REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 15 OF 2018

STENSILES KIPRONO KETER.....1ST APPELLANT

ELDORET EXPRESS LIMITED.....2ND APPELLANT

VERSUS

STEPHEN OTIENO OKUKU (suing as the legal representative

of JOEL PHANUEL OBWAKA, deceased).....RESPONDENT

(*Being an appeal from the Judgement and Decree of Hon. F. Nyakundi, Resident Magistrate in Mumias Civil Case Number 261 of 2016 read and delivered on 22nd January 2018*)

JUDGMENT

1. The appellants, having been dissatisfied with the decision of the trial court in Mumias SPMCCC No. 261 of 2016 of 22nd January 2018, aforementioned lodged this appeal on 19th January 2018 seeking, *inter alia*, that the appeal herein be allowed with costs and that this court sets aside the multiplicand of Kshs. 20,000.00 used by the trial magistrate in assessing the quantum in favour of the respondent. The appellants relied on the following grounds in their Memorandum of Appeal that:

a) The learned trial magistrate erred in fact and in law by awarding the respondent inordinately high quantum as damages for the multiplicand of Kshs. 20,000.00 which was not proved beyond reasonable doubt;

b) The learned trial magistrate erred in fact and in law in failing to consider the appellant submissions on the minimum wages of the respondent;

c) The learned trial magistrate erred in fact and in law awarding damages on multiplicand that was not supported by any evidence;

d) The learned trial magistrate erred in fact and in law in disregarding the appellants' written submissions on the multiplicand in regard to the award relations to the same; and

e) The learned magistrate erred in fact and in law in regarding the respondent's written submissions on the driving license which was not sufficient proof of employment.

2. The respondent had sought general and special damages together with costs and interests on the same in the lower court, arising out of an accident that had occurred on or about the 24th March 2016, involving the late Joel Phanuel Obwaka (the deceased), who was a passenger in a motor vehicle registration mark and number KAR 371W, and motor vehicle registration mark and number KBB 235M which was owned by the 2nd appellant and was being driven, controlled and/ or managed by the 1st appellant on the material day. The respondent claimed that the accident occurred along Kakamega-Mumias road, where the 1st appellant so negligently, recklessly and carelessly drove, motor vehicle KBB 235M that it rammed into motor vehicle KAR 371W thereby causing fatal injuries to the deceased.

3. The respondent stated that he brought the suit in the lower court under the Fatal Accident Act, Cap 32, Laws of Kenya, for the benefit of the deceased's dependants, and the Law Reform Act, Cap 26, Laws of Kenya, for the benefit of the deceased's estate. The respondent stated that the deceased was 46 years old at the time of his death, was in good health and worked as a driver earning an average monthly income of Kshs. 20,000.00 per month. The respondent added that the deceased was the sole support for his family which, by reason of his death, the dependants have lost support and suffered loss and damage. The respondent stated that the deceased was survived by five dependants - a widow and four children.

4. The appellants filed their defence denying the contents of the plaint and blaming the deceased and the driver/owner of the motor KAR

371W for being negligent.

5. In a judgment delivered on 22nd January 2018, the learned trial magistrate held that the appellants were liable for the accident that occurred after both parties recorded a consent in the trial court apportioning liability as between the appellants and the respondent in the ratio of 90% to 10% in favour of the respondent. On quantum, the learned trial magistrate entered a final judgment against the appellants as follows:

a) General damages: pain and suffering – Kshs. 50,000.00;

b) Loss of expectation of life – Kshs. 100,000.00;

c) Lost years – Kshs. 20,000 x 12 x 14 x 2/3 = 2,240,000.00;

d) Special damages – Kshs. 279,439.00;

TOTAL……. Kshs. 2,669,439.00;

Less 10%.....Kshs. 2,402,495.00.

Plus, costs and interest jointly and severally as pleaded.

6. It is the said judgment that forms the basis of the instant appeal.

7. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that it did not have an opportunity to hear the witnesses first hand and did not test the veracity of their evidence and demeanor. This is stated in section 78 of the Civil Procedure Act, Cap, 21, Laws of Kenya, which states the role of a first appellate court which is to:*'* … re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' The Court of Appeal has restated that position in Peter *M. Kariuki vs. Attorney General* [2014] eKLR in the following words:

> *"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui vs. Republic (1984) KLR 729 and* Susan *Munyi vs. Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."*

8. The principles relating to multiplicand in fatal accident claims have been stated and discussed by the courts in several decisions. In *Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another*, Nairobi HCCC No. 1638 of 1988 it was said as follows:

> *"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."*

9. In *Simon Kiplimo Murey & 3 Others vs. Kenya Bus Management Services Limited & 4 Others* (2014) eKLR the court stated:

> *"I now turn to the issue of the net income. The learned magistrate correctly pointed out that plaintiff was bound by the pleadings which showed that the deceased's salary was Kshs 20,000/- although the proved salary was Kshs 40,000/-. Although the statutory deductions were not disclosed, the court could readily ascertain these from the relevant law. I would estimate that statutory deductions such as income tax, NSSF and NHIF would amount to about one third of the gross salary leaving a net income of about Kshs 26,000/- less a reasonable sum the deceased would spend on himself. The appellant, in the pleadings and submissions, accepted that the amount pleaded and proved is Kshs 20,000/- and the same should have been awarded as the net income. I therefore find and hold that the multiplicand is Kshs 20,000.00."*

10. I shall now turn to consider the manner in which the lower court worked out the final award in light of the principles sated above. In the lower court's judgment, the learned trial magistrate noted that the deceased was a matatu driver who used to earn Kshs. 700.00 to Kshs. 900.00 per day which totaled to about Kshs. 22,000.00 per month. Consequently, the trial court adopted a multiplicand of Kshs. 20,000.00. The appellants submitted that there was no proof of payment produced by the respondent to show that the deceased was working and earning an income as a driver. The appellants further submitted that in the absence of proof of wages by the deceased, a multiplicand of Kshs. 6,500.00 be adopted.

