proceed in HCCA No.196 of 2018 a matter arising from the same accident together with HCCA No.198 of 2018.

5. I allowed appeal on liability and made apportioned liability at 20: 80 in favour of the plaintiff. I adopt the same finding on liability in this matter.

6. I will now proceed to consider submissions on quantum in respect to this case. On quantum, the respondent stated the injuries sustained by the plaintiff/respondent as per **Doctor Kiamba's** evidence and cited authorities in support of awards granted under different headings stating that the awards are not inordinately high and that the trial magistrate reached the decision based on evidence adduced.

7. The appellant submitted that the trial magistrate awarded an extremely outrageous dependency ratio of 2/3 and a multiplicand of 20 years without any justifiable assessment or facts leading to such and prayed that in the event this court finds it just to award damages under this head, then a ratio of ½ would have been the best ration for compensation. Appellant cited several authorities which include the case of **Benedeta Wanjiku Kimani Vs Changwon Cheboi & Another [2013]e KLR** where the court held that there is no rule that two thirds of the income of a person is taken as available for family expenses. The extend of dependency is a question of fact to be established in each case.

8. On damages under Law Reform Act the appellant submitted that it should be taken into account in reduction of the damages recoverable under the Fatal Accident's Act. The appellant cited the case of **Hellen Waweru (suing as legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No.22 of 2014[2015] eKLR** where the court held as follows: -

> **"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 Accident 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 loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise."**

9. The Appellant submitted that the trial magistrate erred in law and fact by making duplicate award to the plaintiff in total disregard to the provisions of Fatal Accidents Act and Law Reform Act and in the principles of justice.

10. On award of special damages, the appellant submitted that it should not only be pleaded but specifically proved and cited the case of **Hahn Vs Singh, Civil Appeal No.42 of 1983[1985] KLR 716** where the court held that special damages should not only be claimed but also strictly proved. Appellant submitted that the respondent pleaded special damages amounting to kshs.185,785 but in the hearing for transport claim of kshs.22,000 receipts produced for transport was for kshs.15,000 and money spend on of kshs.91,050 no receipt was produced; that further no receipt for clothing of kshs.4000 and hearse of kshs.4000 was produced. Appellant cited the case of **Jacob Ayiga Maruja & Another Vs Simeon Obayo [2005] eKLR** where the court held as follows:-

> **"We agree and the courts always recognised that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on."**

11. In respect to quantum, the respondent submitted that this matter was brought under **Law Reform Act** and **Fatal Accidents Act** and the trial court did not err in awarding both loss of earnings and loss of dependency. Respondent cited the case of **Pleasant View School Limited Vs Rose Mutheu Kithoi & Another [2017] eKLR** where the court relied on the authority in **Kenfro Africa Vs Aziri Kamu Lubia &**

Another (**(No 2) [1985] eKLR**) where the court held that an award under Law Reform is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act and so it appears the legislature intended that it should be considered.

12. The court further stated that it was not persuaded by the appellant's submissions that the trial court must engage in mathematical deductions of the award under Law Reform Act from the damages awarded under Fatal Accidents Act.

13. The court held that damages awarded to the respondents under the Law Reform Act and Fatal Accident's Act were distinct awards under two separate statutes.

14. Respondent further stated **Section 2 (5) of the Law Reform Act** which provide as follows:-

> **"The right conferred by this part for the benefit of the estates of the deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by Fatal Accidents Act."**

15. On special damages, the respondent submitted that the respondent testified that they spent kshs 150,000 for funeral expenses, letters of administration, copy of records and police abstract and a bundle of receipts produced as exhibit 16 which was not opposed by the appellants and they annexed receipts for special damages to the supplementary record. Respondent submitted that special damages were specifically pleaded and proved to the required standard.

16. Respondent submitted that the rules are clear as to when court can interfere with an award of damages. And submitted that the damages awarded are not excessive considering that this is a fatal claim.

ANALYSIS AND DETERMINATION

17. In respect to double allocation, I note that the determination in the **Kenfro** case was clarified in subsequent case. **Section 5 (2) of the Law Reform Act** is clear that the right conferred to the estate of the deceased shall be in addition to and not in derogation of any rights under the Fatal Accidents Act. On that ground I find that the trial magistrate did not err in making awards under the two heads.

18. On multiplier I note that the deceased was 35 years old at the time of death. Evidence adduced is that, he was employed in a flower farm. The plaintiff had proposed a multiplier of 30 years but the court after considering authorities cited found a multiplier of 20 years reasonable which I also find reasonable.

19. On dependency ratio, the appellant's argument is that, it should have been ½ not 2/3. Evidence adduced show that the deceased was married with 3 children. In view of the fact that the deceased was a family person with children it is reasonable to allow multiplicand of 2/3 as most of his earning was expected to go to his family. I will not therefore interfere with that.

20. On monthly earnings, payslip confirmed he was earning kshs 15,495. this I have no reason to interfere with also.

21. From the foregoing I will not interfere with award under loss of dependency.

FINAL ORDERS

1. **Liability apportioned at 20:80 in favour of the plaintiff.**
2. **Appeal on Quantum is dismissed**
3. **Total award to be subjected to 20% contribution.**
4. **Each party to bear own costs.**

Judgment dated, signed and delivered via zoom at Nakuru This 7th day of May, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mr. Kisila Counsel for Appellants

Oganda holding brief for Gekonga Counsel for Respondent