REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 102 OF 2015

CAMILUS OKWIRI (suing as administrator of the

estate of TABITHA GLADYS MAKOKHA.....APPELLANT

-VERSUS-

MATUNDA BUS SERVICES LIMITED.....RESPONDENT

(Being An appeal from the Judgment and Decree of the Hon. C. Obulutsa, Senior Principal Magistrate, delivered on 4 September 2015 in Eldoret CMCC No. 263 of 2014)

JUDGMENT

[1] This appeal was lodged on the **17 September 2015** by the Appellant, **Camilus Okwiri**, in his capacity as the administrator of the estate of **Tabitha Gladys Makokha** (the deceased). It arises from the decision of the Chief Magistrate, Hon. Obulutsa, in **Eldoret Chief Magistrate's Civil Case No. 263 of 2014: Camilus Okwiri (suing as the administrator of the estate of Tabitha Gladys Makokha) vs. Matunda Bus Services Ltd** rendered on **4 September 2015**. The Appellant had sued the Defendant in that suit claiming general and special damages in respect of a road traffic accident that occurred on **12 December 2013** involving the Respondent's **Motor Vehicle Registration No. KBK 901D, Isuzu Bus**, in which the deceased, **Tabitha Gladys Makokha,** was then travelling as a lawful fare paying passenger.

[2] As the parties had settled the issue of quantum by consent at the ratio of 90:10 in favour of the Appellant, the task of the trial magistrate was limited to assessing damages payable. Hence, in a Judgment dated **4 September 2015**, the trial court awarded the Appellant **Kshs. 382,070.70** made up as follows:

Pain and Suffering	20,000/=
Loss of Dependency	360,000/=
	380,000/=
Less Loss of Expectation of Life	70,000/=
	310,000/=
Special Damages	114,523/=
Less 10% Contribution	42,452.30
Net	**382,070.70**

[3] Being dissatisfied with Judgment of the trial magistrate, the Appellant filed the instant appeal on **17 September 2015** on the following grounds:

[a] That the learned magistrate erred in law and fact in failing to appraise properly all the evidence on record;

[b] That the learned magistrate erred in law and in fact by awarding the estate of the deceased a minimal amount in fatal damages which is not commensurate with her age and earnings; and therefore arrived at an erroneous estimate of the damages payable under the **Law Reform Act** and the **Fatal Accidents Act.**

[c] That the learned magistrate erred in law and in fact by failing to consider the submissions by the Appellant;

[d] That the learned magistrate erred in law and in fact by failing to consider the elaborate evidence of the Appellant which was to the effect that the deceased's estate suffered loss of earnings and dependency;

[e] That the learned magistrate erred in law and in fact by failing to consider that the deceased's estate had dependants;

[f] That the learned magistrate erred in law and in fact by failing to consider that the Respondent had totally failed to rebut the Appellant's overwhelming evidence on record in terms of loss of amenities, loss of dependency and loss of earnings;

[g] That the learned magistrate erred in law and in fact by misapprehending the evidence on record and thereby reached an erroneous conclusion and findings;

[h] That the learned magistrate erred in law and in fact by failing to evaluate the evidence and thereby arrived at an erroneous conclusion and finding;

[i] That the learned magistrate erred in law and in fact in making conclusions and findings which he was not in law be entitled to make.

[4] Accordingly, the Appellant prayed that the appeal be allowed and that the Judgment and award by the trial court be reviewed upwards with costs to the Appellant. Upon the appeal being admitted to hearing, directions were issued on **7 September 2018** that the same be canvassed by way of written submissions; and whereas Counsel for the Appellant duly complied, no written submissions had been filed by or on behalf of the Respondent by **18 September 2019** when this matter was reserved for Judgment.

[5] The main arguments advanced by the Appellant's Counsel in the written submissions filed herein on **23 November 2018** were, firstly, that the trial magistrate erred in adopting a multiplier of 9 years for the purpose of calculating loss of dependency. According to Counsel that figure was unreasonable in the circumstances, considering that the deceased was a businesswoman and was not constrained by a retirement age. Counsel instead proposed that a multiplier of 15 be adopted, positing that the deceased was in good health at the time of her death. He relied on **Joseph Kahiga Gathii & Another vs. World Vision Kenya & 2 Others [2014] eKLR** in which a multiplier of 8 years was adopted where the deceased was 57 years at the time of death. Counsel also cited the case of **Hardev Kaur Dhanoa vs. Multiple Hauliers (E.A.) Limited [2017] eKLR** in which a multiplier of 6 years was adopted where the deceased was 62 years.

[6] The second ground of attack by Counsel for the Appellant was on the multiplicand. He faulted the trial magistrate for adopting a figure of **Kshs. 5,000/=** as the deceased's monthly earning without any basis at all. He argued that the Appellant presented credible evidence before the lower court to demonstrate that the deceased would contribute between **Kshs. 12,000/=** to **Kshs. 15,000/=** to the family income every month; and therefore tht the figure adopted by the trial court was not only inordinately low, but was also entirely unjustified. He relied on **Kenya Pipeline Company Limited vs. Lucy Njoki Njuru (suing as the legal representative of the estate of John Wamae (Deceased) [2017] eKLR** in which the sum of **Kshs. 15,000/=** per month was taken as a reasonable average income from the hawking business.