11. One does not have to prove a profession by producing certificates and diplomas. The courts have also rejected the notion that the only way of proving earning is by the production of documents, as taking a contrary stand would do injustice to many locals, some of whom are even illiterate, and who do not keep records, and yet earn their livelihood in various ways. If documentary evidence is available, then the same ought to be produced, but I reject any contention that only documentary evidence can prove these things.

12. In *Ondigo Gilbert vs. Joab Jonah Olunyama* [2018] eKLR, the court took that position and held as follows:

> *"I now turn to the substantive challenge to the award. The multiplicand represents the income the deceased was earning. In his evidence, PW 1 stated that the deceased was a driver. He gave the income of the deceased as Kshs. 15,000/-. The appellant contended that there was no documentary evidence to prove that the deceased was a driver. Counsel for the respondent countered that apart from the oral testimony, the fact was corroborated by the death certificate which showed that the deceased was a driver.*
>
> *The trial magistrate awarded Kshs. 10,071/- which, from the appellant's submissions before the trial court, was the minimum wage for a driver under the applicable Regulation of Wages (General)(Amendment)Order, 2013 LN No. 197/2013. I accept the decision of the Court of Appeal in Jacob Ayiga Maruja & Another v Simeone Obayo KSM CA Civil Appeal No. 167 of 2002 [2005] eKLR where it was observed that, "We do not subscribe to the view that the only way of proving earnings is equally the production of documents." The claimants need only prove the case on a balance of probabilities hence I hold that PW 1's testimony on oath is corroborated by what is stated in the death certificate that the deceased was a driver. I therefore find that the deceased was a driver. I would award the minimum wage of Kshs. 10,071/- as the multiplicand."*

13. The respondent produced a driving license and death certificate of the deceased which indicated that his occupation was a driver. The respondent further drew the attention of the trial court to Legal Notice No. 117 of 2015 which fixed the wage of a commercial vehicle driver at Kshs. 23,262.40. The submission of the appellants that the multiplicand be fixed at Kshs. 6,500.00 is clearly without foundation. I find that the figure of Kshs. 20,000.00 was sufficient and reasonable in the circumstances as the same was not excessive and the learned trial magistrate applied the correct principles in arriving at that multiplicand.

14. On the ground that the learned trial magistrate failed to consider and adopt the written submissions of the appellants on the applicable multiplicand, I wish to refer to the decision of the the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & another* [2014] eKLR held that:

> *"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."*

15. See also *Magana Miguna vs. Standard Group Limited & 4 others* [2016] eKLR**,** *Waltraud Melichar vs. Jacob M. Nguthu* [2018] eKLR, *In re Estate of Philip Mokaya Gesanda (deceased)* [2018] eKLR, and Alfred *Pengo Mamboleo vs. Oserian Development Co. Ltd & another* [2018] eKLR**.**

16. Section 3 of the Evidence Act, Cap 80, Laws of Kenya, defines evidence as:

> *"Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity."*

17. I accordingly find that the learned trial magistrate was not bound or obligated to adopt the submissions of the appellants or the respondent for that matter. The court is bound to consider the submissions of either party, since they encapsulate a summarise of their legal and factual arguments, but it is under no obligation to adopt the said submissions. A court of law decides matters on the evidence adduced.

18. The appellants submitted that the trial court awarded Kshs. 100,000.00 for loss of expectation of life which was excessive and was a double award to the estate. It would be double compensation only when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same. The learned trial magistrate, in awarding Kshs. 100,000.00 for loss of expectation, noted that there was no evidence that the deceased was of ill-health. I find no reason to interfere with this finding as the learned trial magistrate applied the correct principle in arriving at the sum of Kshs. 100,000,00. The respondent was a brother to the deceased and he stated in his plaint that he brought this action for himself and on behalf of the dependants under both the Law Reform Act and Fatal Accidents Act. Section 4(1) of the Fatal Accidents Act provides as follows;

> *"Every action brought by nature 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 … be brought by and in the name of the executor or administrator of the person deceased…"*

19. From the above, the respondent, being a brother to the deceased would not benefit from the award under the Fatal Accidents Act, meaning that the beneficiaries under the Law Reform Act and those under the Fatal Accidents Act for the instant accident would not be the same, hence the issue of double compensation cannot arise. In the foregoing, I find that the learned trial magistrate was right in awarding the Kshs. 100,000.00 as loss of expectation of life and not deducting it from the final award.

20. The appellants submitted that a multiplier of 10 years ought to have been adopted instead of 14 years as was applied by the learned trial magistrate. The learned trial magistrate noted that the retirement age was 60 years, which was admitted by the appellants in their submissions. The learned trial magistrate applied a multiplier of 14 years "taking into account the uncertainties of life." I find that the learned trial magistrate applied the correct principles in arriving at the applicable multiplier and I find no reason to interfere with that.

21. In conclusion, I find that the learned trial magistrate applied the correct principles in awarding quantum to the respondent, which was just and reasonable in the circumstances. I find no reason to interfere with the multiplicand of Kshs. 20,000.00, the multiplier of 14 years and

Kshs. 100,000.00 for loss of expectation of life that was awarded. The upshot is that I find this appeal lacks merit, and I hereby dismiss the same with costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY JUNE 2019

W MUSYOKA

JUDGE