REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 68 OF 2016

SUSAN NJUGUNA……..1ST APPELLANT

JOSEPH NJUGUNA KAMARI……..……...……..……2ND APPELLANT

VERSUS

RUFUS CHEGE GACHII (suing as the legal administrators

of the estate of (STEPHEN MACHARIA CHEGE).……..…….RESPONDENT

(Being an appeal against the judgment of Honourable P. Gesora, delivered on 29th September, 2016 in Naivasha CMCC No. 231 of 2014)

JUDGMENT

Background

1. This appeal challenges only the quantum of damages awarded in the trial in the lower court. The parties recorded a consent on 25th April 2016 in favour of the plaintiff, and the trial court awarded as follows:

a) Pain and Suffering Kshs 20,000.00

b) Loss of Expectation of life Kshs 120,000.00

c) Loss of Dependency Kshs 900,000.00

Kshs 1,040,000.00

Less 30% contribution Kshs 104,000.00

Kshs 936,000.00

Special Damages Kshs 35,000.00

TOTAL Kshs 971,000.00

2. The grounds of appeal are as follows:

a.) That the learned Trial Magistrate erred and misdirected himself in his assessment of damages awardable to the Respondent for loss of expectation of life which was manifestly excessive.

b.) That the learned trial Magistrate erred and misdirected himself in his assessment of damages awardable to the Respondent for loss of dependency and more so in adopting a multiplier of 25 years which was manifestly excessive under the circumstances.

c.) That the learned trial Magistrate erred in assessing both general and special damages respectively and failed to apply the

principles applicable in award of damages and comparable awards made under similar circumstances.

3. From the grounds, there are three aspects of the award challenged: Loss of expectation of life; Loss of dependency; general and special damages.

4. The extant jurisprudence in Kenya indicates that the role of this court as an appellate court is to review the evidence availed in the lower court being careful to note that it did not have the opportunity to hear the witnesses and see their demeanour and to come to its own conclusions. In so doing, the court will also consider the submissions made by both the appellants and respondent. have filed their written submissions. Having done so, the court may interfere with such of the lower court's decisions as it considers are based on a wrong application of law and legal principle. This is particularly so if the award is so inordinately high or low as to be an inaccurate representation of the true and reasonable compensation due as a result of the nature of the injuries and damage suffered by the plaintiff. **(See Selle v. Associated Motor Boat Company [1968] EA 123)**.

5. The case was made out by two of plaintiff's witnesses, who were cross examined. The defence did not avail any witnesses. This is the only evidence available.

Loss of Expectation of Life

6. For loss of expectation of life, the appellants had proposed a sum of Kshs. 70,000/= relying on the case of **Abdi Kadir Mohamed & Another v John Wakaba Mwangi (2009) eKLR** where the court awarded 70,000/= for a deceased aged 21 years. On their part the respondent had suggested an amount of Kshs 150,000/=. The magistrate awarded Kshs 120,000/=

7. The appellant argued that the amount awarded for loss of expectation of life at Kshs. 120,000/= and pain and suffering at Kshs. 20,000/= were inordinately high. In the case of **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR**, Emukule J, held:

> ***"In common law jurisprudence of which Kenya is part, the courts have enrolled the principles loss of expectation of life and pain and suffering by the deceased: for award of damages under the Fatal Accidents Act for pain and suffering…..determined what is commonly referred to as conventional sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident …something to the estate?"***

8. In **Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased) [2015] eKLR,** it was stated that:

> ***"…the generally accepted principle is that very nominal damages will be awarded on these heads claims of the death followed immediately after the accident. Higher damages will be awarded of the pain and suffering was prolonged before the death in this case, the conventional figure for loss of expectation of life is Ksh.100,000/=.***
>
> ***Similarly, since the deceased died more or less immediately after the accident judging from the death certificate which states she died on 15th January 2011 same day the fatal accident causing death, occurred. The trial court's award on pain and suffering for Ksh.20,000/= was in order."***

9. In light of the foregoing, the trial court's award of Shs 120,000/= is neither inordinately high nor inordinately low. Accordingly, I see no reason to interfere with the lower court's award under this head.

Pain and Suffering

10. Under this head, the appellants proposed a sum of Kshs. 10,000/= in both the lower court and in this court as the deceased had died on the spot. They relied on the cases of **Re Estate of Fred Gekonge HCCA No. 95 of 2009 Kisii** and **Patrick Jacob Ouma v Tawfiq bus services HCCC No. 41 of 1998 Mombasa**. The respondent had proposed Kshs 50,000/=.

