REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 563 OF 2015

STANLEY MUIRU NJUGUNA.....1ST APPELLANT

ANN NKIROTE.....2ND APPELLANT

VERSUS

AN [Minor suing through his father and next friend SK (Deceased)]....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgement of the Resident Magistrate in Nairobi CMCC No. 2551 of 2013 delivered on the 15th May 2015.

2. The respondent instituted suit against the appellant's jointly and severally for special and general damages under the Fatal Accident's Act and the Law Reform Act as a result of a traffic accident which occurred on or about the 7th October, 2012 when the deceased was walking along Naivasha road.

3. The trial court apportioned liability in favour of the respondent against the appellants at the ratio of 70:30 and proceeded to award Kshs. 823,160 for loss of dependency, Kshs. 100,000 for loss of expectation of life, Kshs. 100,000 for pain and suffering and Kshs. 52,251 for special damages.

4. The appellant being dissatisfied with the trial court's decision appealed the decision on 6 grounds that can be summarised as follows;

a) **The learned magistrate erred by finding the appellants contributory liable against the weight of evidence.**

b) **The learned magistrate erred in law and fact by making an award of general damages that was excessive and against decided cases**

5. The parties consented to dispose of the matter by way of written submissions.

B. Appellant's Submissions

6. The appellants submitted that the respondent lacked capacity to prosecute the suit to its entirety as the limited grant obtained by the respondent allowed her to only file the suit and not proceed with its prosecution. They relied on the case of **Nairobi HCCA No. 618/1997, Lydia Ntembi Kairanya v The AG.** As such it was their submission that the respondent lacked locus standi to prosecute the suit and the same ought to have been dismissed as the courts should not perpetuate an illegality. They relied on the cases of **Mistry Amar Singh v Serwano Wofunira Kulobya [1963] EA 408** and that of **Standard Chartered Kenya Ltd v Intercom Services Ltd & 4 Others [2004] eKLR.**

7. On liability, it was submitted that the respondent had failed to prove negligence against them and further that the she had failed to prove ownership of the motor vehicle that allegedly caused the accident.

8. On quantum, it was submitted that an award of Kshs. 50,000 would suffice on pain and suffering and relied on the case of **Kenya Railways Corporation v Samwel Mugwe Gioche [2012] eKLR.**

9. On loss of expectation of life, it was proposed that a figure of Kshs. 60,000. They relied on the case of **Joseph Kahiga Gathii & Paul**

10. On the claim under the fatal accident act, it was submitted that there should have been no award as the multiplier approach the trial court employed was erroneous as there was no proof of age, proof of dependency or even the level of dependency if any. As such the award was based on speculations and ought not to have been given.

C. Respondent's Submissions

11. On liability, the respondent submitted that the appellant's defence in the trial court was a sham and further that attempts by them to shift liability to a 3rd party failed as they failed to adduce any evidence of the same before the trial court. The respondent stated that she had proved her case on a balance of probabilities.

12. On quantum and particularly the issue of double compensation as raised by the appellant, she submitted that the principle of double compensation only relates to the award for lost years and dependency and as such a beneficiary should not be denied damages for pain and suffering as well as loss of expectation of life as these were only awarded under the Law Reform Act. She relied on the provisions of Section 2 (5) of the Law Reform Act as well as the case of **Petronilla Anyango Owino v James Omondi [2018] eKLR.**

D. Analysis & Determination

13. I have considered the written submissions of the appellants and those of the respondent as well as the authorities relied on by the respective counsels.

14. As a first appellate court, the duty to subject the whole of the evidence to a fresh and exhaustive scrutiny, whilst making my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand as was stated in ***Peters –vs- Sunday Post Limited [1958] EA 424.*** The appropriate standard of review established in this case can be stated in three complementary principles:

> **a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
>
> **b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
>
> **c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.**

15. The respondent's case as it emerged from trial was that on the 7th October 2012, the deceased was involved in a fatal accident whilst walking along Naivasha Road Nairobi, involving motor vehicle registration number KAW 732H which was driven and owned by the appellants respectively leading to her claim for general and special damages under the Fatal Accident's Act and Law Reform Act.

16. The issue of the capacity of the plaintiff to sue would have the effect of settling this matter at the first instance if found to be as asserted by the appellants. I do note that this issue was not raised in the memorandum of appeal but was a matter canvassed by the trial court in favour of the respondent herein. In fulfilment of this court's mandate on appeal as stated in the ***Peters* case** (supra), I shall proceed to consider it.

17. I have perused the authority cited by the appellants and am in agreement with the decision of the trial court as regards its findings that the full grant required to be obtained before payment of damages.

18. However, it is noteworthy that there is no dispute that the Respondent filed and prosecuted this suit on the strength of a Limited Grant of Letters of Administration Ad Litem issued to her by the High Court on 6th February 2013. It is not disputed that the grant authorized the Respondent to file this suit. But that is as far as that limited grant of Letters of Administration Ad Litem can go. That grant does not contain authority or power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should Plaintiffs be successful. Those should have been included in the Limited Grant.

19. Consequently, the argument by the trial court that it was not the intention of the legislature or court issuing the grant to have parties file suits in court to have them sleep in the registry with no intention of prosecution does not convince me bearing in mind that the High Court issues what the Applicant has asked for. What is issued to her is what she is entitled to in law because it is what she asked for. There was nothing preventing the respondent from applying for rectification of the Limited Grant if Respondent wanted powers beyond the power to file suit. This is not a matter of form. It is a matter of substance which goes to the core of the type of authority given in the Limited Grant.

20. Though the Respondnet prosecuted this suit therefore, she did it without legal power to do so and she lacks legal power to collect or receive proceeds from prosecution of this suit in the event of success – under the Law Reform Act.

21. In the circumstances the claim of the Plaintiffs under the Law Reform Act fails.

22. I will however consider what has been done so far in terms of the Fatal Accidents Act. Section 4(1) of the Fatal Accidents Act states as follows:

> ***"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of 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 benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

23. Section 7 of the same Act provides that:

"If at any time, in any cause intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator."

24. Under the Fatal Accidents Act the dependants bring the suit on their own behalf and on behalf of other dependants not in the suit. They need not be personal representatives of the deceased unlike under the Law Reform Act where such personal representatives bring the suit for damages on behalf of the estate of the deceased.

25. That being the position, then the Respondent in this suit properly filed the suit as she did because she is a parent to the deceased. I will now turn to the issue of liability.

26. On liability, the respondent testified that the 1st appellant's vehicle overtook them on the right side and hit the deceased who was crossing the road from right to left. The appellant's driver had a duty of care to other road users. PW1 had already started overtaking when the appellant's driver started to overtake. Taking into consideration that the deceased was hit while crossing the road at a de-facto zebra crossing and hence contributed to the accident.

27. The appellant blamed a 3rd party owner of motor vehicle KAW 693 for the accident but did not join him in the proceedings. There was no evidence against any other party but the appellant in causing the accident. The investigating officer PW1 confirmed that the appellant's driver was charged for reckless driving in a traffic court. PW1 said he was not aware of a 3rd party vehicle that was involved in the accident. I find that that the finding of the magistrate on liability was based on cogent evidence and that it was correct.

28. I have considered the evidence given in the trial Court and the arguments made by the parties. It is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

29. The issue therefore is whether the awards of damages by the trial court under the different heads were based on any known factors or principles of law. The Court of Appeal held as follows in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR:**

20. 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.

30. Consequently, I shall proceed to consider the award of damages for pain and suffering as well as loss of expectation of life. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/' to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. The deceased died 12 days after the accident and must have suffered pain and suffering therefore I uphold the trial court's award of Kshs. 100,000 and Kshs. 100,000 for loss of expectation of life.

31. Lastly, on the award of loss of dependency, section 4 of the Fatal Accidents Act stipulates that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the deceased. The court record reveals that the deceased was 21 years and a seller of second hand clothes. There was no proof of his exact monthly income.

32. In **MWANZIA -VS- NGALALI MUTUA KENYA BUS LTD** and quoted in **ALBERT ODAWA -VS- GICHUMU GITHENJI NKU HCCA NO.15 OF 2003 (2007), KLR,** Justice Ringera was of the following view;

"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."

33. This reasoning was adopted in **MARY KHAYESI AWALO & ANOTHER -VS- MWILU MALUNGU & ANOTHER ELD HCCC NO. 19 OF 1997 [1999] EKLR** where Nambuye J., stated that:-

"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."

34. I have looked at our decisional law on this point. It would appear that our Courts tend to lower the dependency ration when the Deceased is an unmarried child and the claimant the parent. This is due to the presumption that such a child spends less at home by virtue of being unmarried. Of course, this is a presumption that can be rebutted by actual evidence. Hence, in ***Mary Kerubo Mabuka Vs Newton Mucheke Mburu & 3 others (2006) eKLR*** the court used a multiplier of 20 years on a 26 year old unmarried lady and a dependency ratio of ½. Similarly in the case of ***Alice O. Alukwe Vs Akamba Public Road Services Ltd (2013) eKLR***, the court used a dependency ratio of 1/2 on an unmarried lady aged 24 years. In ***Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR***, the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years.

35. The principle emerging from these cases is that the court will use a lower dependency ratio where the deceased was unmarried and therefore less inclined to spend his or her earnings at home. Given this emergent practice, I would agree that the use of the dependency ratio of two-thirds here was high. I would, in consonance with the emerging judicial precedents, go with a ratio of one-half (1/2) which I find reasonable in the circumstances.

36. In the case of **Florence Mumbua Ndoo & Francis Kioko (suing as the Administrators of the Estate of the Late Alfred Safari) v Ezra Korir Kipngeno & another [2017] eKLR,** the court awarded a global sum of Kshs. 700,000 where the deceased was 20 years, unmarried and without children. The plaintiff in that case did not prove earnings of the deceased. In this case, the deceased was said to be in a business of selling clothes but no evidence of monthly income was adduced. I am of the considered view that a global sum ought to have been awarded in this case.

37. Consequently, I hereby set aside the award of the trial court on loss of dependency and replace it with a global sum of Kshs. 700,000.

38. The upshot of the above is that the trial court award is substituted in the following terms;

a) Loss of dependency	Kshs. 700,000.00
b) Loss of expectation of life	Kshs. 100,000.00
c) Pain & Suffering	Kshs. 100,000.00
d) Special Damages	Kshs. 52,251.00
TOTAL	Kshs. 952,251.00
Less 30% contribution	Kshs. 277,105.00
GRAND TOTAL	**Kshs.646,579.00**

39. The appeal is only partly successful. It is hereby allowed. The appellant will bear costs of this appeal and the suit in the court below.

40. It is hereby so ordered.

DELIVERED, DATED AND DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE