



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 62 OF 2018

AUTO HAULIERS COMPANY LIMITED.....APPELLANT

-VERSUS-

MARGARET MUTHONI KINYENI AND

RACHEL MUMBI (suing as personal representatives of the Estate of

JOHANA NJURU MAINA.....RESPONDENTS

(Being an appeal from the Judgment and Decree of the Hon. C. Obulutsa, Chief Magistrate,

delivered on 25 May 2018 in Eldoret CMCC No. 830 of 2017)

JUDGMENT

[1] The two respondents in this appeal, **Margaret Muthoni Kinyeni** and **Rachel Mumbi**, sued the appellant before the lower court in **Eldoret Chief Magistrate's Civil Case No. 830 of 2017** as the administrators of the Estate of the late **Johana Njuru Maina**. The deceased died on **25 December 2016** near Ukwala Supermarket along Uganda Road in Eldoret Town after being knocked by Motor Vehicle Registration No. KBS 705W; and it was the contention of the respondents that the accident and the death of the deceased were solely attributable to the negligence of the appellant's driver.

[2] The appellant had denied the claim vide its Defence dated **24 August 2017**; contending that, if an accident did occur as alleged that it was solely or substantially occasioned by the deceased. Thus, upon hearing the parties to the dispute, the lower court found in favour of the respondents on liability in its Judgment dated **25 May 2018** and made awards as hereunder:

| | |
|------------------------|--------------------------|
| [a] Pain and suffering | Kshs. 100,000/= |
| [b] Loss of dependency | Kshs. 2,400,000/= |
| [c] Special damages | Kshs. 13,400/= |
| Total | Kshs. 2,513,400/= |

[3] Being dissatisfied with Judgment of the trial magistrate, the appellant filed the instant appeal on **7 June 2018** on the following grounds:

[a] That the finding on liability was erroneous vis-à-vis the issues entailed and the evidence tendered by the appellant.

[b] That the learned trial magistrate's award on damages was inordinately high, improper, unrealistic and inappropriate under all the circumstances of the case.

[c] That the learned trial magistrate erred both in law and fact in basing his findings on irrelevant matters without taking into consideration the evidence of the appellant.

[d] That the learned magistrate erred in law and in fact in failing to appreciate or take into account the appellant's submissions or at

all.

[e] That the learned trial magistrate erred on all points of fact and law in as far as award of damages is concerned.

[4] Accordingly, the appellant prayed that the decision of the **Chief Magistrate in Eldoret CMCC No. 830 of 2017** on both liability and quantum be set aside and a proper finding be made by this Court. It also prayed for costs of the appeal.

[5] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **10 June 2020**. In the Appellant's written submissions filed herein dated **25 June 2020**, **Mr. Kibichiy** for the appellant faulted the trial court for holding the appellant 100% liable in the face of evidence that the deceased was hit while crossing the busy Eldoret-Uganda highway. He urged the Court to believe the version of evidence given before the lower court by the appellant's witness, to the effect that the deceased was busy playing with a ball on the road when the accident occurred; and that he was therefore the author of his own misfortune. Counsel relied on **Peter Okello Omedi vs. Clement Ochieng** [2006] eKLR and **Joseph Muturi Koimburi vs. Mercy Wahaki Mugo** [2006] eKLR for the submission that a pedestrian owes a duty of care to other road users and must exercise prudence while crossing the road so as not to endanger other road users.

[6] It was further the submission of **Mr. Kibichiy** that the respondents did not indicate what steps the deceased took to avoid the accident; and therefore that some measure of blame ought to have been apportioned to him in the circumstances. Reliance was placed on **Techarad Steam & Power Limited vs. Mutio Muli & Mutua Ngao** [2019] eKLR to support the proposition that the deceased ought to have been held equally liable with the appellant. Thus, on liability, counsel urged the Court to believe the appellant's account; contending that the respondents failed to discharge the burden of proof for purposes of **Sections 107 and 108 of the Evidence Act, Chapter 80 of the Laws of Kenya**.

