REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 97 OF 2018

AUGUSTINE MURIUNGI MUKINDIA.....APPELLANT

-VS-

MOFFAT MWANDIKI (Suing as a legal representative of the estate

of the late Anderson Mbae Mukobwa) .....RESPONDENT

(Being an appeal from the judgment and decree the Honorable E. M. Ayuka delivered on 30th August 2018 in Nkubu SPMCC No. 51 of 2017)

JUDGEMENT

1. This appeal emanates from a road traffic accident that occurred on or about the 5th day of November 2015 where the plaintiff was lawfully walking along the Nkubu – Meru road at Nkubu as a pedestrian when the defendant's driver, his agent, servant or employee recklessly drove, managed, controlled motor vehicle registration No. KCD 960N Isuzu FSR that caused or permitted the same to violently hit the deceased and occasioning the plaintiff fatal injuries. The plaintiff filed a suit against the defendant for general damages, special damages and costs and interests of the suit.

2. The trial court entered judgment in favour of the plaintiff. On liability, the trial magistrate entered for the plaintiff against the defendant at 100% and awarded him Kshs. 1, 255, 300/- and costs of the suit as well as interest.

3. The appellant being aggrieved by the award initiated this appeal based on five grounds in the memorandum of appeal which may be collapsed into two: that the trial magistrate erred and misdirected himself by entering judgment on liability in favour of the plaintiff and in assessment of damages.

4. The appeal was canvassed by way of written submissions. The appellant submitted that the trial magistrate erred in finding that the deceased was a pedestrian and apportioned liability at 100% yet it was contested as to whether the deceased was a pedestrian or simply alighting from his motor vehicle. No eye witness account was given or any evidence. As for damages, they must be specifically pleaded and strictly proven but the amount awarded was inordinately high and erroneous.

5. The respondent submitted that the appellant knocked down the respondent while reversing. The driver was not called to explain what happened and thus 100% liability apportioned. On damages, it is based on the discretion of the court which it applied judiciously. That this court ought not to interfere in the absence of prove on any bias by the trial court. He relied on the following authorities: **Meru Parkers Limited v Herbert Liatema Omnaka CA No. 78 of 2001**, **Jacob Ayiga Marusa & another v Simeon Obaya [2005] eKLR** and **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No. 2)[1985]eKLR**.

6. This being a first appeal, the court is to re-evaluate, re-assess and re-analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. (***See: Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123***). Accordingly, this court has carefully considered the record of appeal and submissions brought before this court.

7. PW1 Moffat Mwandiki stated that he is the son of Anderson Mbae who died in the traffic accident that occurred on 5th November 2015. He stated that the deceased was a driver who earned about Kshs. 1,000/- daily and about Kshs. 30,000/- per month. He was a widower who left behind three children who are in school.

8. PW2 No. 82348 PC Maurice Juma produced the police abstract issued on 18th April 2015 in regard to the accident. He told the court that the accident happened on 5th November 2015 at about 8.00PM within Nkubu Township. It involved a pedestrian and motor vehicle registration KCD 960N Isuzu lorry which is owned by the defendant. On the material day, one Dancan Koome Mugira was reversing and in

the event he hit the pedestrian. The accident was caused by the driver of the motor vehicle.

9. At the close of the plaintiff's case the defendant did not call any witness.

10. This court has carefully considered the record and submissions presented and the issues to be determined are:

a. Whether the learned trial magistrate applied wrong principles in apportioning liability

b. Whether the learned trial magistrate misapprehended the principles governing the assessment of damages resulting excessive and erroneous award

11. Regarding the first issue, the trial magistrate apportioned 100% liability on the appellant. According to the evidence adduced is that the deceased was a pedestrian who was hit when the appellant was reversing his vehicle. The appellant denied this in his defence. He stated that his motor vehicle and motor vehicle registration number KBQ 871P without due regard for his own safety when he was crushed to death.

12. It is trite law which is spelt out under ***Section 109 of the Evidence Act*** which stipulates that whoever alleges must prove. In this case, the respondent had the burden to prove that the accident happened the way he says it did of which a police abstract was adduced. The appellant stated the contrary but he produced no evidence to ascertain his assertions. I incline myself to the declarations of GV Odunga J expressed in **Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another [2014] eKLR** as follows:

"Therefore his evidence on how the accident took place could only be at best hearsay. Without any evidence to the contrary, this Court finds that the accident took place when the driver of the suit motor vehicle was reversing. He ought to have had a proper lookout before reversing and the fact that the accident took place without him noticing the plaintiff can only be explained on the ground of negligence. In Meru Packers Limited vs. Hebert Liatema Omwaka Civil Appeal No. 78 of 2001, it was held that where a moving vehicle crashes against another which is stationary and in a parking bay it is the culprit of the accident. Similarly, where a vehicle crashes a pedestrian in a parking bay, in the absence of an explanation coming from the driver of that vehicle, it is my view that the driver ought to be held liable. It follows that the next issue - whether the plaintiff proved her case to the required standards – must similarly be answered in the affirmative."

