REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 5 OF 2017

G. ISSAIAS COMPANY LIMITED..APPELLANT

VERSUS

PAUL KAMAU KARIUKI & JANE NJERI WAWERU

(Suing as the Legal Representative to the Estate of

PETER WAWERU KAMAU – Deceased)...RESPONDENT

*(Being an appeal from the Judgment of the **Hon. A.M. Maina in Gatundu PM** delivered on **19.01.2016** in The Principal Magistrates Court at Gatundu)*

JUDGMENT

1. This appeal emanates from the judgment of **Maina, PM** in **Gatundu PMCC No. 236 of 2014.** That suit was filed by the Respondents herein **Paul Kamau Kariuki** and **Jane Njeri Waweru** in their capacity as legal representatives of the estate of **Peter Waweru Kamau** (deceased) against **G. Issais & Co. (K) Ltd** (the Appellant herein). The cause arose from a road traffic accident occurring on 4th August 2014, and involving the Appellant's motor vehicle **KBM 415 V Volvo Lorry.** It was averred that the Appellant's driver, servant or agent so negligently drove the vehicle that it lost control and knocked down the deceased who sustained fatal injuries.

2. The Respondents were named as the persons for whom the claim for damages under the Fatal Accidents Act was brought. Damages were also sought under the Law Reform Act. Although the Appellants initially denied liability vide their Defence Statement, on 5.11.15 the parties recorded a consent judgment on liability in the ration of 80:20 in favor of the Plaintiffs (now Respondents). The parties further agreed to admit the documents filed by the Respondents and to file written submissions to facilitate the assessment of damages.

3. In the judgment delivered on 19th January 2015, the court entered judgment for the Respondents against the Appellants as follows:

Damages under the Law Reform Act

Pain and suffering	-	KShs.10,000/=
Loss of expectation life	-	KShs.50,000/=

Damages under the Fatal Accidents Act

Lost dependency	-	KShs.2,520,000/=
Grand Total	-	KShs.2,580,000/=
Less 20% contribution	-	KShs. 516,000/=
Net	-	KShs.2,064,000/=
Special damages	-	KShs. 1,875/=
Total	-	KShs.2,065,875/=

4. Aggrieved by this outcome the Appellants preferred this appeal. Seven grounds of appeal are raised in the memorandum of appeal. The grounds challenge the awards under the Law Reform Act and the Fatal Accidents Act.

5. The Appellants complain that the awards were excessive inter alia because:

i) the trial court did not apply a dependency ratio in computing lost dependency

ii) the multiplier and multiplicand applied were too high

iii) the trial court did not uphold the doctrine of precedent and relate the evidence to relevant case law.

iv) the trial court did not take into account the awards under the Law Reform Act in assessing damages payable under the Fatal Accidents Act.

6. The court directed that the appeal be canvassed by way of written submissions. Regarding (i) above the Appellants in their submissions took issue with the failure by the trial magistrate to apply a dependency ratio apparently on the erroneous assumption that the deceased would have spent all his income on his dependents. It was contended further in respect of (ii) above that the multiplicand of KShs.7,000/= was too high as the deceased was a student and had not yet started earning. The Appellants reiterated the applicable principles in making awards for lost dependency as enunciated by the Court of Appeal in **Hassan V Nathan Mwangi Kamau Transporters & 4 Others [2008] I KLR (G & F) 90.**

7. Moreover, it was asserted that the multiplier of 30 years in the instant case was too high and ignored the vagaries of life. The court was urged to consider the multiplier of 16 years used in the case of **Hassan** where the deceased was 17 years old, the Appellants pointing to the fact that the deceased herein had not started earning and there being no evidence of his performance at school. An award based on a global approach as in the High Court decision in **Oshivji Kivenji and Stephen Kilimo V James Mohamed Ongege HCCA 40 of 2009** and other similar cases was said to be more applicable in this case. The court was urged to set aside the award in respect of lost dependency and substitute it with a global award of KShs.320,008/=.

8. For their part the Respondents opposed the appeal. Reiterating the discretion of the court in deciding whether to use the global or multiplier approach, the Respondents, citing the case of **Butt v Khan [1977] I KAR 5** assert that the appellate court can only disturb an award if it is so high or low as to represent an erroneous estimate, arising *inter alia* from a misapprehension of the evidence in some material respect. The Respondents submitted that the deceased though a student had good prospects and that the trial court's adoption of the minimum wage was justified.

9. It was submitted that the deceased's dependents were entitled to compensation for lost dependency in accordance with Section 4(1) of the Fatal Accidents Act. The Respondents defended the multiplier used in the case citing the retirement age, and the decisions of the High in **Daniel Kuria Ng'ang'a V Nairobi City Council [2013] e KLR** and **Steve Tito Mwasya and Another V Rosemary Mwasya [2015] e KLR.**

10. The Court has considered the evidence in the lower court and submissions on this appeal. By their submissions, the Appellants narrowed the grounds of appeal to the challenge in respect of award of damages for lost dependency.

11. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its own conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**; **Peters v Sunday Post Ltd (1958) EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on a misapprehension of the evidence or on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

12. The sole question in this appeal is the quantum of damages. As regards the award in respect of lost dependency, the sticking point at the trial was proof of the deceased's income. The Court of Appeal has laid down the principles upon which an appellate court will interfere with the trial court's exercise of discretion in assessment of damages. In **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** the court held that:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low".**

See also **Kemfro Africa t/a Meru Express Service** and **Another [1982 – 1988] I KLR 727.**

13. The deceased herein was aged 18 years at the time of his death and was a high school student. The trial court noted that the deceased's academic records were not exhibited and guided by the authority in **David Njung'e Mwangi v The Chairman BOG Njiri's High school** adopted a multiplier of 30 years, and the current minimum wage of KShs.7000/=. With regard to these factors the trial court cannot be faulted. The trial court was entitled despite the dearth of solid evidence on income to do its best in arriving at an award. The Court of Appeal in **Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR** stated *inter alia*:

> **"But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ... we do not subscribe to the view that the only way to prove the profession of a person must be by way of 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."

14. In **Wambua v Patel [1986] KLR 336** cited in Kimatu's case, the Court grappled with the quantification of loss of earnings of a cattle trader who had sustained injuries in a road traffic accident. Even though the Court found the Plaintiff's earnings rather low, and that he kept no records the Court (**Apaloo J** (as he then was) stated:

> **"Nevertheless. I am satisfied that he was in the cattle trade and earned his livelihood from that business, a wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method ... But a victim does not lose his remedy in damages because the quantification is difficult."**

15. No authority is required for the trite proposition that the trial court may in its discretion use a multiplier or global approach in this regard. In this case, the trial court proceeded to apply the former, and used the limited material available, including the deceased's age at death and the minimum wage to arrive at an award. However, by failing to take into account the dependency ratio, the trial court erred. As stated in **Hassan's** case, the parent dependents of the deceased could not reasonably have expected to be recipients of all the deceased's earnings all of his life, and probable living expenses of the deceased ought to have been deducted from his anticipated future income. The trial court's failure to apply the appropriate dependency ratio resulted in an excessive award of damages in respect of lost dependency.

16. In **Chunibhai J. Patel and Another v PF Hayes & Others [1957] EA 748,** cited in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja) v Kiarie Shoe Stores Ltd [2015] e KLR** the Court of Appeal had given the following guidelines in assessing damages under the Fatal Accidents Act:

> **"The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) <u>and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency which must then be capitalized by multiplying by a figure representing so many years' purchase</u>. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of widow or children (dependants).... The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."** (emphasis added)

17. The courts have conventionally applied a dependency ratio of ? for parents of a deceased child, anticipating that such child would have likely married and therefore applied ? of his income for himself and his family.

18. Thus, in this case, the court is satisfied that the multiplier and multiplicand adopted were reasonable and would only interfere by applying a dependency ratio of ?. Thus KShs.7000 x 30x12x? = 840,000/=.

19. In **Kemfro Africa Ltd t/a Meru Express Service, Gathogo Kanini v A. M. Lubia and Olive Lubia (1987) KLR 30,** the Court of Appeal stated that:

> **"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages."** see **also Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.**

20. In the latter case, the trial Court of Appeal asserted the discretionary nature of general damages awards and observed that "***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 in the first instance".***

21. In the present case, the court did not consider a relevant factor, namely, that the dependents of the deceased, being parents were only entitled to a third and not the entire earnings that the deceased would have made had he lived a full life. In the circumstances, the court allows grounds 1(a), 3 and 4 of the appeal as they relate to the award of damages for lost dependency. The court hereby sets aside the award in the sum of KShs.2,520,000/= on that head and substitutes therefor an award of KShs.840,000/=.

22. Judgment is therefore entered for the Respondents against the Appellants as follows:

<u>Damages under the Law Reform Act</u>

a) Pain and suffering - KShs. 10,00/=

b) Loss of expectation of life - KShs. 50,000/=

<u>Damages under the Fatal Accidents Act</u>

Loss of e dependency - Kshs.840,000/=

Grand Total	-	KShs.900,000/=
Less 20% Contribution		
Net	-	KShs.720,000/=
Add Special damages	-	KShs. 1,875/=

Total KShs.721,875/=

[SEVEN HUNDRED AND TWENTY ONE THOUSAND EIGHT HUNDRED SEVENTY FIVE]

As the appeal has only partially succeeded, the Appellant is awarded half the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 7TH DAY OF NOVEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Ms Matengo holding brief for Mr. Maanzo for Appellant

Respondent – No appearance