[7] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** it was held thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[8] As an appellate court, I remind myself of the expressions of the Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** that:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."**

[9] The Appellant did not challenge the multiplier or the awards under the **Law Reform Act**; particularly the sum of **Kshs. 70,000/=** for loss of expectation of life, for which the conventional awards in recent years range between Kshs. **100,000/=** to **Kshs. 200,000/=.** The special damage award was also not contested. It is manifest that the lower court awarded that which was proved before him. Thus, the issues in contest in respect of which the lower court decision is to be re-evaluated are only two; the issue of the applicable multiplier and the appropriate multiplicand. And, in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others** [1957] EA 748, the Court of Appeal for East Africa restated the formula to be applied in such cases the following terms:

"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 dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. 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."

[10] The evidence adduced before the trial court by the Appellant, which was not refuted (the Respondent having opted to call no evidence), was that the deceased was his wife; and that they had 6 children together who depended on them. He further testified that the deceased died at the age of 45 years; and that she was engaged in business and would assist him in taking care of the family expenses to the tune of **Kshs. 12,000/=** to **Kshs. 15,000/=** monthly. The trial court however took the view that:

"As submitted by the defendant it is not clear what business the deceased was engaged in as there is no proof of income to warrant the proposed 15,000/= the defence proposal will suffice of 5,000/=. The burial permit shows she was 51 years. The court shall take a multiplier of 9 years and ratio of 2/3 hence 9x12x5000x2/3=360,000/=."

[11] In stating that there was no proof of income to support the sum of **Kshs. 15,000/=** that the Appellant testified about, it is manifest that the trial court had in mind documentary evidence; yet in **Hellen Waruguru Waweru Case** (supra) the Court of Appeal proffered the following position for the purpose of advancing the course of justice in such circumstances:

"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-

'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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."

[12] In the premises, the trial magistrate misdirected in rejecting the oral evidence of the Appellant as to the deceased's monthly earnings, yet the evidence was not disputed at the trial or rebutted by the defence. It is also noteworthy that he did not give any reason for preferring the defence proposal of **Kshs. 5,000/=.** Indeed, it is now trite that where it is impossible to ascertain income, the preferable option would be for a trial court to employ the global approach. The words of **Hon. Ringera, J.** (as he then was) in **Mwanzia Ngalali Mutua vs. Kenya Bus Services (Msa) Ltd & Another**, are apt; that:

"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 alter of methodology, something a court of justice should never do."

[13] I note, however, that as a guide, Counsel for the Appellant cited **Kenya Pipeline Company Limited vs. Lucy Njoki Njuru (suing as the legal representative of the estate of John Wamae (Deceased) [2016] eKLR,** in which more or less similar facts played out; urging the Court to apply the average sum of **Kshs. 15,000/=** as a reasonable monthly income of a smalltime trader. In that case the court took the view that:

"I do not believe that he was earning Kshs. 3,000/= or more per day but he was earning a living from the business which enabled him to fend for his family. I will therefore take Kshs. 15,000/= per month as his earning because I find it a reasonable average from hawking business which I understand can fetch more than that per month or less than that in some occasions per month."

[14] Thus, I am satisfied that the uncontroverted evidence of the Appellant before the lower court was proof enough that the deceased was earning **Kshs. 15,000/=** on the average; and that the said amount is a reasonable multiplicand in the circumstances.

[15] As to the multiplier, it is significant that the trial court was faced with contradictory evidence as to the age of the deceased, in that, while the Appellant's testimony before the lower court was that the deceased was 45 years old at the time of her demise, he produced a Burial Permit as his **Exhibit No. 2** in which the age of the deceased was given as 51 years old. In the circumstances, the lower court cannot be faulted for relying on the burial permit. However, since the deceased was not in salaried employment, I would agree with the Appellant that, in adopting a multiplier of 9 the trial court committed an error in principle. It is noteworthy for instance that in **Hardev Kaur Dhanoa vs. Multiple Hauliers (E.A.) Limited [2017] eKLR** in which the deceased died at the age of 61 years, a multiplier of 6 years was employed. Thus, as a business woman the deceased could well have continued with her endeavours beyond 60 years; there being no rebuttal of the evidence of the Appellant that she was otherwise in good health at the time of her demise. Thus, I would thus agree that a multiplier of 15 would not be unreasonable in the circumstances.

[16] In the light of the foregoing, I find sound basis for interfering with the award made by the lower court and would re-work the damages due to the Appellant for loss of dependency under the **Fatal Accidents Act** thus:

- Kshs. 15,000 x 12 x 2/3 x 15 = 1,800,000/=

As the other items are not in dispute, the total amount due to the estate of the deceased, **Tabitha Gladys Makokha,** would be as hereunder:

Under the Law Reform Act:

- Loss of Expectation of life - Kshs. 70,000
- Pain and suffering - Kshs. 20,000

Under the Fatal Accidents Act

- Loss of dependency - Kshs. 1,800,000/=

Special damages	-	Kshs. 114,523
Total	-	**Kshs. 2,004,523**
Less 10% contribution		Kshs. 200,452.30
Net		**Kshs. 1,804,070.70**

[17] In the result, the appeal succeeds to the extent aforestated. The Judgment and Decree of the lower court is hereby set aside and substituted with Judgment in favour of the Appellant in the aforestated sum **of Kshs. 1,804,070.70** together with interest thereon from the date of the lower court judgment and costs of both the lower court suit and the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE