REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 114 OF 2016

PATRICK BARASA……APPELLANT

VERSUS

SERAH WAMBUI KARUMBA (Suing as the legal representative to the estate of the late **ALBERT CHEBAYA…….RESPONDENT**

(Being an appeal against the Judgment/Decree of Hon. W. Kagendo, Chief Magistrate delivered on the 27th September, 2016 in Molo CMCC No.253 of 2013)

JUDGMENT

INTRODUCTION

1. This appeal arise from decision in a suit filed by the appellants both legal representatives of the estate of the late **ALBERT LUBISA CHEBAYA** against the respondent seeking general and special damages under Law Reform Act and fatal Accidents Act. The claim from an accident involving the defendant's motor vehicle registration number KBE 193Y which collided with the deceased who was riding in motor cycle registration number KMC 926C on 13th January 2013.

2. Decision on liability was determined in Molo SPMCC No.262 of 2013 which was selected as test suit. The defendant was found 100% liable for the accident.

3. The trial magistrate assessed damages as follows:-

a) Pain and suffering…….....Kshs 20,000

b) Loss of expectation of life……....Kshs 100,000

c) Loss of dependency……..……...Kshs 536,000

d) Special damages……...Kshs 25,000

e) Funeral expenses……..Kshs 30,000

GRAND TOTAL…….....Kshs 711,000

4. Being dissatisfied with the trial court's decision, the appellant filed this appeal on the following grounds:-

a) That the learned magistrate erred in law and fact in failing to properly evaluate the evidence adduced on the issue of liability and quantum thereby rendered judgment that is unsound in principle and not reflective of the evidence adduced.

b) That the learned trial magistrate erred in law and principle in finding the defendants wholly liable for the accident where there was evidence of negligence on the part of the plaintiff/respondent.

c) That the learned trial magistrate erred in law in making an award of Kshs.20,000 on account of pain and suffering contrary to the principles and law governing the making of such an award and in the absence of evidence to justify such a high award under that head.

d) That the learned magistrate erred in law in making an award of loss of dependency on the basis of speculation and assumption and in the absence of any evidence that the deceased was in any employment. The recourse to minimum wage was made on the basis of illogical and contradicting assumption that the deceased was working or doing business when there was no evidence as indeed found by the court.

e) That the learned magistrate erred in law in applying a dependency ratio that was high and unjustifiable in the circumstances.

f) That the learned trial magistrate erred in law and principle in applying a multiplier of 10 years for a 52 year old which is too high and failed to take into account vicissitudes of life.

g) That the learned trial magistrate erred in law and in principle in making an award for funeral expenses where the same was not pleaded or proved.

h) That the learned trial magistrate erred in law, principle and fact in failing to consider that she made an award under the Law Reform Act which should have been taken into account while making the award under the Fatal Accident Act or the final award and consequently made duplicate award to claimant and thus leading to unlawful enrichment and unnecessary and unjustified prejudice and burden upon the appellants.

APPELLANT'S SUBMISSIONS

5. The appellant restated grounds of appeal. In respect of liability, he submitted that, there was no justification in finding the appellant 100% liable as the rider did not have a license and carried 2 pillion passengers; that there is evidence of negligence on both parties and trial court ought to have apportioned liability.

6. Appellant submitted that the court misdirected itself by awarding damages both under Law Reform Act and under Fatal Accidents Act thus benefiting the estate of the deceased twice.

7. Counsel for appellant cited the case of **Kemfro vs Am Lubia & Olive Lubia [1982-1988]1 Kar 727** where the court held as follow:-

> **"The net benefit will be inherited by the same dependants under the Law Reform Act and that must then be taken into account in the damages awarded under the Fatal Accident Act because the loss suffered under the latter Act must be off-set by the gain from the Estate."**

8. Further that **P.S Atiya** in his book **Accident Compensation and the Law, 2nd Edition, page88** the same principle is stated as follows:-

> **"The law will not allow double recovery. In practice, this means that the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from award under Fatal Accident Act on the legal justification or pretext that the inheritance is a gain resulting from the death which must be set off against the loss."**

9. The appellant also challenged the use of 10 years as multiplier noting that the deceased was 52 years. He argued that use of the multiplier is excessively high. He cited the case of **James Wambura Nyikal & Another vs Mumias Sugar Company Ltd & Another [2011] eKLR** where the court awarded multiplicand of 6 years for a man aged 46 years and **Silas Njeri Catholic Diocese Vs Andrew Kirunja [2010] eKLR** where the court awarded 5 years for 45 years old man.

10. On dependency ratio, the appellant submitted that the respondents failed to prove how they depended on the deceased. He submitted that there was no evidence to confirm that the deceased was earning Kshs.10,000 as alleged by plaintiff; and that the court erred in awarding multiplicand of Kshs.6,700. Appellant further submitted that the court should have awarded a global figure of Kshs.300,000.

11. Under pain and suffering appellant submit that Kshs 20,000 is high as the deceased died immediately; that an award of Kshs 10,000 would have been fair in the circumstances. On funeral expenses, the appellant submitted that it was not specifically pleaded.

RESPONDENTS SUBMISSION

12. Respondent submitted that the trial magistrate awarded damages under 2 limbs and there was no double award as alleged. He urged court to look at the case of **Hellen Waruguru Waweru (suing as legal representative of Peter Waweru Mwenja (deceased) vs Kiarie Shoe stores limited [2015]eKLR** where the court held as follows:-

> **"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 Accident 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."**

13. That the court found that, in the case of **Kemfro –Vs- (Am Lubia) & Olive Lubia (1982 – 1988) 1 Kar 727**, the authority relied on was incomplete; that complete version of Kemfro and Hellen Waweru favour compensation under the fatal Accident's Act and Law reform Act

14. On liability, the respondent submitted that Molo SRMCC No.262 of 2013 was selected as test suit; that it was heard and determined and the defendant was found 100% liable.

15. As concern multiplier, respondent argued that the appellant had submitted for 8 years in trial court and respondent 20 years. She stated that the appellant should not be asking for 5 years now.

16. On multiplicand respondent submitted that in the lower court, appellant submitted for multiplicand of ½ and should not therefore be asking for global award. Respondent urged court for multiplier of Kshs.10,000 and multiplicand of 2/3 be retained.

17. Respondent submitted that Kshs.20,000 for pain and suffering and Kshs.30000 for funeral are reasonable and justifiable respectively.

ANALYSIS AND DETERMINATION

18. It is not disputed that Molo SRMCC No**.**252 of 2013 was selected as test suit and liability determined at 100%. Argument put forward for urging the court to interfere with liability is that the deceased did not have licence and was carrying 2 pillion passengers. The appellant has not however demonstrated nexus between the two-traffic offences and occurrence of the accidence.

19. The decision in the case of Hellen Waweru which was decided after the case of Kemfro settle the confusion that existed on the issue of awards under law reform Act and Fatal Accidents Act by holding that it is proper to award under separate headings. The award under the 2 subheadings is therefore upheld

20. On the issue of multiplier, I note that the deceased was 52 years old at the time of death. If he were in salaried employment, he would have retired at the age of 60. The deceased's wife testified that he was a pastor and farmer; and the farm he used for farming is still available. I however take note of the fact that due to uncertainties in life, there is no certainty that he would have lived to attain 60 years and remain strong to continue working after 60 years. I find multiplier of 10 years on the higher side and adopt a multiplier of 6 years.

21. On monthly earning, I note that the court did not adopt kshs 10,000 but minimum wage of kshs 6,700. Appeal on that limb cannot therefore stand

22. I find assessment on pain and suffering and funeral expenses reasonable. I do not see justification to disturb award under that heading. In respect to dependency ratio, I do not see reason to disturb the ratio adopted by the trial magistrate.

23. The upshot of the above therefore is, the appeal succeeds on multiplier to be adopted for calculating damages. Damages under loss of dependency is 6,700 x 12 x 6 x 2/3=321,000

24. Damages are as hereunder:-

i. Pain and suffering……..Kshs 20,000

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

iii. Loss of dependency…….....Kshs 321,600

iv. Special damages…… …….Kshs 25,000

v. Funeral expenses…….Kshs 30,000

vi. GRAND TOTAL…….Kshs 496,600

FINAL ORDERS

1. Appeal on liability is dismissed

2. Appeal on assessment of damages partly succeed in respect to multiplier. Multiplier of 10 years is set aside and replaced with multiplier of 6 years.

3. I hereby set aside judgment entered 27th September, 2016 and enter judgment for respondent/plaintiff against appellant/defendant for kshs 496,600

4. Costs in trial court to be paid by the appellant to the respondent

5. Each party to bear own costs on appeal.

Judgment Dated, signed and delivered at Nakuru this 2nd day of May 2019.

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared Court Assistant

Mawenzi Counsel for Appellant

Gekonga Counsel for Respondent