REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 86 OF 2019

ALFRED KAINGU NGUWA.....APPELLANT

VERSUS

ALI DZIVO SAHA & REHEMA ALI DZIVO (both suing on behalf of the estate of

RASHID JOHA DZIVO (Deceased).....RESPONDENTS

(Being an Appeal from the Judgment delivered on 2nd October 2019 by Hon. L. N. Wasige (Mrs) Principal Magistrate in Kaloleni SRMCC No. 36 of 2018)

Coram: Hon. Justice R. Nyakundi

Isaac Onyango Advocate for the appellant

Njoroge Mwangi Advocate for the respondent

JUDGMENT

Background

The respondents filed a claim seeking general and special damages for wrongful death under the Law Reform Act (Miscellaneous Provisions) and Fatal Accidents Act against the appellant from an accident which occurred on or about 2.12.2017. in that accident the deceased was lawfully travelling as a passenger on motor cycle registration number KMEE 071K being driven along Kaloleni-Mazeras Road was knocked down by motor vehicle registration number KBU 857Q.

As a consequence, he sustained fatal injuries. The claim filed pursuant to the grant of letters of administration issued to the legal representatives herein the respondents was heard and determined by the trial Magistrate , **Hon. Wasige (PM)** of Kaloleni Principal Magistrate's Court.

Following, the aforesaid hearing, its clear from the Judgment of the Learned trial Magistrate delivered on 2.10.2019. That an assessment of damages in favour of the respondent was ordered as follows:

Damages for pain and suffering	**Kshs. 70,000/=**
Damages for loss of expectation of life	**Kshs. 150,000/=**
Damages for loss of dependency	**Kshs. 2,395,764/=**
Special damages	**Kshs. 63,100/=**

Being aggrieved with the Judgment of the trial Court an appeal has been preferred by the appellant on six premised grounds touching on assessment of damages. This bring me to the issues raised on appeal in the submissions filed by the parties.

It is the case for the appellant that on account of the evidence and the well settled principles on assessment of damages under the Fatal Accidents Act. There is an err and misdirection on the part of the Learned trial Magistrate.

In relation to the award, Learned counsel for the appellant argued that the discretion as exercised lacked basis and sufficient reasons for a

fundamentally serious issue of this nature. Learned counsel's contention was on the facts as displayed out in evidence that the deceased had no income at the time of his death save that he had just sat for his KCSE examination the previous year. He also made observations that no supporting documents were ever produced on the act or prospective of employment to inform the Court of loss of earning capacity due to the wrongful death.

Learned counsel further submitted that the presumption of the Learned Magistrate in adopting the basic minimum wage of ungraded artisan failed to take into consideration the reality in the cautioning of unemployment and the certainty of the deceased getting employed within the scope of legal notice no. 12 of 2017 on regulation of wages general order.

Another point of contest referred to by Learned counsel was on the multiplier/multiplicand formulae. He submitted on the adoption of retirement age of 60 years in the public service in respect to the deceased as one which resulted in an error in principle. Learned counsel further submitted that in absence of evidence the Learned Magistrate assumed in particular to dependency the ratio of ½ was appropriate as opposed to 1/3. Learned counsel referred and cited following cases in support of the appeal, **Mumias Sugar Company Limited –v-Nalinkumar M. Shah Civil Appeal No. 21 of 2011, Hakika Transporters Services Limited v Omar Gafo Bwanaidi {2019} eKLR, Rahima Tayab & Others v Anna Mary Kinanu {1983} KLR 114, Joseph Wachira Maina & another v Mohamed Hassan {2006} eKLR, Mombasa Maize Millers Limited v WIM suing as the representative of JAM (deceased) {2016} eKLR, Salicio Mithika M'rukunga v Millicent Wairimu Kimani & another {2006} eKLR.** Relying on the above cases, Learned counsel submitted that in any event the deceased claim could have been adjusted to a downward assessment of Kshs.551,692/= for lost years, loss of expectation of life of Kshs.80,000/= and pain and suffering of Kshs.10,000/= having regard to the evidence elicited.

