REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.21 OF 2019

JANE WAMBAIRE CHEGE.....1ST APPELLANT

CHARLES WAITHAKA KIRAGU.....2ND APPELLANT

VERSUS

RACHEL CHEPKOECH KOECH

(Suing as admin, representative on behalf of the dependants of

LEONARD GWARO MWAMBA).....RESPONDENT

(Being an appeal from the Judgment of Hon. E. Obina PM delivered on the 5th February 2019 in Kisii CMCC No. 69 of 2018)

JUDGMENT

1. The respondent herein filed Civil Suit No. 69 of 2018 in her capacity as administratrix of the estate of Leonard Gwaro Mwamba ("*the deceased*") seeking compensation for the death of her husband in a road traffic accident that occurred on 14th July 2017. On that day, the deceased was travelling as a passenger aboard motor vehicle registration number KBT 332 C Toyota Prado belonging to the 1st appellant when the 2nd appellant who was driving the vehicle, caused it to lose control, veer of the road and roll. The deceased sustained severe injuries which he succumbed to.

2. The trial court awarded the respondent damages of Kshs. 6,450,000/= which the appellants say is inordinately high. The disputed award was computed as follows;

General damages-

a. Fatal Accidents Act

70,000/= x 15 x 12 x 2/3 = Kshs. 8,400,000/=

b. Law Reform Act –

Pain and suffering Kshs. 100,000/=

Loss of expectation of life Kshs. 100,000/=

Total Kshs. 8,600,000/=

Less 25% 2,150,000/=

6,450,000/=

c. Special damages - Nil

3. The appellant's counsel condensed the appeal to 3 issues in their written and oral submissions as follows:

a. Whether the learned trial magistrate erred in law and fact in failing to adopt the global award while awarding damages to the estate of the deceased;

b. Whether the learned trial magistrate erred in law and fact in failing to deduct the award of Law Reform Act from that of Fatal Accidents Act before making final award; and

c. Whether the learned trial magistrate erred in law and fact while awarding damages under Law Reform Act to the deceased's estate.

4. As a first appellate court, I will first re-evaluate the evidence noting that the trial court had the advantage of seeing and hearing the witnesses testify before him. (***Peters–vs- Sunday Post Limited [1958] EA 424***).

5. **PC Caleb Osodo (PW 1)** testified as the first witness in support of the respondent's case. He told the court that motor vehicle registration number KBT 332 C Toyota Prado was being driven by the 2nd appellant from Kisii towards Oyugis on the material day. As he was driving, he lost control and swerved off the road whereupon the vehicle rolled several times and hit a 9 year old pedestrian who also died. The deceased who was on board sustained serious injuries and was rushed to Christamarianne hospital but succumbed to his injuries. PW 1 testified that the 2nd appellant was arrested and charged in Traffic case No. 321 of 2017. He pleaded guilty to three counts of causing death by dangerous driving and was fined a total of Kshs. 150,000/= in default to serve 3 years in jail. The 1st appellant was the owner of the vehicle.

6. Rachel Chepkoech Koech (PW 2) testified that she was in Kericho market when she was informed that her husband had died. The deceased died 2 hours after the accident. He was 41 years old at the time of his demise and they had two children together. Their first son was one born in 1995 and another born in 2004. She also testified that she paid Kshs. 60,000/= per year as school fees for their youngest son. The deceased was the sole bread winner. He owned Ragwaro Security Services Limited, Nyamira Resort Bar and Restaurant and was an aspiring member of parliament for Kitutu Chache constituency having been cleared to vie under the Jubilee party. The deceased was the sole director of Ragwaro Security Services Limited and made between Kshs. 600,000/= and Kshs. 1,000,000/=. She produced the certificate of incorporation and bank statements for the security firm in support of this. She also produced a business permit and valuation report putting the value of Nyamira Resort Bar and Restaurant at Kshs. 21,500,000/=.

7. The appellants consented to liability at 75:25 in favor of the respondent and closed their case on 27th November 2018.

8. The principle to be considered in determining the issues raised by the appellant is that the assessment of damages is at the discretion of a trial court and an appellate court will only disturb the award of damages if it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on wrong principles, or that the trial court misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.(See ***Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal No 295 of 2000 [2003] eKLR***)

9. On the first issue, on whether the trial court erred in adopting the multiplier approach as opposed to the global award, the appellant submits that the respondent did not prove the deceased's earnings, therefore the trial court erred in using the multiplier method. The respondent testified that the deceased was a businessman running a security firm but it was unclear whether he owned the business solely.

