REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 33 OF 2019

CHINA CIVIL ENGINEERING &

CONSTRUCTION COMPANY (K) LIMITED ..... APPELLANT

VERSUS

MWANYOHA KAZUNGU MWENI &

MWENI KAZUNGU MWENI (Both suing on behalf of the estate of

NDEGWA MZUNGU MWENI (Deceased) .....RESPONDENTS

(*Being an appeal from the judgement and decree of the Honourable L.N. Wasige, Principal Magistrate delivered in PMCC No. 37 of 2018 delivered on 15th May, 2019)*

Coram: Hon. Justice R. Nyakundi

Mogaka, Omwenga & Mabeya for the appellant

Njoroge Mwangi Advocates for the respondent

JUDGMENT

The question of the appellant's liability has been determined by a consent judgement in the ratio of 15%:85% in favour of the respondent. This is an appeal against the assessment of quantum

According to the record the learned trial magistrate in her judgement assessed and awarded the following head of damages:

1. **Damages for pain and suffering** **Kshs. 30,000/=**
2. **Damages for loss of expectation of life** **Kshs.150,000/=**
3. **Damages for loss of dependency** **Kshs.700,000/=**
4. **Special damages** **Kshs. 48,125/=**

Net award less 15% - **Kshs.788,906.23.**

The appellant was aggrieved with the judgement and did raise the following grounds:

1. That the learned trial magistrate erred in law and in fact in awarding a global award for loss of dependency of Kshs.700,000 without consideration of the deceased advanced age when the said figure was not supported at all or whatsoever with any documentary evidence at the trial.

2. That the learned trial magistrate took into account material which was not relevant to the case arriving at an erroneous finding at the aspect of quantum.

3. The learned magistrate erred in law and fact in awarding double compensation under both the Law Reform act and under the Fatal Accidents Act contrary to the guiding principles in such cases.

Background

The respondent through the firm of **Njoroge Mwangi & Co. advocates** filed suit on behalf of the **Estate of Ndegwa Mweni Mzungu** seeking damages as a result of negligence which caused the death of the deceased on 14th December, 2017.

The plaint averred that the deceased on the material day was lawfully standing off the road along Kaloleni – Kilifi Road at St. Lukes Hospital, what, motor vehicle registration KCD 38A owned by the appellant was dangerously driven. In the process of overtaking a motorcycle, and in the course was confronted with an oncoming motor vehicle and to avert the collusion the appellant's motor vehicle veered off the road knocking the deceased fatally as a result prematurely terminating his life.

The complainant had the burden discharge the evidential burden under Section 107(1) and Section (108) of the Evidence Act on a balance of probabilities basically from the testimony of PW1 **Mwanyoha Kazungu** whereas it was not objected that an accident and the deceased was fatally injured, the witness went a step further to prove loss and damage suffered. The following material was laid before the trial court that the deceased was aged 79 years, but still active and carrying out farming activities earning a monthly salary of Kshs.18,000 per month. That following the deceased death, a postmortem examination conducted revealed the injuries suffered. The cause of death was ascertained to be flowing from serious injuries suffered at the time of the road traffic accident. The witness produced receipts showing expenses incurred to inter the body of the deceased which included purchase of the coffin, Kshs.8,000, mortuary expenses Kshs.1,875, postmortem report Kshs.3,250, funeral expenses and other incidentals on or about Kshs.60,000. The claimant also petitioned for grant of Letters of Administration to file this suit on behalf and for the benefit of the estate of the deceased. The costs of litigation on the succession cause was stated to be Kshs.15,000 as supported with exhibit 2. True to the nature of the case management directions taken the appellant did not adduce any evidence.

The learned counsels moved to prepare and file written submissions on the issues for the trial court to determine the mater conclusively as to the damages under the Law Reform Act and Fatal Accidents Act to the estate of the deceased.

Following the respective submissions taken by both counsels, the learned trial magistrate in her judgement interalia made the findings to the effect that on the head of damages for loss of dependency a global approach was appropriate. She therefore sought guidance from the case of **Mary Njeri Murigi v Peter Macharia & Another (2016) eKLR** for this proposition which is a statement of law to proceed and assess damages in favour of the respondent.

On loss of expectation of life, the Learned trial Magistrate also assessed the sum payable at Kshs.150,000 . The context is on this two limbs under the Law Reform Act and Fatal Accidents Act.

On appeal the appellants counsel **Mr. Mogaka** invoked the jurisdiction of the first appellate court as settled in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Muchira T/A Muchira & Co. Advocates 2013 eKLR** to re-examine the evidence afresh and interfere with the assessment.

In deciding this appeal, I would be obligated to bear these principles in mind, giving due allowance that the discretion of the trial court which passed the judgement had an advantage of assessing the credibility and demeanor of witnesses.

According to counsel the award made in the final analysis was far away excessive from the proposals of Kshs.500,000 in his submissions which he considered appropriate.

The precedent case of **Gammel v Wilson (1981) 1 ALL ER 578** was cited by counsel. The authority being of persuasive nature counsel invited the court to find more solace in the local decisions. Counsel submitted and relied on the legal professionals in the cases of **John Wamae &2 others v Jane Kituku Nziva & another [2017] eKLR** and **Tayab v Kinanu CA No. 29 of 1982** to drive the legal point home. That the learned magistrate misdirected herself in the assessment of damages in two tier approach provided for under the Law Reform and Fatal Accidents Act with this counsel urged this court to allow the appeal.

For the respondents' counsel **Mr. Njoroge** has asked me to apply the principles in the case of **Camwene Delvash of Kisumu v Tete 2004 eKLR, Peter Waweru Mwinja v Kiarie Shore shore Ltd 2015 eKLR.** That assessment of damages being a discretionarily matter the appeal court should proceed with caution in interfering with the award of the trial court.

The contention by learned counsel was to the effect that the appellant has not shown that indeed the learned trial magistrate did not address herself or direct her mind to the law pertaining to assessment of damages. That there is no factual complaint to render the award inaccurate.

Learned counsel further approach was to urge the court by way of precedent setting decisions in **Mwanza v Ngalali Mutua Kenya Bus Services Ltd, Albert Odawa v Gichumu Githenji Nakuru HCA No. 15 of 2003 (2007) eKLR Joseph Mutunga Wambua v Kamal Khunji Patel 1986 eKLR** and **Jacob Ayiga Maruja v Simeane Obayo 2005 eKLR.**

On the principles and facts of the case before the trial court to persuade me not to interfere with the award Learned counsel on double compensation under the two statutes relied on the principles in the case of Hellen **Warugaru (suing as the legal representative of Peter Waweru Mwanja v Kiarie Shore Shore (supra).** Learned counsel contended with these propositions and laid down principles urging this appeal court not to substitute the award for reasons that if it was the trial court it would have arrived at different quantum.

Analysis

As can be deduced from the submissions by both counsels the principles, on which this court would interfere with the trial magistrate's assessment of damages are now well settled.

The court is only allowed to do so where the appellant shows that the learned trial magistrate in assessment of damages took into account an irrelevant factor or failed to appreciate relevant evidence or factor. That in the total sum of her findings she ended up with an inordinately high or excessive or low award of damages.

The procedure in a relation to the appellate jurisdiction in exercise of discretion over the decision of a trial court can be summarized in the case of **Hidaya Ilanga v Mangena Mayaka 1967 EA 705** where the court expressed itself as follows:

> **"Whether the assessment of damages be by a judge, the appellate court is not justified in substituting a figure of its own for what awarded below simply because it would have awarded a different figure if it had filed the case in the first instance. Before the appellate court I am properly intervene, it must be stratified either that the Jude in assessing damages applied a wrong principle of law as by taking into account some relevant factor or leaving out of account. Some irrelevant one, or short of this that the amount awarded is so inordinately. Law or inordinately high that it must be actually erroneous estimate of the dame.**
>
> **The principles in the case of Kimaru Mbuvi T/A Kimaru Mbuvi v Augustine Munyao Kioko CA No. 203 of 2001 decided by the court of Appeal adopting the precedent in the case of H. West & Sons Ltd v Shephered 1964 A.C. 326 IS particularly important as the court lays down the principles and guidelines in assessment of damages. The predominant principles which lies across these cases is that damages should be a fair compensation for the loss suffered by the deceased or claimant. As for the deceased the loss of pecuniary as can be shown on the facts establishment by the claimant as an against the defendant or tortfeasor under vicarious liability."**

Lord Scarman in **Gammel v Wilson & others and Furness and another v B and S Massey Ltd 1982 C 27** being a relevant authority from the House of Lords put it more succinctly and is worthy of note to complement the principles in **H West & sons v Shephered** (supra) the judge observed:

> **"The correct approach in law to the assessment of damages in these cases presents by Lords, no difficulty, thought the assessment itself often will:**
>
> Ø **the principle must be that the damage should be fair compensation for the loss, suffered by the deceased in his lifetime.**
>
> Ø **The loss is pecuniary, as such it must be shown, on the facts found to be at least capable of being estimated.**
>
> Ø **If sufficient facts are established to enable the court to avoid the fancies of speculation, even not enabling it to reach mathematical certainty, the curt must make the best estimate it can in civil negligence, it is the balance of probabilities which matters, but in call cases it is a matter of evidence and a reasonable estimate based on it."**

In my view the catastrophy of any assessment of damages which may be fair by a trial court in the course of trial and the phrase of assessing the evidence sequecially falls on the exercise of discretion and continuing apprehension or misapprehension of the above principles.