[7] On quantum, counsel for the appellant made reference to **Kemfro vs. A.M. Lubia & Another** [1982-1988] KLR 727 and urged the Court to bear in mind that the awards under the **Law Reform Act** and the **Fatal Accidents Act** are in respect of the same dependants; and therefore ought not to be duplicated. He also took the view that the award for pain and suffering was unwarranted, for the reason that the deceased was unconscious and felt no pain before he succumbed. The case of **Suleimani Muwanga vs. Walji Bhimji Jiwani & Another** [1964] EA 171 was cited in support of this argument. He consequently urged that if any amount is to be awarded under this head, it should be no more than **Kshs. 15,000/=**. His proposal was backed by **Charles Masoso Barasa & Another vs. Chepkoech Rotich & Another** [2014] eKLR in which a similar amount was awarded in a case where the deceased died a few hours after being involved in a road traffic accident.

[8] With regard to loss of dependency, **Mr. Kibichiy** submitted that dependency is a question of fact under the **Fatal Accidents Act**; and that since evidence was adduced to prove that the deceased had dependants as had been pleaded in the Complaint, there was no justification for the award of **Kshs. 2,400,000/=** by the lower court. He also took the view that it was erroneous for the lower court to apply a dependency ratio of 2/3 in the absence of proof of income and how the deceased would spend the same. Counsel relied on **Florence Kaniaru vs. Dominic Muteti Ndambuki & Another** [2005] eKLR; **Mbale Mwea vs. Kiriko Kihara & Another** and **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another** for the proposition that there is no rule that 2/3 of the income of a person is taken as available for family expenses; and that the extent of dependency is a question of fact to be established in each case.

[9] Accordingly, counsel proposed that, in the circumstances of this case, the lower court ought to have adopted a ratio of 1/3, a multiplier of 15 years and a multiplicand of **Kshs. 5,218/=** which is the minimum wage applicable for a general labourer at the time, per the **Regulation of Wages (General Amendment Order) 2013**. On special damages, counsel observed that, although the respondents asked for funeral expenses in the sum of **Kshs. 13,200/=**, and **Kshs. 200/=** for the Police Abstract, no evidence was adduced in proof thereof. He cited **David Bagine vs. Marti Bandi** for the principle that special damages must be strictly proved. Thus, in the estimation of **Mr. Kibichiy** a total award of **Kshs. 328,180/=** would suffice as compensation in this matter.

[10] On behalf of the respondents, **Mr. Mwinamo** relied on his written submissions dated **29 June 2020**. He defended the lower court's decision on both liability and quantum. He relied on the following authorities in support of the various heads of damages awarded by the lower court:

[a] **Nakuru HCCC No. 99 of 1994: John Mwangi vs. Patrick Kariuki & Another** in which a dependency ratio of 2/3 was adopted along with a multiplier of 30 years.

[b] **Kakamega HCCC No. 12 of 1985: Miriam Sei & Others vs. John Njega Khuyu & Another**, in which the deceased died at the age of 26. A multiplier of 35 was adopted with a 2/3 dependency ratio;

[c] **Mombasa HCCC No. 478 of 1984: Kiptampan Lockorir vs. Kadenga Kenga & Another**; in which **Kshs. 150,000/=** was awarded for loss of expectation of life;

[d] **Mombasa HCCC No. 16 of 1997: Mwalla Katana Mwangongo vs. Kenya Post and Telcomm**; in which **Kshs. 100,000/=** was awarded for pain and suffering.

[11] This is a first appeal, and therefore it is the duty of this Court to re-evaluate the evidence adduced before the lower court with a view of making its own conclusions and findings on the basis thereof; while giving an allowance for the fact that it neither saw nor heard the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968] EA 123, it was held thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] The record of the lower court proceedings shows that the 1st respondent, **Margaret Muthoni Kinyeni**, testified on **28 February 2018** as **PW1**. She adopted her witness statement dated **1 August 2017**. She explained that they had filed the suit under the **Fatal Accidents Act**, for the benefit of the deceased's dependants and under the **Law Reform Act** for the benefit of the deceased's estate; and that the deceased was, prior to his death aged 30 years and was in superb health. It was her evidence that the deceased was a businessman earning **Kshs. 30,000/=** per month; and that he was the sole source of support for the entire family before his untimely death. **PW1** also testified that she incurred expenses in pursuing probate and administration proceedings to enable them file this suit. It was on that basis that she prayed for general and special damages along with interest and costs.

[13] The respondents called an eye witness, **Martin Okelo (PW2)**, whose evidence before the lower court was that, on **25 December 2016**, he was on the left hand side of the Uganda Road, facing Webuye direction when **Motor Vehicle Registration No. KBS 705W** came at high speed and knocked the deceased, who was standing on the left side of the road near Ukwala Supermarket. He was categorical that the deceased was completely off the road when the accident occurred.

[14] The appellant called its driver, **Patrick Lumumba Masava (DW1)** in its defence. He confirmed that he was driving **Motor Vehicle Registration No. KBS 705W** Mercedes Axor on the **25 December 2016**; and that, at around 1730 hours, an accident occurred near Ukwala Supermarket in Eldoret Town while he was driving along Uganda Road. His version was that he was driving at an average speed of 20 kph while keeping to the outer lane of the dual carriage way; and that on reaching the Muliro Street-Uganda Road junction he noticed two pedestrians who were crossing the road while playing with balls and that it was in that process that the deceased was knocked. He therefore blamed the deceased for the occurrence.

[15] It is manifest from the foregoing that the trial court was faced with two divergent accounts as to how the accident occurred. He opted to believe the respondents and found the appellant's driver 100% liable. On the basis of the evidence, I am unable to fault the lower court for its conclusion; and having believed the respondents, whose account was that the deceased was completely off the road, there was no basis for apportionment of liability. As was observed by **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424**:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

[16] On quantum, it is now well settled that matters to do with assessment of damages are matters within the discretion of the trial court; and that an appellate court ought to respect that discretion if properly exercised; and to do so even when, on the facts, it would have come to a different conclusion. This was aptly expressed by the Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR** thus:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[17] The correct approach in such circumstances was aptly stated thus in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others [1957] EA 748**, by the Court of Appeal for East Africa:

"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase...A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."

[18] Thus, in establishing **the multiplier**, the starting point is the age of the deceased. The uncontroverted evidence adduced before the trial court by the two Respondents was that the deceased, a businessman, died at the age of 30 years; and that he was in good health generally. It is not unreasonable for a businessman to ply his trade beyond 60 years and therefore I find no particular reason to fault the conclusion reached on the multiplier. As for the multiplicand the lower court was told that the deceased was earning **Kshs. 30,000/=** per month on the average. There was however no hard proof thereof.

[19] It is instructive that, in **Hellen Waruguru Waweru Case** (supra) the Court of Appeal proffered the following position for the purpose of advancing the course of justice in such circumstances:

"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-

"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."

[20] Granted the foregoing, can it be said that the multiplicand of **Kshs. 10,000/=** adopted by the lower court was entirely erroneous, granted the context and the circumstances presented before it? I do not think so; though the court was better placed to adopt the global approach in the circumstances. Authorities abound for the proposition that where it is impossible to ascertain income, the preferable option would be for a trial court to employ the global approach. The words of **Hon. Ringera, J.** (as he then was) in **Mwanzia Ngalali Mutua vs. Kenya Bus Services (Msa) Ltd & Another**, are apt; namely, that:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency, and the expected length of the dependency are known 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."

[21] As pointed out hereinabove, I do not consider the amount of **Kshs. 10,000/=** per month to be an unreasonable estimate for a businessman granted that from the proposed monthly income, the deceased would have to plough back the capital component. Likewise, I have no particular quarrel with the dependency rate of 2/3. Among the documents produced before the lower court was a letter dated **10 July 2017** by the chief of Chepkoilel Location to confirm that the beneficiaries of the deceased included his mother Margaret Muthoni (the 1st respondent) and his widow Rachel Mumbi (the 2nd respondent). It also confirms that the deceased left behind two young children aged 11 and 6 years, respectively. Given that this was a young family, it is not unreasonable to expect that the deceased would commit 2/3 of his income for their upkeep and well-being.

Nakuru HCCC No. 99 of 1994: John Mwangi vs. Patrick Kariuki & Another in which a dependency ratio of 2/3 was adopted along with a multiplier of 30 years.

[b] **Kakamega HCCC No. 12 of 1985: Miriam Sei & Others vs. John Njega Khuyu & Another**, in which the deceased died at the age of 26. A multiplier of 35 was adopted with a 2/3 dependency ratio;

In the premises, I would uphold the lower court's calculation of the award due under the **Fatal Accidents Act**.

[22] Under the **Law Reform Act**, an award of **Kshs. 100,000/=** was made for pain and suffering; and none for loss of expectation of life. The evidence presented before the lower court shows that the deceased died the following day after the accident. The Certificate of Death (at page 72 of the Record of Appeal) confirms that the deceased died on **26 December 2016**. Whether he became unconscious or not is, in my view, immaterial to the pain that he must have suffered when he was knocked. Hence, in **Sukari Industries Limited vs. Clyde Machimbo Juma** [2016] eKLR that:

"... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years..."

[23] It is noteworthy, too, that in **Joyce Mumbi Mugi vs. The Co-operative Bank of Kenya Limited** (supra) where, as in this case, the deceased died the following day after the accident, the Court of Appeal approved an award of **Kshs. 300,000/=** for pain and suffering. And, in

Mombasa HCCC No. 16 of 1997: Mwalla Katana Mwangongo vs. Kenya Post and Telcomm; in which **Kshs. 100,000/=** was awarded for pain and suffering.

I therefore find no reason for interfering with the award of **Kshs. 100,000/=** for pain and suffering.

[24] I note too that, although Counsel for the Appellant submitted that there was double compensation under both the **Fatal Accidents Act** and the **Law Reform Act**, the truth of the matter is that the learned trial magistrate did not make any award for loss of expectation of life. Thus, the Appellant had no cause at all for complaint in this respect. In any event, considering that **Section 4(2)** of the **Fatal Accidents Act** does not provide for such deduction, but simply for the **"taking into account"** of any sums awarded for lost years under the **Law Reform Act**, it is not correct for counsel to talk about double compensation. In the **Hellen Waruguru Waweru Case** (supra), the Court of Appeal made this clarification thus:

"...learned counsel for KSSL, Mr. C.K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law. 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 Accidents 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 suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise." (emphasis added)

[25] The deduction was thus reversed by the Court of Appeal on the basis that the words "to be taken into account" used in Section 4(2) of the Fatal Accidents Act and "to be deducted" are two different things; and that what is to be taken into account is not necessarily deducted. As pointed out hereinabove, as no award was made for loss of expectation of life, the issue does not arise.

[26] Counsel for the appellants also challenged the special damage award, positing that it was not proved. What was pleaded was funeral expenses of Kshs. 13,200/= and Kshs. 200/= for the Police Abstract. It is not true that no receipt or document of any kind were produced by the Respondents to prove the funeral expenses component. The record of the lower court shows that an invoice, referred to as Farewell Home Charge Sheet (Adults) was produced before the lower court as **the Plaintiffs' Exhibit 4**, showing that the respondents were required to pay Kshs. 13,200/= for mortuary services. Whereas there is no receipt to confirm payment, it is a matter of notoriety that the amount had to be paid for the body to be released to the respondents. Thus, in **Premier Dairy Limited vs. Amarjit Singh Ssagoo & Another** [2013] eKLR the Court of Appeal took the view that:

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages”

[27] Consequently, **Mr. Kibichiy** had no valid basis for attacking the award of Kshs. 13,200/= under the head of funeral expenses. As for the Kshs. 200/= spent on Police Abstract, the same was wrongfully awarded in the absence of proof of payment. Indeed, the Police Abstract itself was produced before the lower court and marked the Plaintiffs' Exhibit 6; and on the reverse side thereof, it is indicated, at paragraph 3, that:

“The abstract form is issued free of charge.”

The same is, accordingly, disallowed.

[28] In the result therefore, it is my finding that the appeal is devoid of merit and is hereby dismissed with costs. Other than the aforementioned adjustment on the special damage component by Kshs. 200/= the award by the lower court is hereby upheld. The sums due to the respondents is confirmed as hereunder:

| | |
|------------------------|--------------------------|
| [a] Pain and suffering | Kshs. 100,000/= |
| [b] Loss of dependency | Kshs. 2,400,000/= |
| [c] Special damages | Kshs. 13,200/= |
| Total | Kshs. 2,513,200/= |

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF OCTOBER 2020

OLGA SEWE

JUDGE