REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 35 OF 2014

CAROLINE LEAH AWINO

(Also as ADUOGO CAROLINE).....APPELLANT

VERSUS

FRANCIS KIPSANG NGETICH (Suing as personal administrators

ad litem and/or personal representative of the estate of

MARY JEPKURGAT (DECEASED).....RESPONDENT

(Being an Appeal from the Judgment of the Ag. Senior Resident Magistrate Honourable G. Adhiambo in Kapsabet Civil Case No. 39 of 2012, dated 4th March, 2014)

JUDGEMENT

This is an appeal emanating from Kapsabet PMCC No. 39 of 2010 in which the trial magistrate entered judgement dated 4th March 2014 in favour of the plaintiff in the following terms;

a) Liability……. 80% : 20% against the defendant

b) Pain and suffering…….…… Kshs. 30,000/=

c) Loss of expectation of life……. Kshs. 150,000

d) Loss of consortium and servitude…….. Kshs. 100,000

e) Loss of dependency

(Kshs. 6,000/= x 12 years x 12x2/3……. Kshs. 576,000

f) Special damages…….. Kshs. 2,300

g) Sub-total…….. Kshs. 858,300

h) Less 20% contribution…….. Kshs.171,660/=

i) **Total**……. **Kshs. 686,640/=**

This appeal challenges the quantum of damages award in the trial court on the following grounds; -

1. THAT the learned trial magistrate erred in law and in fact in assessment of damages.

2. THAT the learned trial magistrate erred in law and in fact in failing to take into account relevant factors and evidence on record in assessment of damages under the Fatal Accidents Act.

3. THAT the learned trial magistrate erred in law and fact in adopting a dependency ratio of 2/3 contrary to the evidence on record.

4. THAT the learned trial magistrate erred in law and fact in awarding damages for loss of consortium.

5. THAT the learned trial magistrate erred in law and fact in failing to discount the damages awarded under the Law Reform Act from those awarded under the Fatal Accidents Act, contrary to the well laid down principles in law.

6. THAT the learned trial magistrate erred in law and fact in awarding damages which were manifestly excessive in the circumstances.

The plaintiff/respondent commenced proceedings in the lower court vide a plaint dated 5th December 2011 in which he prayed that judgment be entered against the defendant/appellant for negligence resulting in the death of Mary Jepkurgat in a road accident along Serem-Kambogi road on or about 5th October 2010. The appellant prayed that judgment be entered against the respondent/defendant for; -

a) General damages under the Law Reform Act and Fatal Accidents Act.

b) Special damages.

c) Costs of the suit

d) Interest at Court Rates.

e) Any other or further relief that this Honourable Court may deem fit and just to grant.

A brief synopsis of the case is that on or about 5th October 2010, there was allegedly an accident along Serem-Kambogi road that involved motor vehicle Reg. no. KBG 294. Mary Jepkurgat, the deceased was a pedestrian along the said road.

The plaintiff herein Francis Kipsang Ngetich instituted this suit against the defendant /respondent, Caroline Leah Awino pursuant to the limited grant of letters of administration issued on 12 July 2011 that allowed him to file the suit as the personal representation of the deceased.

The particulars of the claim were that the deceased was a 48 year business woman earning approximately Kshs 10000 monthly. The plaintiff also claimed that the deceased was the sole breadwinner for the family.

The plaintiff claimed that he spent Kshs 30,000 on funeral expenses, Kshs. 10,875 on the application for the limited grant of letters of administration and kshs.500 on search. The plaintiff made the above claims under both the Law Reform Act and The Fatal Accidents Act.

The defendant/ respondent vide her statement of defence dated 18 June 2012 denied responsibility/involvement in the said accident. She averred that the said accident never look place and that if it ever did, then it was entirely on the fault of the deceased.

In a consent between the parties and adopted by the lower court, liability was entered in the ratio of 80%:20% in favour of the plaintiff.

Since this appeal is premised entirely on the quantum, I'll get right into it.

The appellant claims that the trial magistrate adopted the wrong multiplier in computing the damages awarded. The appellant claims that the trial magistrates did not consider the deceased's age in computing the damages. The trial magistrate adopted a multiplier of 12 years which the applicant claims was inordinately high considering the uncertainties of life. The appellant holds the view that a multiplier of 6 years would have been reasonable.

In the case of **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, **Ringera J.** as he then was, held at page 248 that:

> **"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 purchases. 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."**

The deceased died at the age of 48 years. This court finds that the computation of 12 years was reasonable as the deceased might as well have continued with the business of selling vegetables beyond the age of 60 years.

The appellant also disputes the dependency of two thirds that was adopted by the trial magistrate. The appellant states that the deceased used to sell vegetables that were sourced from the farm of the plaintiff. The plaintiff, in his testimony stated that the deceased used to assist him in

the farm and other family chores. The plaintiff further testified that their older children used to help him in paying school fees for the younger children.

The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

> ***"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life***
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> ***of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."***

The evidence on record, with much reliance on the testimony of the plaintiff indicated that the deceased was not the sole breadwinner of the household. The plaintiff further stated that he still has the farm, and it is this farm that he still cultivates to fend for his family in the absence of his deceased wife. An assessment of the evidence on record shows an inclination that the trial magistrate erred in apportioning the dependency ratio at two thirds to the deceased. Given the evidence, I do find that the dependency ratio should have been set equally between the plaintiff and the deceased.

The applicant further submitted that the trial court erred in awarding damages under both heads and that in the alternative, the trial magistrate

failed to discount the damages awarded under both the Law Reform Act and the Fatal Accidents Act. In their written submissions, the Appellants contended that there is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. That is in the **Law Reform Act** and the **Fatal Accidents Act**, which are the two statutes which govern the award of damages in fatal accident claims. The appellant submitted that the trial magistrate ought to have discounted the damages awarded under the Law Reform Act from those awarded under the Fatal Accidents Act. The appellant holds the view that the award should be discounted to Kshs. 80,000/= as a reasonable award.

In this appeal, it is clear from the appellants' submissions that the appellant is only challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by**
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> **the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

It is the duty of this Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

As to the award of damages for the loss of consortium, the appellant submitted that this court should set it aside entirely on the grounds that it is not anchored in law.

Since the appeal only challenges the award of damages, it goes without saying that the issue of special damages awarded, the multiplier and the assessment of damages for loss of dependency are not in dispute. With the

foregoing in mind, I have keenly perused the record of the lower court and noted that, in the Plaint dated **5 December 2011**, it was pleaded

that the deceased was, prior to his death a woman in good health aged 48 years; and that by reason of his death, his estate had suffered loss of dependency and lost years.

There is sound basis for the claim and award of damages for loss of consortium in fatal accident matters. Indeed, in the Court of Appeal case of **Salvadore De Luca vs. Abdullahi Hemedi Khalil & Another [1994] eKLR,** it was held that:

> **"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitude. Bearing in mind the fact that each case should be judged on its own facts, we would think**
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> **that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."**

This appeal therefore succeeds in relation to loss of dependency, where the calculation should be Kshs.6,000 x 12 x 12 x ½ ……. 432,000/=

Total damages is therefore 714,300 – 20/100 (142,800) to give a net figure of 571,500/-.

The figures are so adjusted. Each party to meet own costs on this appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **3rd** day of **July,** 2019.

In the presence of;

Ms Tum holding brief for Onyinkwa for the Appellant

Firm of Sila Munyao for the Respondent absent

Ms Sarah - Court assistant