Without evidence to the contrary I find that the accident took place when the driver of the suit motor vehicle was reversing and in the process hit the deceased. The appellant having control of his motor vehicle he had the obligation to check that it was all clear before reversing. Certainly, the appellant was liable and the trial magistrate did not error when he apportioned liability at 100%.

13. On the issue of damages, an appellate court ought not to disturb the award issued by the trial court unless it is inordinately high or low; or awarded based on wrong principles of law or misapprehension of facts; or any other reason that may lead to a wrong conclusion. This was so articulated in the case of **Mariga Vs. Musila [1984] KLR 251 at page 252** where it was held: -

"4. The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

14. The respondent sought general and special damages. To start with the special damages he sought were for the police abstract, post mortem and legal fees for P & A cause No. 2 of 2017 totaling to Kshs. 25,300/-. This was specifically pleaded and proved therefore, the amount was warranted.

15. He went on to seek general damages under ***the Law Reform Act*** and ***Fatal Accident Act***. Under ***the Fatal Accidents Act*** the trial court awarded the respondent Kshs. 1,080,000/- for loss of dependency. According to the appellant is that the trial magistrate erred and misdirected himself in his finding on the multiplicand despite the same not being pleaded or proved. Also, solely disregarded the provisions of the regulation of Wages (General Amendment) Order, 2015 that indicates the minimum wage for a driver as Kshs. 7,966/-.

16. The respondent died at the age of 56 years old. The trial magistrate used a multiplier of 9 years and a multiplicand of Kshs. 30,000 per month. On multiplier, Maraga J (as he was then) held in the case of ***Simon Mwangi Mureithi v Martin O. Shikuku & 3 others [2005] eKLR*** that:

"Life expectancy in Kenya is said to be around 45 years these days."

The learned judge relied on such a multiplier for he was of the opinion that life expectancy in Kenya was 45 years those days when he delivered the judgment in 2005. It is now about 14 years later and the life expectancy is not the same as it was then as it has risen. The life expectancy in Kenya is about 65 years which is equivalent to the retirement age. According to the World Health Organization the life expectancy of Kenya is at 64 – 69 years (See: https://www.who.int/countries/ken/en/). Therefore, the multiplier 9 years used by the trial magistrate was reasonable.

17. On multiplicand, **PW1** stated that his father was a driver who earned Kshs. 1,000/- per day which is equivalent to Kshs. 30,000/- per month. According to the appellant this was not been proved thus the trial magistrate out to have regarded the minimum wage for a driver according to the law. The Court of Appeal in the case of **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR** held as follows:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of

certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

18. I incline myself to the affirmations of the learned judges for most Kenyans work and do not keep records. It would be unfair not to take that into consideration when determining the multiplicand. It was not indispute was a professional driver however, the proposal by the appellant that the court should award Ksh. 3000/- as the deceased monthly wages is inordinately too low and the proposal by the Respondents that the deceased was earning Ksh. 1000/- per day would also be on the higher side considering that at the time of the accident he was not engaged in any employment as such driver. In that regard it cannot be said that he was capable of earning Ksh. 1000/- consistently as such driver when he was not even in employment. This court will therefore assess the reasonable and probable of the earning of the deceased as a driver to atleast Ksh. 500/- per day and find that General damages for loss of dependency would amount to Ksh 15,000/- X 9 X 1/3 X 12 = Ksh. 540,000/-.

19. The trial magistrate then awarded the respondent damages from ***the Law Reform Act***, which are pain and suffering Kshs. 50,000/- and loss of expectation of life Kshs. 100,000/-. According to the appellant is that the trial magistrate erred on the aspect of loss of expectation of life for he did not consider that when people entitled to the deceased's estate are the same persons for whose benefit the action is brought the said damages are deductible to prevent them benefitting twice. Thus, the magistrate ought to have deducted Kshs. 100,000/- from the final award.

20. This issue of double compensation has been litigated upon and in the case of ***David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR***, Mativo J, had this to say about ***Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act*** and ***Section 2(5) of the Law Reform Act:***

"I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act."

The Court of Appeal in the case of ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR*** held :

"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."

In Kefro Africa Limited t/a "Meru Express Services (1976)" & Another Vs. Lubia & Another (No. 2.) [1987] KLR 30

"The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

I fully associate myself with the findings in the above cited cases and I therefore of the opinion that the trial magistrate appropriately awarded damages both under ***the Fatal Accidents Act*** and ***the Law Reform Act***.

21. From the foregoing, I am of the opinion that save for damages for loss of dependency the other grounds of the appeal lack merit and are dismissed with costs to the Respondent at 75%.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 17th DAY OF OCTOBER 2019.

In the presence of :

C/A:

Appellant :- Mr Mbogo holding brief for Njeru for Appellant

Respondent:- Mr Kijaru Advocate for Respondent – No appearance

HON A. ONG’INJO

JUDGE