REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.9 OF 2018

GUYO JILLO .....1ST APPELLANT

GULSAN INSTAAT STN V TAS.....2ND APPELLANT

VERSUS

LILIAN KANYUA.....RESPONDENT

JUDGMENT

The late Francis Muriuki Thambura was involved in a fatal road traffic accident on the 6.6.2017 along the Kaisut-Nyayo road. The respondent being the deceased's widow filed civil suit No.14 of 2017 before the Marsabit Principal Magistrate's Court seeking damages under both the Law Reform Act and the Fatal Accident Act. Parties recorded a consent on the 30.5.2018 on liability. The appellants conceded 90% liability while the respondent absorbed the remaining 10%. The appeal is on the assessment of damages as done by the trial court and is brought on the following grounds:

1. The learned Resident Magistrate erred in law and in fact in finding the appellant at all contrary to the weight of evidence.

2. That the learned Resident Magistrate erred in law and in fact in awarding the respondent Ksh.8,160,000/= when the respondent did not prove the dependency or render any proof to ascertain their relationship.

3. That the learned Resident Magistrate erred in law and in fact in calculating damages on the bases that the deceased died at the ae of 25 years and supported his dependants thus contravenes section 4(2) of the Fatal Accidents as the deceased cannot benefit twice.

4. The learned Magistrate erred in law and in fact in awarding *the respondent Kshs.135,000/= as the general expenses when the respondent did not prove.*

5. The judgment of the learned Principal Magistrate is against the weight of evidence on record in that the mistakes of the counsel should not be visited upon the appellant.

Mr. Kiogora appeared for the appellants. In his submissions he contends that the amount of Ksh.8,160,000/= awarded for loss of dependency is excessive. The multiplier of 25years and multiplicand of Ksh.60,000/- is on the higher side and is unreasonable. The deceased was 43 years old. The age of the dependants was not given. No birth certificates were produced. Counsel relies on case of ***MONICAH MUTHONI MWANGA -Vs- PETERSON WANJOHI & ANOTHER (2004) eKLR***. In that case the deceased was 58 years old and was survived by three children. A multiplier of 2 years was adopted. Counsel is proposing a multiplier of four (4) years. There was no proof that the deceased was a business-man. It is submitted that a multiplicand of Ksh.15,000/= per month is reasonable. It is also submitted that the sum of Ksh.100,000/= for loss of expectation of life ought to be deducted from the final award that the special damages were not proved.

Mr. Thangicia appeared for the respondent. He submitted that the evidence proved that the deceased was survived by his wife and three school going children. The documentary evidence proving dependency was produced by consent. The deceased was 43 years old at the time of his death. The appellant proposed a multiplier of 20 years. The trial court adopted a multiplier of seventeen(17) years and a multiplicand of Ksh.60,000/=. The deceased was a cobbler and used to have his own workshop. The special damages were equally proved.

The appeal herein is simply on quantum. The trial court made the following awards.

1. Pain and suffering …….. Kshs.20,000.

2. Loss of expectation of life…….. Kshs.100,000.

3. Loss of dependency……... Kshs.8,160,000.

4. Special damages ……..Kshs.135,050.

Before the trial court only one witness testified. The respondent's evidence is that she was married to the deceased in the year 2000. They were blessed with three children. First child EN, was a form four student. The second child, AM was in form two while the last born, EB, was a class four pupil. Her husband was a cobbler and used to do upholstery on motor vehicles and motor cycles. He used to earn Ksh.60,000/=. She was living in Meru and the deceased used to send her money for upkeep and school fees. The deceased had his own workshop in Marsabit town. He was also doing car seats, covers and interior trimmings. His workshop was called Alpha Cushion and Canvas Repairs. He was the sole bread winner for his family. She spent over Kshs.100,000/= as funeral expenses.

The 1st ground of appeal is not clear as to what the complaint is all about and the same is hereby dismissed. The other grounds of appeal are on quantum. Contrary to the appellants' assertions on the proof of dependency, the record of the trial court shows that the deceased was married to the respondent and they had three children. Birth certificates for EB (born on 18.10.2008), AM (born on 23.9.2002) and EN (born on 26.1.2001) were produced. In all the birth certificates the deceased is indicated as the father of the children. I am therefore satisfied that the award under the Fatal Accidents Act was proved and is within the principles determining award of damages in Fatal accident matters. The only issue will be whether the assessment by the trial court is reasonable.

It is a well settled principle of law that a superior court should not interfere with the award of damages by the awarding court unless it is shown that the latter court awarded damages that are in ordinately high or low or too low as to amount to an erroneous estimate, or that the court taking into account irrelevant issues in assessing damages or that the assessment is not based on the evidence on record.

In the case of **Butler V Butler, (1984)KRR 225** the court held as follows:-

> **The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong decision.**

There is no dispute as to the age of the deceased at the time of his death. A postmortem report was produced, it indicated that the deceased apparent age was 40 years. A death certificate dated 20.6.2017 was produced which indicated that the deceased was 43 years old. The death certificate indicates that the deceased was a casual worker. Photographs showing the deceased in a workshop were also produced. The respondent testified that the deceased owned his workshop and was earning Ksh.60,000/=. The trial court in its judgement stated as follows:

> **PW1 testified that the deceased was earning shs.60,000/= per month. Her statement was also filed. It shows that the deceased had a workshop in Marsabit town christened Alpha Cushon & Canvas Repairs. He was also said to be a driver. However, no documentary exhibit has been produced to support the claim that the deceased was earning the stated amount of money monthly. The defendant proposed that in the circumstances, the Regulation of Wages(General Amendment) Order, 2017 which sets out the minimum monthly pay for a driver at shs.25,737.10 should be adopted, <u>it is my determination that the deceased was earning shs.60,000/=. This is the available oral evidence which has not been rebutted.</u>**

From the evidence on record it is established that the deceased was the main bread winner for his family. He was catering for the needs of his family. There is no evidence that the deceased was earning Kshs.60,000/=. The trial court in its finding that the oral evidence on the deceased's income as adduced by PW1 was not rebutted cannot be held to be a well founded conclusion. PW1 was cross examined and she had no document to prove that her husband was earning that amount monthly. The total school fees for the three children was Ksh.39,910/= per term. The children were attending government schools. The appellant could not have tendered any evidence to disprove the respondent's contention on the deceased's income. The mere assertion by the respondent that her husband used to earn Kshs.60,000/= monthly cannot be taken as proof on a balance of probabilities. No bank statements were produced to establish whether the income ws being banked. No form of receipt from the county government showing that the deceased used to pay for his annual licence was produced. No certificate showing that the deceased's business was registered. It is not clear who gave the information to the doctor who performed the postmortem to the effect that the deceased was a casual worker and not a businessman. It would have been prudent if more evidence was adduced by the respondent to prove the alledged monthly income.

Before the trial court counsel for the appellant in his submissions stated as follows in relation to the award on loss of dependency.

> **Having been no proof of income or exact wage the deceased earned, we urge your honour to be guided by the Regulation of Wages (General Amendment) Order, 2017, which sets the minimum wage for heavy commercial vehicle drivers for those working outside cities and municipalities at Ksh.25,737.10. This being a taxable amount, we pray your honour adopts a multiplicand of Ksh.15,000/=.**
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> **Taking into consideration the deceased was 43 years at the time of his death and the fact that he probably would have worked up to the age of 60 years, we pray your honour adopts a multiplicand of 20 years taking into account contingencies of life.**

Hence, the amount under this head should be:

Ksh.15,000/=x20x12x3/4 =2,700,000/=.

Before this court counsel for the appellant have made the following proposal of loss of dependency:

Ksh.15,000x4x12x2/3 = Ksh.480,000

It is not clear why the appellants have discarded their initial offer. Such types of submissions makes the Court to conclude that even if the trial court had awarded the respondent the amount proposed in the submissions by the appellants' counsel, still the appellant would have been dissatisfied and prefer an appeal. Parties should take a specific stand on what they would like the court to award as damages. One cannot urge the trial court to award Ksh.2.7million for loss of dependency and make an about-turn on appeal and offer an award for Ksh.400,000/=. The circumstances of the case are the same and the subsequent submissions defeats the very logic of submissions in civil matters. The submissions by the parties act as a guide to the court and if a party exponentially varies its stand, then the court is left with no option but to conclude that such a party is not honest.

The multiplicand of Ksh.15,000/- proposed by the appellants' counsel was arrived at from a sum of Ksh.25,737.10 being the minimum wage for heavy commercial vehicle drivers. It was alleged that the deceased was also a driver. His driving licence was not produced. Counsel for the appellants urged the court to subject the sum of Ksh.25,737.10 to tax and arrived at Ksh.15,000. Even if the sum of Ksh.25,737.10 was to be subjected to an income tax liability of 30% still the remaining balance would have been Ksh.18,000/=. Having observed that the respondent did not prove that the deceased was earning Ksh.60,000 monthly, I do find that a multiplicand of Kshs.22,000 is reasonable. The trial court adopted as a multiplier of 17 years despite the fact that the appellant had offered a multiplier of 20 years. The trial court assumed that the deceased would have retired at the age of 60years. That is why it adopted a multiplier of 17 years. There being no cross appeal on the adoption of a multiplier of 17 years by the trial court I do find that there is no good reason to disturb that finding.