11. It is not in dispute that the deceased died instantly. The lower court awarded 20, 000/= which the trial magistrate stated was conventional. There is no basis for interfering with this award as the amount is neither inordinately high or low compared to the awards normally made under this head.

Loss of Dependency

12. Under this head, the appellants urge that in adopting the minimum wage model, the

trial magistrate did not state the year of the minimum wage, the category of employee/skills and the town/ region/municipality to which it applied. They propose a lump sum of between Kshs 400,000/= - 500,000/=. They further seek that the evidence that the deceased was a hawker earning 30,000/= per month be disregarded as no proof of such earning was availed.

13. The respondent on their part urged that a multiplier of 35 years be applied, but ended up using a multiplier of 30 years in their calculation; used a multiplicand of Kshs. 30,000/= and a ratio of 1/3 to make a total of Kshs. 3,600,000/= for general damages.

14. The Magistrate adopted a multiplicand of Kshs. 9,000/=, a multiplier of 25 years and a ratio of 1/3 making a total of 900,000/=

15. There are different approaches used by the courts in dealing with claims for loss of dependency under the **Fatal Accidents Act.** Some courts are inclined to apply the formulae proposed by Ringera, J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** while others elect to make global awards.

16. Ringera J, explained the multiplier approach in ***Kwanzia v Ngalah Rubia and another*** (citation not available) as follows:

> ***"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 facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency 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 altar of methodology, something a court of justice should never do"***

17. Whilst in ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Nyeri Civil Appeal No. 35 [2014] eKLR*** *the Court of Appeal stated that*:

> ***"The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason"***

18. The learned trial magistrate used the multiplier and multiplicand approach in the present case. Given the decision in the **Kwanzia case** (supra), the Magistrate did not err in any way as age of the deceased, the amount or annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation.

19. The appellants also submitted that the magistrate misapplied the minimum wage as proof of earning was not availed. Further, that the learned magistrate did not indicate the year, job group and town that the deceased fell under. It was testified that deceased was a hawker and was making Kshs. 30,000/= monthly from the hawking business.

20. It was not in dispute that the deceased was a hawker or that there was no documentary evidence to show how much the deceased earned. Courts, in pursuit of justice, appreciate the fact that there are numerous people in our society today who are illiterate or who do not maintain documents and documentary evidence in proof of their incomes, yet they earn a living. (See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited Court of Appeal at Nyeri Civil Appeal No. 22 of 2014 (2015) eKLR** among others). A Court therefore ought to revert to the applicable provisions of the Regulation of Wages Order or to a global figure in appropriate cases for instance when the deceased is a minor among other cases.

21. As the deceased was an adult and indisputably a hawker, then in the absence of any formal evidence of income a Court can safely revert to the appropriate Wages Order. In this case, the appropriate provisions would be **The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197)**. That Order came into effect on 1st May 2013, and the deceased died on 14th December 2013. I think he would fall under the category of General labourers within the Municipalities since Naivasha was a municipality, and the monthly income was Kshs. 9,024.15/=. It is my opinion that the trial magistrate did not err in applying Kshs 9,000/= as a multiplicand.

22. On the issue of multiplier, the case of **Wilson Nyamai Ndeto & Another v China Wu Yi Ltd & Anor (2017) eKLR** adopted a multiplier of 27 years for a 30 year old deceased person. In **HCA No. 141 of 2015 Charles Omwenga Ongiri v Daniel Muniko(2017) e KLR** the court upheld a multiplier of 25 years for a 32 year-old deceased. In **Wilter Chemutai Torongei -vs- W.E. Tiltey Muthaiga Ltd & Another (2017) eKLR,** a multiplier of 25 years for a 32 year old man was adopted.

23. All these cases disclose comparable circumstances and criteria for awards which are within the range of criteria and awards given by the trial court.

Disposition

24. In light of all the above, my view is that the learned magistrate made an appropriate award in respect of the several heads of claim, and I decline to interfere with the said award

25. Accordingly, I find that the appeal herein lacks merit and is hereby dismissed with costs.

26. Orders accordingly.

Dated and Delivered at Naivasha this 16th Day of December, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Kiariha holding brief for Geno for the Appellants

2. No representation for Gekonga for the Respondent

3. Court Clerk - Fred Kamau