The respondent counsel countered the appellant's submissions in reply and contended that on analysis of the evidence no error or application of wrong principles has been pointed out to warrant interference with the decision. Learned counsel contention is that whatever the appellant seeks to hold fails to bring the appeal within the well laid down principles to subject the assessment to a variation or fully setting it aside. Counsel relied on the stream of cases consisting the various guidelines and principles on exercise of discretion by the trial Court to assess damages on various heads outlined in the impugned Judgment **Catholic Diocese of Kisumu v Tete, Kisumu C. A. No. 284 of 2001 {2004} eKLR, Muchami Mugeni v Elizabeth Mungara, Nairobi C. A. 141 of 1998, David Kahuruka Gitau & Anor {2016} eKLR, Moses Akumba & Anor v Hellen Karisa Thoya, Malindi HCCA No. 17 of 2015 {2017} eKLR, Kenya Breweries Ltd v Saro C. A. No. 144 of 1990 {1991} eKLR, Daniel Kuria Nganga v Nairobi City Council {2013} eKLR, Silico Mithika M'Rukunga v Millicent Wairimu Kimani & Anor, Cecilia Wanja Maina & 2 others –v Reme K. Ltd & 2 others {2015} eKLR, Paul Ouma v Rosemary Atieno Onyango & Anor, Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 others {2006} eKLR, FMM & Anor v Joseph Njuguna Kuria & Anor {2016} eKLR.**

The above authorities tend to show that Learned counsel for the appellant contention is not so forceful as it might at first sight appeal subsequently after these lengthy submissions time has come for the Court to determine the appeal.

Determination

The rule on the adjudicatory role of an appeal's Court is as stated in **Sumana & another v Allied Industries Ltd {2007} KLR, East African Portland Cement Company Ltd v Tiheka Keloi {2016} eKLR** in which the Court held:

> ***"The positions of the Law as regards a first appeal is that as the first appellate Court, this Court has a duty to reconsider the evidence, evaluate it and draw its own conclusions, which appearing that it did not have the advantage, like the trial Court had, of seeing and hearing witnesses."***

Turning now to a consideration of the legal basis of the appellant's appeal, it is trite as held in **Bashir Butt v Khan Civil Appeal No. 40 of 1977, Kigaragari v Agripiana Mary Aya {1982 – 88 KAR 768}:**

> ***"For the Court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award has based on wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred."***

In the instant appeal the awards quantified by the Learned trial Magistrate are resisted by the appellant on the grounds of being manifestly excessive presenting an erroneous compensation to the Estate of the deceased. The principles in which this Court would be testing the impugned Judgment fall within the following category of cases. In **P. N. Mashru Ltd v Omar Mwakoro Makenge alias Omar Masoud HCCA No. 9 of 2017** where she stated:

> ***"26. In the case of Cecilia W. Mwangi & Another v Ruth Mwangi {1977} eKLR where the Court cited with approval the case of Tayab v Kinanu {1982-88} 1KAR 90 where the Court therein stated that:***
>
> ***"I state this so as to remove the misapprehension so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the Law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the defendants. The defendants are not wrong doers. They are simply the people who foot the bill.***
>
> ***27. Further in the case of Daniel Kosgei Ngelechi v Catholic Trustee Registered Diocese of Eldoret & Another {2013} eKLR, the Court therein cited with approval the case of Kigaragari v Aya {1982 -88} 1 KAR 768 where it had been stated as follows:***
>
> ***"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee ….."***

> ***28. <u>In assessing general damages, Courts must have presence of mind to ascertain the sum of general damages that other Courts and especially appellate Courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other Courts. In view of the aforesaid, a Court must therefore be guided by precedents."</u>***

The facts in this case clearly establish from the testimony of **Ali Nzivo** that the deceased was involved in an accident at the age of twenty years, survived with five siblings namely **Raja Dzivo, Swabrina Dzivo** and **Yusuf Dzivo** as evidence by the chief's letter produced as exhibit 7. Here the witness stated that the deceased was a bright student and hoped to become a journalist later in life. Subsequently, it was also made clear that the deceased was yet to raise a family of his own although he had just completed KCSE examinations. The respondents case was determined by the trial Court which adopted a multiplier/multiplicand approach. The burden of proof in this approach is a heavy one as held in the case of **Marko Mwenda v Bernard Mugambi & Another NBI HCCC No. 2343 of 1993** thus:

> ***"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. The multiplier approach is just a method of assessing damage not a principle of Law or 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 age of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or knowable without undue speculation. Where that is not possible, to insert on the multiplier approach would be to sacrifice justice on the altar of methodology, sometimes a Court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."***

In the case under review there is abundant of authorities where Courts have adopted minimum wage guidelines intended to assess damages under the Fatal Accidents Act.

It is my view that adopting such an approach in this matter by the Learned trial Magistrate cannot be entirely disturbed as subjective. So much for the evidence and arguments put forward by each side. Now we come back to the jurisprudence surrounding the multiplier and multiplicand. Thus in any case involving an appropriation of a multiplicand the determination is to be made by the Court upon consideration of all the evidence and factors as settled in the various precedents.

I consider the cases of Board of Governors of **Kangubiri Girls High School & Another v Jane Wanjiku Court of Appeal sitting at Nyeri in Civil Appeal No. 35 of 2014 eKLR** where the Court pronounced itself as follows:

> ***"the choice of a multiplier is a matter of the Courts discretion which discretion has to be exercised judiciously with a reason."***

However in reference to the decision in the case of **Kwanzia v Ngalah Rubia & Another Ringera J.** as he then was read as follows:

> ***"the multiplier approach is just a method of assessing damages. It is not a principle of Law or a dogma. Can and must be abandoned where facts do not facilitate its application…. to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do."***

It will therefore be necessary in this respect to evaluate the standing under this claim and the multiplier and the multiplicand. Reference is made to the cases of **Ruth Wangechi Gichuhi v Andrew Mangeni Luande {2011} eKLR**:

> ***"The Court adopted a starting salary of Kshs.30,000/= for 30 years for a graduate pharmacist aged 22 years." and***
>
> **Salwinder Singh Bhogal v Sahinder Kanr Benawra & 2 others:**
>
> ***"The Court adopted one quarter as a multiplicand and a multiplier of 20 years where the deceased was aged 20-23 years old."***

In addition to the dicta in **Paul N. Kinyanjui v Esther W. Wesonga {2015} eKLR**

> ***"the Court dealt with the issue of multiplier by substituting a multiplier of 30 years with that of 25 years for a deceased aged 23 years. Further the Court in Kenya Power & Lighting Co. v Patience Mbulwa (Suing as the Administrator of the estate of the late Benard Wambua Mutisya {2019} eKLR adopted the multiplier of 30 years for a deceased who at the time of death was aged 24 years old."***

As a consequence, essentially no evidence has been advanced for the Court to conclude that the Learned Magistrate exercised improper or unreasonable exercise of discretion with regard to the multiplier. With respect to the issue on multiplicand as matters and assessment of evidence carried out, I am of the considered view that the ratio of ½ be however interfered and substituted by 1/3.

As I have set out above, the trial Court would have the discretion to exercise it in such a manner as may be most equitable bearing in mind the nature and peculiar circumstances of the case. With respect to the findings and application of the multiplier and multiplicand, no single piece of evidence should be weighed to come up with an appropriate formulae, except one has to take into account all other evidence in a specific case. In my view the circumstances of the present case are that a multiplicand of 1/3 is more plausible to the ½ ratio applied by the Learned trial Magistrate.

Having so said, the assessment of damages under the Fatal Accidents was manifestly excessive. However, as I have already pointed out nothing wrong has been established by the appellant that a multiplier of 30 years used in respect of a 20 year old deceased is out of touch with reality or comparable decisions. I therefore partially agree with the appellant's counsel and in consonant with the dictum **in Kemfro Africa Ltd t/a Meru Express Services & another v A. M. Lubia & another {1982 – 1988} KAR 727** to interfere with the Judgment as prompted herein: Kshs.13,399.80 x 30 x 12 x 1/3 = Kshs.1,597,080/=.

The second concerns raised is to the effect that sum award by way of general damages for pain and suffering and loss of expectation of life was manifestly excessive and should be considerably reduced.

From a review of the previous decisions, the error complained of is not likely, however to have any impact of importance demanding this Court to interfere with the quantum. In this regard it should be made clear that the power of judicial decision making is in the exercise of discretion. As **De Smith & Jon Evans Judicial Review of Administrative Action 4th Edition 1980 (278):**

> ***"The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion both the performance of a duty. To say that somebody has a discretion presupposes, that there is no uniquely right answer to his problem. Discretionary decisions are those where the Judge has area of autonomy free from that still legal rules, on which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case."***

In this appeal, I am satisfied that partially on loss of dependency the Learned trial Magistrate took into account a relevant factor but on application of it she misdirected herself to arrive at an erroneous quantum. That can be stated to be wholly erroneous to require regulation by the Court.

In the circumstances, the appeal partially succeeds within the broad context under loss of dependency calculated to an award of Kshs.1,597,080/= which is hereby substituted with the initial assessment of Kshs.2,395,764/=. The appellant appeal against assessment of other category of damages is dismissed and the amount as assessed by the trial Court stands. The costs of this appeal shall be shared equally by both parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF NOVEMBER, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Isaac Onyango advocate for the appellant

2. Mr. Kazungu advocate for the respondent