REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 11 OF 2018

AGNES NDUUME KIOKO (Suing as legal representative of the estate of

ALEX WAMBUA KIOKO-DECEASED .....APPELLANT

-VS-

ALEXANDER NJUE

T/A AWAMAN INVESTMENTS.....RESPONDENT

[An appeal from the Judgment of Hon. E. Agade (Resident Magistrate) delivered on 15th December, 2017 in Civil Case No. 179 of 2015 before the Senior Principal Magistrate's Court at Kangundo]

BETWEEN

AGNES NDUUME KIOKO (Suing as legal representative of the estate of

ALEX WAMBUA KIOKO-DECEASED).....PLAINTIFF

-VERSUS-

ALEXANDER NJUE

T/A AWAMAN INVESTMENTS .....DEFENDANT

JUDGEMENT

1. By a plaint dated 21st December, 2015, the Appellant herein instituted a suit as next of kin to and legal representative of the estate of **Alex Wambua Kioko** (deceased) against the Respondent herein claiming Special Damages in the sum of Kshs 41,850/- General Damages, Costs and interests.

2. The Appellant's suit was premised on the fact that on or about 12th December, 2013 at around 11.30am the deceased was lawfully aboard motor vehicle registration No. KBR 345B Mitsubishi Minibus was alighting when the said motor vehicle was so negligently driven, controlled and or managed by the driver thereof that it did not stop to allow the deceased to alight hence hitting him and as a result he suffered fatal injuries.

3. According to the plaint, the family of the deceased who was a healthy man aged 24 years and who had a promising future, lost his expectation of life and his estate lost loss and damages. It was pleaded that the deceased who was assisting in securing passengers at Kangundo and Tala Bus stops earning an average of Kshs 12,000/= per month.

4. On 21st September, 2017 a consent order on liability was recorded in which judgement was entered in favour of the Appellant against the Respondent at the rate of 70 to 30. The parties then agreed that submissions on quantum be filed within 21 days.

5. Following the filing of submissions, the learned trial magistrate delivered a judgement in which she awarded Kshs 10,200.00 as special

damages. With respect to general damages, the learned trial magistrate found that there was no evidence of the deceased's earnings. Regarding the claim under ***Fatal Accidents Act***, the court noted that the dependants in this case were mother and siblings and while the mother falls under the said Act, the siblings have no claim thereunder unless they can prove dependence as a matter of fact. Finding no such proof the learned trial magistrate held that only the mother's claim would be considered.

6. Based on the decision of the Court of Appeal in **Theta Tea Company Limited & Another vs. Florence Njau Njambi [2002] eKLR**, the learned trial magistrate held that where it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean the claim must fail. The court then proceeded to make a global award of Kshs 100,000.00. As regards pain and suffering, the court found that it was not clear how long it took after the accident for the deceased to die. Accordingly, an award of Kshs 10,000.00 was awarded for pain and suffering.

7. In the end the learned trial magistrate awarded a total sum of Kshs 120,200.00.

8. The Appellant is aggrieved by this award has raised the following grounds of appeal:

a) The learned magistrate erred in law and in fact when she disregarded the pleadings of the plaintiff which clearly disclosed what the deceased was doing for a living and his estimated income.

b) The learned magistrate erred in law and in fact when she disregarded the submission of the plaintiff on the issue of earning and therefore arrived at an erroneous conclusion on quantum.

c) The learned magistrate erred in law and in fact when she awarded a global sum which was inordinately low and failed to take into account that the deceased died in his prime age

d) The learned magistrate erred in law and in fact when she disallowed the receipts for special damages which had been properly served upon the defendant and no notice of objection to the same had been served.

9. In this appeal it was submitted on behalf of the appellant that the under the ***Law Reform Act*** that the plaintiff indicated to court that the deceased was supporting her and the trial court ignored this for want of proof. Counsel placed reliance on among others the case of **Alice O Olukwe vs. Akamba Public Road Services Ltd & 3 Others (2013) eKLR.** In this regard it was the argument of counsel that the appellant had submitted on monthly earnings of Kshs 12,000/-, a multiplier of 31 years and the dependency ratio of ½ that led to a sum of Kshs 2,232,000/- and yet the subordinate court awarded Kshs 100,000/-. On the issue of pain and suffering, counsel submitted that the court failed to make an award and the respondent had submitted that the court awards Kshs 10,000/- for pain and suffering and Kshs 70,000/- for loss of expectation of life and on damages under the ***Fatal Accidents Act***, the respondent submitted that the court adopt a multiplicand of Kshs 5,000/- as the monthly income and 30 years as the multiplier and the ratio of 1/3 hence the calculation for damages would be Kshs 600,000/-. Counsel posited that the trial magistrate went outside the submissions of the parties. According to counsel, the deceased was aged 24 years hence awarding Kshs 100,000/- as a global sum was not fair to his estate hence urged the court to set aside the global sum and make an award based on the statutory minimum wage as at 12th December, 2013 that is Kshs 5,218.00 and adopt a multiplier of 31 years and a dependency ratio of ½ hence the award under the ***Fatal Accidents Act*** would be Kshs 970,096/-.