As a country having our heritage in the English Common Law and with time perfectly developed our own jurisprudence on this aspect on assessment of damages in tort law and principles are now well demonstrated and settled.

This is more so that our fundamental statutes, the Law Reform Act and Fatal Accidents Act are basically products of Common Law of England. Consequently, the English precedents persuasive authorities would continue to mirror in our jurisprudential development and decisions.

I think in these circumstances I am enjoined to apply the principles in the case of **Harris V Empress Motors Ltd 1984 1 WLR 212**. Where the court stated:

> **"In the course of time, the courts have worked out a simple solution to the problem of calculating the net dependency under the Fatal Accidents Acts in cases where the dependents are wife and children. In times past the calculation called for a tedious inquiry into how much for the children's shares etc. This has all been swept away and the modern practice is to deduct a percentage from the yet income exclusively to represent what the deceased would have spent exclusively to himself. The percentage have become conventional in the sense that they are used unless there is striking evidence to make the consecutive figure in appropriate, because there is no department from the principle that each case must be decided on its own facts."**

I now turn to the question in this appeal being the award under the Law Reform Act and Fatal Accidents Act.

a) The assessment under the Law reform act is of course a consideration to be given on the following terms:

> ***i) Pain and suffering a result of the injuries***
>
> ***ii) Loss of earnings capability in the course of incapacitation from the wrongful act of the defendant***

iii) Post-trial costs

iv) Funeral expenses

v) Loss of expectation of life

The application of the provisions under this statute found its way in the case of **Benham v Gaubang 1941 AER** as later and in the case of **Oliver v Ashman 1961**.

> In **Oliver (supra) case;** *"the plaintiff a minor was injured at the age of twenty months in a road traffic accident resulting in brain injuries as to that he was mentally defective and could hardly talk or understand his environment and surroundings. His expectation of life was assessed at thirty years instead of sixty."* The court observed that **"he would need constant care than of course no regard must be had to financial losses or gains during the period of which the victim has been deprived of life, not loss of future pecuniary projects."**

Further said what is lost in in an expectation not the thing itself –

> **"on one view of the matter there is no loss of earnings when a man dies prematurely. He is no longer there to earn them, since he has died before they could be earned. He has merely lost the prospect of some years of life which is a complex of pleasure and pain, of good and ill, of profits and losses. On the other view, he has in addition to losing of a prospects of the years of life, lost the income that he would have earned and the prospects that he would have been his and had he lived."**

In **Zablon Mansa 99 v Morris Wambua Musila CA No. 66 of 1986 UR** the court of appeal stated interalia:

> **"I am convinced that the rule which enables the lost years to be taken into account comes closer to the ordinary man's expectation than which limits his interest to his shortened life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in quantum, has a value which can be assessed."**

What do I make of this principle to this appeal?

In the instant case the learned trial magistrate assessed damages for loss of expectation of life at 150,000. However, the principle applicable in assessment of damages under this head is so distinct from that under the Fatal Accidents Acts.

In determining assessment of damages under the **Law Reform Harrison J in Daris Falter, AD Estate Agana Barrett, deceased v Attorney General CL {1993} 1F152** put in categorically under Law Reform to Misc Act it is a practical approach

> ***"there is no room for sentimental agonizing, its hard matter of dollars and cents subject to the element of reasonable future "probabilities""***

The principle of Lost Years is crystal clear from the Court of Appeal in **Wambua case (supra):**

> ***"It is a loss arising from the death of the deceased and is calculated at the time of death of the deceased (see Miller Administrator of the Estate of Weston Miller, the deceased v Carribean Producers Ltd & Another {2015} JMISC when we talk of a conventional sum in calculating damages for lost years the age of the deceased is normally not a factor to inference exercise of discretion."***

The principle is more illustrative from the speech by **Lord Morris** in **Yorkshire Electricity Board v Naylor {1968} AC 52G:**

> ***"It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount L. C. in his spent were not the prospects of employment or of social status or of relative pecuniary affluence but the prospect of a positive measure of happiness or of a predominately happy life."***

In **Flint v Lovell {1935} 1 KB 354** their **Lordships** held on assessment of damages under the Law Reform Act for lost years as **Collins First Lord Artiken:**

> ***"I think, he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts nor only in regard to pain, suffering and disability by tortious acts, but also in regard to the continuance of life for it's normal expectancy."***

As for **Lord Wright**:

> ***"I regard impaired health and vitality, not merely as a cause of pain and suffering, but also as a loss of a good thing itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such a loss there is a loss of a temporal good, capable of evaluation. In mostly through the evaluation is a difficult, though the calculation is expressed to be difficult under this limb of damages. It is arrived at without regard to the question of the amount of future earnings and primarily the court is to give due attention of what life was going to be worth to a health victim aged 79 years***

hecking his own living with few dependants."

I suppose for that matter without necessary factoring the conventional sum approach I am of the view that an award of Kshs.150,000/= under this head was on the higher side. What can be claimed under the Law Reform Act for the deceased Estate would be Kshs.100,000/=. This item of the appeal is therefore interfered with on appeal.

From the facts of this case on the gap between the time the deceased was hit and death, I consider the benefit of the deceased's estate on behalf of the claimant for pain, and suffering, loss of amenities to be Kshs.10,000/=. The view therefore renders the findings of the trial court, though discretionary erroneous for not taking into account relevant factor in assessment of damages for pain and suffering. On pain and suffering the factor to be taken into account is the gap period from the time the fatal injuries were suffered and confirmation of death. I am unable to find reasons for the award of Kshs.30,000/= for pain and suffering.

As regards loss of dependency under the Fatal Accidents Act what the claimants must proof and answer evidentially is proof of a benefit from the deceased during his life time.

The case of **Beatrice Wangui Thairu v Hon. Ezekiel Bangeituny & Another NBI HCC 1638 OF 1998 Ringera J** held as follows:

> ***"The principles applicable to an assessment of damages under the Fatal Accident Act are all too clear. The court must in the first instant find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lumpsum and would if wisely invested yield returns of an income nature."***

From there it is therefore an onerous task for the trial court for its called upon to determine the future prospects of the deceased. The major challenge is to determine the numbers of years' expectancy and dependency between the date of the deceased death when his earning capacity ceases or on the attainment of retirement. It does not follow that if the deceased was employed in public service the estimate of the number of years will last with the statutory age of retirement.

The court in **Vassam v Kampala Aerated Water Co Ltd {1965} 1 WLR 668** rightly stated:

> ***"That the exercise of this discretion sometimes is a matter of speculation and may be conjecture."***

In the instant appeal, the deceased was aged 79 years, survived by the claimant. Without certainty, if the court would have applied the multiplier formulae may estimate multiplicand of 4 -5 years and or income of Kshs.18,000/= per month it would have been an appropriate estimate life expectancy to consider, in calculating dependency on this multiplier as the period of dependency the claimant would probably ended up with an award of over Kshs.600,000/=. With this in mind, the consideration of a global approach may not have been too generous for that matter. The fundamental evidence of the deceased good health, evidence as to the income of the deceased and dependency remained uncontroverted.

In view of the jurisdiction of the 1st appellate court, I am properly guided that there is no material for interference with the award on dependency.

That the claimant is now a victim of the wrongful act of negligence which resulted in the premature death of the deceased depriving him or her of the entitlement of that benefit that accrues from the deceased.

Having looked at the evidence and submissions by both counsels it is not disputed that the respondent in this appeal was not dependent to the deceased. One point raised in the appeal by **Mr. Mogaka** was the advanced age of the deceased and his capacity of earnings and the prospect of dependence for the respondent.

I cannot resist stating that there was no medical evidence that would proof that the deceased prior to the wrongful act was not enjoying good health and engaged in income generating activities for his benefit and dependant. A man in good health able to make a living from his business or farming activities and is killed due to the negligence ought to be fairly and adequately compensated for the benefit of his estate.

On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the Fatal Accidents Act.

In the result, the appeal partially succeeds and in my view, on the questions of Law and fact which were brought to the attention of the court, at the conclusion of it all these shall be orders of the court:

- ***The appeal on the liability as per the Judgment of the trial court 15%:85% in favor of the respondent.***

- ***Damages under the Law Reform Act***

i. Pain and suffering Kshs. 10,000/=

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

iii. Special damages Kshs. 48,125/=

Ø Damages under the Fatal Accident Act

i. Loss of dependency Kshs.700,000/=

Ø A ¼ of the cost of this appeal awarded to the appellant whereas ¾ shall be payable to the respondent by the appellant to this appeal.

Ø Interest at court rates on quantum on general damages from the date of the Judgment by the trial court and on special damages from the date of filing suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER, 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Kirui for Mogaka, Omwenga & Mabeya Advocate for the appellant

2. Mr. Thuku for Njoroge Mwangi Advocate for the respondent