Before the trial court counsel for the appellants preferred a dependency ratio of ¾. This has now changed and counsel in his submission is offering a dependency ratio of ?. There were four dependants and even if the deceased had his own personal needs, I am satisfied that a dependency ratio of ? is ideal given the circumstance of the case. The offer of a multiplier of 4 years by the appellants is unreasonable. The deceased was self employed and was only 43 years old. The appellants have once again shifted from their earlier offer of 20 years to four (4) years multiplier. The respondent is hereby awarded damages for loss of dependency as follows:

Ksh. 22,000x17x12x2/3 =2,992,000.

The appellant are also contesting the award of Ksh.135,000 as special damages. The evidence shows that the deceased died in Marsabit and was buried in Meru. The burial expenses was estimated at Ksh.100,000/-. Receipt for the mortuary charges was produced. A sum of Ksh.30,000/= was also supported by a receipt for the limited grant before the suit was filed. I do find that the award of Ksh.100,000/= for funeral expenses is not inordinately high. The body was transported to Meru from Marsabit. tThere was a coffin and clothing for the deceased and mourners must have been fed. This is expected in a normal African burial. I see no reason as to why I should disturb the award.

Mr. Kiogora submit that the award made under the Law Reform Act ought to be deducted from the award made under the Fatal Accidents Act. In the case of **HELLEN WARUGURU WAWERU (suing as the legal representative of PETER WAWERU MWENJA (deceased) -V- KIARIE SHOE STORES LTD, Nyeri Civil Appeal No.22 of 2014** the Court of Appel stated at para 10 as follows:-

This Court has explained the concept of double compensation in several decisions and it is 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.

***The confusion appears to have arisen because of different reporting of the Kenfro case (supra*) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as <u>Kenfro Africa Ltd T/A Meru express Services 1976 & another –vs- Lubia & another (No.2</u>) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia that:-**

An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act, it appears the legislation intended that it should be considered.

The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estate of deceased persons shall be in addition to and not derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law reform Act in respect of the same death.

The words 'to be taken into account' and ' to be deducted' are two different things. The words in Section 4(2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgement of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial Judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. <u>There is no requirement in law or otherwise for him to engage in a mathematical deduction.</u>

***<u>The deduction of the entire amounts made under the LRA in this case was erroneous once again, we have to interfere with the final award of damages</u>*. We observe that the High Court reduced even further the figure of Sh.100,000 awarded for Loss of the**

expectations to sh.70,000 despite confirmation in the judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the Fatal Accidents Act award. With respect, that argument is misguided since there is no compulsion in law to make the deduction

There is no legal requirement that awards made under the Law Reform Act must be deducted from those made under the Fatal Accidents Act. All what is required is for the awarding Court to take into account the award made under the Law Reform Act when making award under the Fatal Accidents Act. In my view there is no double compensation. Why then do we have two separate statutes on the same issue of Fatal Accidents. The award made under the Law Reform Act is in addition to what is awarded under the Fatal Accidents Act. Although Section 2(5) of the Law Reform Act provides for the ***"rights***" conferred to the estate, such rights lead to the award under the Law Reform Act which awards are in addition and not in derogation to those rights or awards made under the Fatal Accidents Act. Taking into consideration the fact that the respondent will have to take care of her young family and considering that the children are still in school, I do find that there is no need of deducting the sum of Ksh.100,000 awarded under the Law Reform Act for loss of expectation of life from the award of Ksh.2,992,000 made under the Fatal Accidents Act.

The deceased died on the spot. There is no painless death. The appellants are not contesting the award of Ksh.20,000 for pain and suffering. In the end the appeal partly succeed. The award of Ksh.8,160,000 for loss of dependency by the trial Court is hereby set aside. It is replaced with an award of Ksh.2,992,000. The total award is as follows:

1. Pain and suffering……. Ksh.20,000

2. Loss of expectation of life under the

   Law Reform Act …….…… Ksh.100,000

3. Loss of dependency under the Fatal

   Accidents Act ……. Ksh.2,992,000

4. Special damages ……. Ksh. 135,000

Total **Ksh.3,247,000**

The above sum shall be subjected to the 10% agreed contribution giving a net award of **Ksh.2,922,300**. Parties shall meet their own respective costs of this appeal The respondent shall retain the costs awarded by the trial Court.

Dated Signed and Delivered at Marsabit this 11th da of March, 2019

S. CHITEMBWE

JUDGE