10. On the issue of damages under the ***Law Reform Act***, counsel submitted that the court enhances the figure to Kshs 20,000/- because in the case of **Alice O Olukwe vs. Akamba Public Road Services Ltd & 3 Others (2013) eKLR,** the court awarded Kshs 50,000/- for a person who died on the spot. On loss of expectation of life, counsel submitted that the trial court did not award anything hence submitted that the court awards Kshs 100,000/-. On the issue of special damages, counsel submitted that the court rejected the receipt of Kshs 1,150/- that was paid for the Succession Cause 122 of 2014 in respect of the limited grant as well as the receipt for Kshs 2,000/- dated 11th February, 2015 and the receipt for Kshs 500/- for the search despite the defendant not objecting to the same. Counsel assailed the rejection of the receipt of Kshs 30,000/- dated 17th December, 2013 that was evidence of receipt of money for funeral services and yet the same was used to facilitate the burial of the deceased and in this regard the disallowing the receipts for special damages was in error. On costs and interests, counsel submitted that the court upholds the award of the trial court.

11. The appellant's counsel urged the court to set aside the award of the trial court and make a finding as follows.

Damages Under the Law Reform Act

Pain and Suffering	Kshs.	20,000/-
Loss of expectation of life	Kshs.	100,000/-

Damages under the Fatal Accidents Act

Kshs. 970,096/-/-

Special damages	Kshs.	41,850/-

12. There were no submissions filed on behalf of the Respondent.

Determinations

13. In this case, I am perturbed by the manner in which the proceedings before the trial court were conducted. Having consented to liability and properly so in my view, the parties adopted a strange way of assessment of damages. They consented that on the issue of quantum, the same to be determined by way of written submissions. No documents were produced either by consent or otherwise. The receipts were annexed to the submissions instead. It would seem that the parties believed having recorded a consent on liability each party was at liberty to annex the documents in support of the quantum. It was not stated that the said documents were to be produced in evidence because the consent did not deal with the calling of witness.

14. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved. It is however unfair to the court to just throw all manner of documents at the court by way of annexures to the submissions and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by **Ringera, J** (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001:**

> **"the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise."**

15. The same Judge in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** held that:

> **"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident."**

16. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** it was however, held that:

> **"The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."**

17. However, where the parties produce exhibits by consent the court has no option but to make the best out of them. In **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**, the Court of Appeal held that:

> **"The two medical reports before the learned Judge were made by Dr C O Agunda and Dr. Betty Nderitu...The appellant also produced a P3 form...which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgement, the Judge made remarks such as "No qualifications disclosed; the doctor is not a consultant". If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident."**

18. In this case however, the learned trial magistrate, quite properly in my view, was not amused by the procedure adopted. Instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

> **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."**

19. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

20. Similarly, in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly**

speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

21. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

"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."

22. Having considered the learned trial magistrate's reasoning on the special damages, I cannot find fault with it. That decision resonates with the law regarding strict proof in claims for special damages and where there is no proper evidence produced in respect thereof, the court has no option but to disallow the same. As was held by **Makhandia, J** (as he then was) in **South Nyanza Sugar Co. vs. Hezron Ndarera Mogwasi Kisii HCCA No. 103 of 2006**:

it is still trite law that special damages must be pleaded and specifically proved with a degree of certainty and particularity. Special damages must first be pleaded and then strictly proved and in this case the respondent neither pleaded specifically the special damages nor did he specifically prove the same. Special damage is all about what one has lost and or incurred and it can never be left to speculation but must be real.

23. In this appeal, 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 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."

24. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

25. Similarly, 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."

26. As regards the claim for loss of dependency, it is true that no evidence was adduced in support of the multiplier. In the absence of that evidence, the accepted practice has been to adopt the minimum wage as the multiplier. See **Kigaragari vs. Agripina Mary Aya [1985] KLR 273; VOL. 1 KAR 768; [1976-1985] EA 224.** In the submissions of the Respondent, suggested Kshs 5,000.00 in that regard. In my view that suggestion was reasonable in the circumstances. The defendant/Respondent also suggested 2/3rd as the dependency ratio and a multiplier of 30 years. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held that:

"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

27. I appreciate the views expressed in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) that:

"Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future."

28. However, in this case account must be taken of the fat that the deceased was unmarried and there was a possibility that he would with time marry and have his own family.

29. Accordingly, whereas parents have an expectation of being assisted by their children, 2/3rd dependency ratio is on the higher side. However, being unmarried it is not unreasonable to assume that he could have been contributing to his parents ½ of his income. Accordingly, I adopt the one half as the dependency ratio. As regards the multiplier it is my view that 20 years would have been appropriate.

30. It is therefore my view the award for loss of dependency any ought to have been as hereunder:

5,000.00 x 20 x ½ x 12 = 600,000.00

31. The learned trial magistrate seems not to have assessed the award under loss of expectation of life. I would award Kshs 100,000.00 under this head.

32. I however have no reason to interfere with the other awards. In the result, I allow the appeal and substitute the award given with the following:

Pain and Suffering Kshs. 20,000/-

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

Loss of dependency Kshs 600,000.00

Special damages Kshs. 10,200/-

33. In the result the total award ought to have been discounted by 30% leading the net sum due to the Appellant as Kshs 511,140.00. The costs of the proceedings before the trial court are awarded to the Appellant. The award on general damages will attract interest from the date of the judgement in the trial suit at court rates till payment in full while the interest on special damages will accrue from the date of filing the suit till payment in full at court rates.

34. Half the costs of this appeal are awarded to the appellant.

35. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 22nd day of October, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey