REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.22 OF 2018

WEST KENYA SUGAR COMPANY LIMITED................APPELLANT

VERSUS

DISHON OYOO OBWA (suing as the legal Representative of the Estate of

JOAN AWUOR OYOO OKOTH– Deceased)**.................RESPONDENT**

(Being an appeal from the Judgment and Decree of the Hon. Mary A. Ochieng, SRM,

delivered on 28th June, 2018 in Ndhiwa SRMCC No.02 of 2017)

JUDGMENT

[1] This is an appeal from the decision and judgment of the Senior Resident Magistrate at Ndhiwa in **SRMCC No.2 of 2017**, in which the primary appellant **West Kenya Sugar Company Limited**, was sued by the respondent **Dickson Oyoo Obwa**, in his capacity as the personal representative of the estate of **Joan Awuor Oyoo** (deceased) for damages under the **Law Reform** and **Fatal accidents acts** arising from a road accident which occurred along the Ndhiwa-Sori road on 8th October 2016, in which the deceased was hit and fatally injured by a **M/V Reg. No. KBT 891 Z Fuso Lorry–ZE–3913 Trailer** belonging to the appellant/defendant and driven at the time by its authorized driver.

[2] The appellant filed a statement of defence denying the claim and contending that the deceased was by her conduct the sole author of the accident and/or contributed to the accident.

The appellant therefore prayed for the dismissal of the respondent's claim with costs.

[3] In the course of the trial, the parties recorded a consent on liability to the effect that liability be apportioned at the ratio of 75%:25% in favour of the respondent/plaintiff. What remained for determination by the trial court was the quantum of damages.

In that regard, evidence was led by the respondent (PW1) but not the appellant.

[4] The trial court considered the evidence and awarded a total sum of Kshs.717, 639/45 to the respondent made as follows:-

Under the Law Reform Act:-

(a) Kshs.10, 000/= pain and suffering.

(b) Kshs.100, 000/= loss of life expectation.

Under the Fatal accidents Act:-

(c) Kshs.846, 852/60 loss of dependency.

Grand Total – Kshs.956, 852/60 less 25% contribution

– Kshs.717, 639/45.

[5] Being dissatisfied with this award, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 13th July 2018.

The respondent was on 29th April 2019, granted by this court leave to file a cross-appeal, but the record does not show that the intended cross appeal was indeed filed.

Therefore, the hearing proceeded on the basis of the main appeal by way of written submissions.

[6] In that regard, the appellant filed its submissions dated 3rd July 2019, through **Ogejo, Olendo & Co. Advocates**, while the respondent filed his submissions dated 12th July 2019, through **Veronica Migai & Co. Advocates**.

This court has given due considerations to the rival submissions, the grounds of appeal and the evidence presented before the trial court.

[7] With regard to an appeal on the quantum of damages such as the present one, the principles upon which an appellate court is required to proceed were set out in the case of **Kemfro Africa Limited & Another –vs- A.H. Lubia & Another (1982-88) 1 KAR 777**, where the Court of Appeal held that:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that; it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage"**.

(See also **Butt –vs- Khan (1981) KLR 349**).

[8] In ground one and two of the appeal, it is contended that the trial court grossly misdirected itself in treating the evidence and submissions on quantum superficially and consequently coming to a wrong conclusion on the same and also misdirected itself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited by the appellant.

[9] The appellant accordingly submitted that the trial court erred in law and fact by applying wrong principles and adopting a multiplier of thirty three (33) years which was inordinately high and an entirely erroneous estimate. That, the trial court did not consider the submissions of the appellant in arriving at that conclusion. That, the multiplier of thirty (30) years proposed by the appellant was tenable and ought to be upheld by this court. That, the trial court failed to discount the amount awarded under the Law Reform Act from the total awarded and arrived at a wrong conclusion on the same.

[10] Apart from grounds one and two of the appeal, the foregoing submissions also seemed to extend to grounds three (3) and four (4) where it is contended that a multiplier of 24 years adopted by the trial court was inordinately high such that it represented an entirely erroneous estimate consideration being given to

the imponderable of life. That, the trial court erred in failing to discount the award under the Law Reform.

[11] There is however, a clear contradiction with regard to the actual multiplier adopted by the trial court. Whereas, the submissions refer to a multiplier of 33 years, the third ground refers to a multiplier of 24 years.

Be that as it may, the respondent, in his submissions indicated that the awards under the Law Reform Act were reasonable and based on conventional figure and that the requirement in the Law Reform act is to **"take into account"** but not to mandatorily deduct any amount awarded to the estate of a deceased from damages awarded for loss of dependency.

[12] With regard to the multiplier of 33 years adopted by the trial court, the respondent submitted that it was based on the fact that the deceased was involved in a salon business and was therefore expected to have worked well past the public service retirement age of sixty (60) years. That, as regards the multiplicand of Kshs.6, 415/55, the trial court relied on the applicable minimum wage rate for unskilled employees as no books of accounts were produced in evidence.

[13] This court's opinion with regard to the awards under the Law Reform Act i.e. Kshs.10, 000/= for pain and suffering and Kshs.100, 000/= for loss of expectation of life were indeed based on conventional figures applied by the courts in cases arising from similar circumstances. Herein, the deceased was a pillion passenger on a motor cycle. She suffered serious head injuries for which she succumbed on the very day of the accident at a young age of twenty two (22) years.

[14] The amount of Kshs.10, 000/=, awarded to her estate for pain and suffering was reasonable even though the current trend favours a higher amount. The award for loss of expectation of life was also reasonable. It was not mandatory that the total amount under the Law Reform Act be deducted from the award made under the Fatal Accidents Act considering that in the **"Kemfro Africa Case"** (Supra), the words **"to be taken into account** and **"to be deducted"** are distinct.

[15] It is clear from the judgment of the trial court that the award made in respect of damages under the Law Reform Act was given consideration while the award under the Fatal Accidents Act was being made.

Coming to the award under the Fatal accidents Act, the trial court correctly applied a multiplicand of Kshs.6,415/55 on the basis of the applicable minimum wage rate for unskilled workers as the respondent did not lead any evidence to prove the deceased's alleged monthly earning of between Kshs.20,000/= - Kshs.30,000/=.

[16] With regard to the multiplier of 33 years, the trial court considered that the deceased was aged 22 years at the time of her demise, was

enjoying robust health and was therefore expected to have worked upto age 55 years as a salonist consideration being given to imponderables of life. There is absolutely no reason for this court to interfere with this finding as it is legally and factually correct.

[17] With regard to the dependency ratio of $^{1}/_{3}{}^{rd}$, the trial court noted that the deceased was a single mother of one child and that the respondent (PW1) did not establish in his evidence how her parents depended on her. Therefore, she only had her child for her dependent and for whom $^{1}/_{3}$ of her spending would go to. This court agrees and has nothing useful to add in that respect.

[18] In sum, this appeal is lacking in merit and is hereby dismissed with costs to the respondent. The intended cross-appeal was never filed. Therefore nothing can be said about it.

J.R. KARANJAH

JUDGE

23.07.2019

[Delivered and signed this **23rd** day of **July, 2019**]