REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 85 OF 2018

BETWEEN

MARY FLORENCE MWIHAKI.....APPELLANT

AND

FRANCIS NJUGUNA MBUI (Suing as the legal representative of the Estate of

JOHN MAREKIA NJUGUNA.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court

at Thika given on 5th July 2018 by Hon. T. Murigi in Thika

CMCC number 647 of 2007)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background

1. By the plaint dated 13th July 2007, the respondent herein filed suit against the appellant for recovery of damages under the Fatal Accidents Act and the Law Reform Act arising out of a road traffic accident that occurred on 20th July 2004.

2. The appellant filed defence on 2nd August 2007 and denied the respondent's claim against her. However, during the pendency of the suit the parties entered into a consent on liability in the ratio of 75% to 25% in favour of the respondent. Thereafter the parties filed and exchanged written submissions on quantum of damages.

3. By the judgment dated 5th July 2018, the learned trial magistrate entered judgment for the respondent as against the appellant as follows:-

a. Pain and suffering – Kshs. 10,000.00

b. Loss of expectation of life – Kshs. 200,000.00

c. Loss of dependency – Kshs.1,440,000.00

d. Special damages – Kshs. 3,000.00

Total – Kshs.1,653,000.00

Less 25% contribution – Kshs. 413,250.00

Final Total – Kshs.1,239,750.00

Plus costs and interest

The Appeal

4. Being dissatisfied by the above award, the appellant filed the Memorandum of Appeal on 3rd August 2018. The Memorandum of Appeal is of even date. The appellant has set out 8(eight) grounds of appeal which basically question the extent of the award of damages. The appellant contends that the award of Kshs.1,440,000.00 under the head of loss of dependency is so high as to represent an entirely erroneous estimate of the damages. The appellant also contends that the award of Kshs.200,000.00 for loss of expectation of life is also so excessively high as to represent an erroneous estimate of damages awardable under this head. Further that by awarding Kshs.10,000.00 for pain and suffering as well as Kshs.200,000.00 for loss of expectation of life the learned trial court conferred a double benefit on the dependants of the deceased's estate. These are the reasons why the appellant urges this honourable court to interfere with the said awards and itself give its own assessment of reasonable damages.

5. Because this is a first appeal, this court is under a duty to carefully reconsider the law and the facts in this case and evaluate them afresh before deciding whether or not to interfere with the judgment of the learned trial court. In this regard, I am also aware that an appellate court can only interfere with the judgment of a trial court if it is apparent on the record that the learned trial court proceeded on wrong principles of law or that it misapprehended the facts, or failed to take into account an irrelevant factor in reaching its decision. A case in point here is ***John Kipkemboi & another versus Morris Kedolo [2019] eKLR***, an authority cited by the appellant in his submissions dated 4th September 2019 and filed in court on 5tth September 2019.

Submissions and Issues for Determination

6. I have carefully read the parties' rival submissions filed on 5th September 2019 and 22nd October 2019 respectively. I must commend counsel for their generosity in availing relevant authorities for this honourable court's consumption. I shall refer to specific portions of the submissions as I consider the issues which have fallen for determination.

7. Having carefully analyzed the judgment of the learned trial court and the submissions filed herein, together with the evidence and the grounds of appeal, the only issue for determination is whether the learned trial court applied the correct principle in making the awards under the various heads. The appellant is of the view that the learned trial magistrate fell into grave error in awarding the sum of Kshs.1,440,000.00 for loss of dependency and further that the award of both Kshs.10,000.00 for pain and suffering and Kshs.200,000.00 for loss of expectation of life was unwarranted in the circumstances of this case.

8. On the other hand, the respondent sums up his submissions thus: "***From the foregoing, the trial court did not make any error of law or fact and it applied the correct principles in assessing the damages."***

Analysis and Determination

9. The major issue of concern in this case is the award of Kshs.1,440,000.00 for loss of dependency. There are several factors associated with this award. The first issue is the multiplicand of Kshs.6,000/- which the trial court applied as the monthly earning of the deceased. The appellant submits that the actual figure which the learned trial court should have adopted was Kshs.5,763.00 as per the deceased's pay slip for the month of June 2004. The same appears at page 21 of the Record of Appeal. This document is a **Kenya Railways Casual Wages Advice** in the name of John M. Nganga (typed) and John M. Njuguna (in hand) giving total pay for the month of April 2004 as Kshs.5763.00.

10. The appellant also submits that there was no explanation given by the learned trial magistrate as to why this documentary evidence of the pay slip was ignored. Alternatively, the appellant contends that the trial court should have applied the minimum wage of Kshs.3,999.00 for the class of employee that the deceased was: a labourer, as per relevant Legal Notice attached to appellant's submissions.

11. On this issue, the respondent placed reliance on the Court of Appeal decision in ***Jacob Ayiga Maruja & Another versus Simeone Obayo – CoA Civil Appeal No. 167 of 2002 [2005] eKLR*** where the court held, *inter alia:* -

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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."***

12. In the present case, there is documentary evidence that as at June 2004 the deceased's salary was Kshs.5763.00. The trial court was under an obligation to apply this amount as the monthly salary of the deceased at the time of death, since it appears that the figure of Kshs.6000/- applied had no basis. To that extent, I set aside the multiplicand of Kshs.6,000/- and substitute the same with Kshs.5,763.00.

13. The next contentious factor is the multiplier of 30 years for the deceased who was said to be 30 years old at the time of death. It was the

respondent's case that the deceased could have worked up to 60 years which is the normal retirement age for public and parastatal employees in this country. This was also the view taken by the learned trial magistrate.

14. The appellant contends that the learned trial magistrate erred in law and fact in equating the presumed balance of the deceased's working life with the multiplier. In this regard, reliance was placed on the persuasive authority in ***Bungoma HCCC No. 84 of 1999 – Martha Seyle Omondi versus Webuye Escort Co. Limited & another*** (Not reported) where the court held, *inter alia* that:-

> ***"……. the multiplier is not to be equated with the deceased's balance of working life before retirement. That period is the period of departure but it must be discounted to take account of the vicissitudes of life and the fact that the dependants are receiving an accelerated lump sum payment which is investible for continuous income."***

15. The appellants in this case propose a multiplier of 25 years as fair and reasonable. In the ***Martha Seyle Omondi Case (above)*** the court applied a multiplier of 18 years in respect of the deceased who was aged 30 years at the time of death.

16. The respondent is of the view that the multiplier of 30 years was reasonable considering that the deceased lived a healthy life, was energetic and had a long life ahead of age 60. Further that no evidence of vicissitudes of life or other imponderables or illness which would have shortened the deceased's working life was produced during the trial. The respondent relied on the case of ***Hamisi Said Njenga & 2 others versus Peter Ngigi Ndauwa [2019] eKLR.***

17. I have myself reconsidered the matter and must point of that as man goes through life, he does so like a blind man, not knowing what may befall him tomorrow or even the next hour. That is the reason for saying that in determining the multiplier, the vicissitudes of life must be considered, and that is why the deceased in this case met his death at age 30. No-one ever knows whether it is an accident in a vehicle, electrocution or such other happening. I therefore find that if the learned trial court had considered the vicissitudes of life, it would have found a multiplier of 25 years to be reasonable. I therefore set aside the multiplier of 30 years and substitute the same with multiplier of 25 years.

18. The next factor that has drawn the parties into argument is the 2/3 dependency ratio applied by the learned trial court. The appellant contends that since the deceased was unmarried, it was not reasonable to apply that ratio. Reliance was placed on the case of ***Henry Waweru Karanja & another versus Teresiah Nduta Kagiri versus Francis Wainaina Ng'ang'a [2017] eKLR*** in which the court enumerated a number of recently decided cases showing that courts tend to lower the dependency ratio when the deceased is an unmarried child and the claimant the parent, as it obtains in the present case.

19. The respondent's view on this issue was diametrically opposed to the appellant's view, arguing that at age 30, the deceased had a high financial obligation to his dependant father and mother who were aged 65 and 50 years respectively. The respondent also submitted that since the deceased was unmarried he spent most of his salary on his parents. The respondent's argument, as well as that of the appellant, is a rebuttance presumption. No evidence was placed before the trial court to support either view.

20. Considering the recent case law on the matter, I would agree with the appellant that the dependency ratio of 2/3 applied by the learned trial court was on the high side. This being the case, I do set aside the ratio of 2/3 and substitute it with the ratio of ½ for purposes of assessing damages for loss of dependency in the present case. I note that the facts in ***Hassan vs Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR*** relied upon by the respondent are clearly distinguishable from the facts in the present case.

21. The last point of contention in this appeal is whether the respondent stood to benefit twice from the same claim, namely under the Fatal Accidents Act and the Law Reform Act in his capacity as the legal representative of the estate of the deceased. The appellant urges this honourable court to make the necessary deduction as was done in the ***Martha Seyle Omondi Case (above).***

22. The respondent on his part relies on the provisions of ***section 2(5) of the Law Reform Act*** in contending that the said section does not provide for any deductions in the awards made under the two Acts. The respondent argues that the Law Reform Act clearly provides that any award made under the Act shall be in addition to and not in derogation of any right conferred by the Fatal Accidents Act. Reliance was placed on the persuasive authority in ***Eston Mwirigi Ndege & Another versus Damaris Kairiari (suing as the legal representative of the Estate of Felix Kibiti (Deceased)*** in which the learned judge fortified the position taken by the respondent herein that the Law Reform Act does not provide that sums awarded to the estate of a deceased under the said Act are to be deducted from damages awarded for lost dependency. I entirely agree with this position and have nothing more useful to add.

Conclusion

23. Having reached the above conclusion, the appeal succeeds in some respects, and fails in others. This is now the judgment of this court:-

a. Liability 75% to 25% in favour of the respondent

b. Pain and suffering – Kshs. 10,000.00

c. Loss of expectation of life – Kshs. 200,000.00

d. Loss of dependency

Kshs.5,7763 x 12 x ½ x 25 = Kshs. 864,450.00

Kshs.1,074,450.00

e. Special damages Kshs. 3,000.00

Less 25% contribution Kshs. 267,612.50

Net award Kshs. 809,839.50

24. The respondent shall have costs of the suit in the court below plus costs. As for costs of this appeal, each party shall bear its own costs.

25. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this **11th** day of **June, 2020**

HON.LADY JUSTICE.CHRISTINE W.MEOLI

JUDGE