10. The appellant also complained that the deceased's income which the plaintiff had testified was about Kshs. 600,000/= to Kshs. 1,000,000/= was merely speculative as no documents were produced to show the exact amount the deceased was earning and how he was connected to the security firm or whether he owned any shares in it. It was further submitted that at the time of his death, the appellant had not yet been elected as a Member of Parliament and therefore the trial court erred in using a multiplicand of Kshs. 70,000/= in the absence of any backing for the same.

11. The appellant also objected to the dependency ratio of 2/3 on the grounds that the length and nature of dependency of the deceased's sons was not proved. Since the deceased's eldest son had cleared his college, the appellant argued that he was not a dependent of the deceased. As for the deceased's youngest son the appellant submitted that he only utilized Kshs. 60,000/= per year as school fees and it had not been shown that the deceased was the one who paid the said amount.

12. The appellant contends that the trial court should have made a global award instead, since many factors had not been proven. They proposed a global award of Kshs. 700,000/= and cited the case of the case of ***Mwanzia vs Ngalali Mutua Kenya Bus Ltd*** where the court held;

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

13. On their part, the respondents support the trial court's assessment of the multiplicand and submit that they were able to prove the deceased's income on a balance of probabilities. They argued that they had shown that the deceased was a businessman with his own security firm, owned a bar and restaurant and had also been successfully nominated as an aspiring Member of Parliament for Kitutu Chache constituency. The respondent had also produced a fee structure which showed that the deceased was paying school fees of Kshs. 60,000/= per year for his youngest son.

14. On the dependency ratio the respondents argued that they had proven that the deceased was married and had two children who were in university and primary school. That despite the fact that the eldest son had completed his degree program at the time of the trial it did not

negate from the fact that he was dependent on the deceased at the time of his demise.

15. The question of whether or not a court should adopt the multiplier approach or award a global sum has been the subject of many judicial pronouncements. In the case of ***Mary Khayesi Awalo & Another -vs- Mwilu Malungu & Another ELD HCCC NO. 19 OF 1997 [1999] Eklr*** where Nambuye J. (as she then was) stated that:-

> *"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.*

16. In the case of ***Isaack Abdikarim Abdile & another v Rose Kinanu Muchai (Legal Representative of the Estate of Paul Rufus Muguongo CIVIL APPEAL NO.69 OF 2012 [2016] eKLR*** Gikonyo J. held thus:

> *"Based on the law above, even though the Appellants contended that there was no evidence on record to show that the deceased ever worked or operated his own business, it does not mean that the deceased did not have income or that his income cannot be estimated by the court from the material presented before it. If there is evidence which makes an estimation of income possible or knowable will entitle the trial court to make a reasonable estimate; what should be avoided is undue speculation or engaging into speculative arithmetic. Therefore, should the court find that it has barely any or no evidence which may make income knowable, instead of engaging in speculative arithmetic, it should award a global sum and move away from multiplier approach…"*

17. In the present case, the appellant indicated in her pleadings that the deceased earned a monthly income of Kshs. 600,000/= per month. She reiterated this in her oral evidence and produced documentary evidence in support of her averments. Some of the documents she relied on were a certificate of incorporation and bank statements for a security firm known as Ragwaro Security Services Limited. She also testified that the deceased owned Nyamira Resort Bar and Restaurant whose value she put at Kshs. 21,500,000/=. She however failed to tender evidence on how much the deceased earned from this venture. In her written submissions before the trial court, the appellant surmised that the deceased monthly income was in the region of Kshs. 250,000/= which left a net figure of Kshs. 175,000/= upon taxation. No account of the deceased's net income was produced to support this figure or the higher figure of Kshs. 600,000/=.

18. In light of these inconsistencies and lack of evidence to support the figures given by the appellant, I find that this was a proper case for adopting a global award.

19. The respondent has urged this court to adopt a lump sum award of Kshs. 700,000/= based on the case of ***Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 others Civil Appeal 24,25 & 26 of 2013 [2014]eKLR*** where the court made the following awards for the estates of the deceased;

> a. Collins Ochieng Obambla- Kshs. 700,000/= for a fisherman who was aged 28 years at the time of his death and said to earn Kshs. 20,000/= per month;
>
> b. Fredrick Ouma Obambla- Kshs. 120,000/= for the deceased who was in form two when he died; and
>
> c. Erick Okoth Obambla- Kshs. 700,000/=for a 30 year old business man and boda operator estimated to earn Kshs. 10,000/= per month

20. With utmost respect, I find that the above case was not similar to the present case, since the deceased was much older and had been proved to own businesses whose value exceeded Kshs. 20,000,000/=. In the case of **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** the Court of Appeal held an *award must reflect the trend of previous, recent, and comparable awards.*

21. In ***Samuel Kabuthia Ndana v Jeniffer Wawire Njeru & another Civil Appeal No. 34 of 2016[2019] eKLR***the court awarded a global sum of Kshs. 1,300,000/=,where the deceased died aged 47 and was said to engage in informal employment which earned him an estimated income of Kshs. 90,000/= per month.

22. The respondent cited the case of ***Mary Njeri Murigi v Peter Macharia & Another Civil Case No. 318 of 2012 [2016]*** eKLR which is comparable to the present case. In that case, the court awarded Kshs. 4,000,000/= million for the estate of the deceased who was building contractor and aged 60 years old at the time of his demise.

23. The deceased in this case died aged 41 years old. It is not in dispute that he ran businesses and supported his family and would have continued to do so save for his untimely death. The fact that he was an aspiring member of parliament is also not challenged. The appellant indicated that the deceased was in good health and it is evident that he had a promising future. Doing the best I can, taking into consideration the foregoing authorities and inflation rates, I award the respondent a global award of Kshs. 6,000,000/=. I find that the trial court erred in using the multiplier approach and adopting a monthly income of Kshs. 70,000/= having already found that the figures *thrown at the court by both the plaintiff and defense,* were merely speculative.

24. The second issue is answered by the decision of the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –Vs- Kiarie Shoe Stores Limited [2015] eKLR** where the court expressed itself as follows;

> *"20. 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 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."

25. The above authority is categorical that the estate of a deceased should not be denied damages for pain and suffering and loss of expectation of life, under the Law Reform Act.

26. On pain and suffering, the appellant submitted that since the deceased had succumbed two hours after the accident, the trial court's award of Kshs. 100,000/= under this head was excessive and without basis. The appellant also faulted the trial court's award of Kshs. 100,000/= on the grounds that the court did not justify this award.

27. On her part, the respondent submits that the deceased did not die on the spot and that his death came two hours later after suffering severe pain and anguish and therefore the compensation awarded by the trial court for pain and suffering was adequate. For loss of expectation of life, the respondents submit that the award of Kshs. 100,000/= was sufficient, the deceased having died at the age of 41 years and in good health.

28. The trial court in awarding a sum of Kshs. 100,000/= for pain and suffering held that the deceased must have suffered excruciating pain before he died. The court went on to award a sum of Kshs. 100,000/= for loss of expectation of life having regard to the deceased age of 41 years at the time of his demise.

29. The trial court had guidance in the case of ***Hyder Nthenya Musili & Anor v China Wu Yi Limited& Anor Civil Case No. 53 of 2014 [2017] eKLR*** which was cited by the respondents, where the court awarded Kshs. 10,000/= for pain and suffering as the deceased had died at the scene of the accident. A sum of Kshs. 100,000/= was awarded for loss of expectation of life in that case. The respondent also cited the case of ***Benedeta Wanjiku Kimaru v Changowon Cheboi & Anor [2013] eKLR*** where the court awarded Kshs. 100,000/= as loss of expectation of life and Kshs. 200,000 /= for pain and suffering since the deceased had died aged 60 years, 4 months after the accident.

30. In the case of ***Lucy M. Njeri v Fredrick Mbuthia & Anor Civil Case No. 1484 of 1993 [2006]eKLR*** which was cited by the appellants before the trial court, the estate of the deceased was awarded Kshs. 5,000/= for pain and suffering as the deceased had died on the same day and Kshs. 70,000/= for loss of expectation of life.

31. Considering I find that the award for pain and suffering was excessive since the deceased did not suffer for long after the accident. I therefore substitute the award of Kshs. 100,000/= with an award of Kshs. 50,000/=. On the award of Loss of expectation of life, I see no reason to disturb the same.

32. The upshot of the foregoing is that the award of the trial court is set aside and substituted with an award of Kshs. 4,612,500/= made up as follows:

General damages-

a. Loss of dependency Kshs. 6, 000,000/=

Less 25 % Kshs. 4,500,000/=

b. Law Reform Act –

Pain and suffering Kshs. 50,000/=

Loss of expectation of life Kshs. 100,000/=

Total Kshs150, 000/=

Less 25% 112,500/=

4,612,500/=

33. I apportion the award of loss of dependency as follows:

a. Rachel Chepkoech Koech -30%

b. Felix Nyabando Gwaro - 25%

c. Sammy Orechi Gwaro –45%

34. The sum awarded to Sammy Orechi Gwaro shall be held in trust by the respondent and shall be invested in an interest earning account. Kshs. 4,612,500/= shall attract interest from the judgment date hereof. Since the appeal has only been partly successful, each party shall bear his own costs.

Dated, **signed** and **delivered** at **Kisii** this **20th** day of **September 2019.**

R.E.OUGO

JUDGE

In the presence of;

Miss. Wanjohi **For the Appellant**

Mr. Ondande h/b Mr. Mainga **For the Respondent**

Mr. Omwoyo **Court clerk**