REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.177 OF 2012

NEHEMIAH MWANGI.....1ST APPELLANT

BOLPACK TRADING CO.LTD.....2ND APPELLANT

VERSUS

BONIFACE KASINGA KINGA (Suing as Legal Representative of

the Estate of JACINTA KALUMU (DECEASED).....RESPONDENT

(Being an Appeal from the Judgment of the Honourable Gesora (Mr), (Senior Principal Magistrate. Ag) Delivered on 2nd October, 2012 in Machakos PMCC No.642 of 2008.)

BONIFACE KASINGA KINGA (Suing as Legal Representative of

the Estate of JACINTA KALUMU (DECEASED).....PLAINTIFF

VERSUS

NEHEMIAH MWANGI.....1ST DEFENDANT

BOLPACK TRADING CO.LTD.....2ND DEFENDANT

JUDGEMENT.

1. The Respondent through a Plaint filed in court on 19th June, 2008sued the Appellant for negligence and sought for general damages under the Law Reform Miscellaneous Provision Act, Cap 26 and the Fatal Accidents Act, Cap 32,special damages, costs of the suit, interest and any other relief that the court may deem fit to grant.

2. The trial court concluded that the Appellant was responsible for the accident that occurred on 13/04/2008 and judgment was entered in favour of the Respondent against the Appellants 100% with the trial court awarding a net sum of Kshs 2,409,300/= being general damages, Kshs 73,300/=, special damages Kshs 120,000/= for Pain and suffering, Kshs 100,000/= for loss of expectation of life.

3. The Appellant being aggrieved and dissatisfied by the part of the said judgement appealed against the same on the following grounds:-

a. The Learned Magistrate erred in fact and in law in awarding damages to the Plaintiff/Respondent under both Fatal Accidents Act and the law Reform Act.

b. The Learned Magistrate erred in law and in fact in awarding the Plaintiff/Respondent Kshs 2,409,300/= as general damages which amount is excessive and, manifestly high in the circumstances as the amount is an erroneous estimate of the loss/ damage recoverable by the Plaintiff/Respondent.

c. The Learned Magistrate erred in fact and in law in considering the Dependency ratio to be 2/3 whereas the dependants are all adults and further whose relationship to the Deceased is not described nor was the dependency.

d. The Learned Magistrate erred in law and in fact in using 15 years multiplicand yet the husband to the deceased testified on oath that he was self sufficient and did not rely on his wife's income.

e. The Learned Magistrate erred in fact and in law in relying on documentary evidence and accounts created/ generated purposely for advancing a claim.

f. The Learned Magistrate erred in fact and in law in finding the deceased earned Kshs 19,300/= being a sum which was not even pleaded by the Plaintiff.

g. The Learned Magistrate erred in fact and in law in failing to deduct or discount the damages recoverable by the Plaintiff/ Respondent from the Fatal Accidents act which award amounted to double benefit to the Dependants of the Plaintiff/Respondent.

h. The Learned Magistrate erred in law and in fact in wholly disregarding or failing to accord due and proper consideration upon the first defence counsel's written submissions and the cases cited in respect of the same matter thereby awarding the Plaintiff/Respondent manifestly high general damages.

i. The Learned Magistrate erred in law and in fact in failing to consider the minimum wage of Kshs 6,000/= and held that the Plaintiff/ Respondent earned Kshs 19,300/= which was not proved in evidence by the Plaintiff/Respondent.

j. The Learned Magistrate erred in law in failing to accord the Defendant's submissions due consideration.

k. The decision of the Learned Trial Magistrate is without factual or legal rationale.

l. The Learned Magistrate's decision is against the weight of evidence.

4. Looking at the grounds for appeal raised by the appellants, I feel that they are mostly centred largely on Quantum touching slightly on the liability.

5. This being a first appeal I am guided by the principle in ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.***I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusions. The appeal was canvassed by way of written submissions.

APPELLANT'S SUBMISSIONS.

6. The Appellant's filed their submissions on 4th May 2016 .They indicated that grounds **(a), (b) and (g)** of the Memorandum of Appeal were inter connected and they would therefore submit on them together. They indicated that a sum of Kshs 120,000 was awarded under the Law Reform Act for pain and suffering and loss of expectation of life, while under the Fatal Accidents Act, a sum of Kshs 2,216,000/= was awarded for loss of dependency. It was their submission that the trial magistrate's award under both the Law Reform Act and the Fatal Accidents Act was erroneous, because the same persons were the ones benefiting under both Acts and therefore allowing the same persons to benefit twice amounted to unjust enrichment. They went on to state that it is trite law that the law does not allow for double recovery.

7. They placed reliance on **Kemfro Vs. C.A.M Lubra and Olive Lubia (1982-1988) KAR 727** where court held:

''.....the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damage awarded under the Fatal Accident because the loss suffered under the latter Act must be offset by the gain from the estate under the former act''

The above opinion was also adopted in **Marwanga Jeffern Vs. Jeckton Ochieng & Another (2015)** where Justice C.B.Nagillah opined that;

''With regard to the trial court failure to deduct the award made under loss of expectation of life from the cumulative award in P.S.Atryah on Accident Compensation and law,2nd Edition at P.88 it was held:

''...had reality enters this extra ordinary legal state; the law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased's estate may be dedicated from an award under the Fatal accident's Act on the legal justification pretext that the inheritance is a gain from the death which must be set off against the loss.''

8. It was their submission therefore that the same principles enunciated in the above quoted cases are also applicable in the case at hand because the beneficiaries are the same. They proposed that bearing this in mind it is only fair that the court varies the award already issued to prevent double compensation.

9. Moving on forward to the grounds **(b) and (c)** of the Memorandum of Appeal where the Trial Magistrate applied dependency ratio of 2/3 they stated that the plaintiff never proved 2/3 of the deceased's income was used to support her family. They went on to state that the deceased's husband even admitted that he was the one who supported the family and the deceased's income was only used to buy food for the family

10. They submitted that the deceased husband having admitted that he paid for the school fees for the children then it was clear that it was a shared responsibility to provide for the family with the husband taking the lion's share of maintenance. As a result there was no logic in saying that the deceased provided for 2/3 alone, hence since both were providing then the court ought to have awarded 1/2 as was the position in **Apollo Onyangayo Hongo Vs . Kenya Bus Service Co.Ltd & Another (2006) Eklr**.

11. On the other hand it was highlighted that the dependants were all adults and the Respondent never demonstrated that the children were dependent on the deceased for anything at all. The court ought to have applied the ratio of 1/3 since the principal 2/3 in not applicable in every situation because every case is determined on its own material facts. In the case of **Benedata Wanjiku Kimani Vs. Changwon Cheboi & Another (2013) eKLR** where the court while relying on the case of **Beatrice Wangui Thairu Vs.Hon.Ezekiel Barng'etuny & Another,** where Ringera J said that;

> ''...there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.'' In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants ,the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum (Hannah Wagaturi Moche & Another Vs. Nelson Muya (Nairobi HCCC No.4533/1993)''

12. Further they went ahead to invoked **Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013** where the term dependency was defined as that part of the deceased's earning that he/she spent on maintenance or financial support of his/her dependant.

In the same section the term 'Earnings' is defined as revenue gained from labour or services and includes the income or money received employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act 2007, or the determination of the reasonable income whichever is higher.

13. In light of the above the appellants in conclusion on this grounds, submitted that the trial magistrate had erred in law and in fact in awarding a dependency ratio of 2/3 and a multiplicand of 15 years since it was also not shown how the adults were still depending on the parents and for how long they were expected to do so.

14. On the grounds **(e),(f) and (g)** of the Memorandum of Appeal in regard to the proof of earnings of the deceased it was submitted that during the hearing PW2 attempted to prove the deceased's earnings but upon cross examination no documentary evidence was produced in proof of the same. As a result of this failure, the court ought to have applied the minimum wage of Kshs 6,000/=

15. They pointed out that the respondents in their pleadings had specifically pleaded that the deceased was earning a salary of Kshs 16,000/= but the court disregarded this and went ahead to award Kshs 19,300/= an amount that was not pleaded nor proven in court. It is trite law that parties are bound by their pleadings and averments not in the pleadings should be disregarded. To support this they relied on **Samson Kairu Chacha vs. Isaac Kiiru King'ori (2016) eKLR.**

16. On grounds **(h) and (j)** it was the Appellant's submission that the trial magistrate did not consider the submissions of the Appellants and it would therefore be in the interest of justice to interfere with the judgment of the lower court and lower the quantum of damages awarded to the respondent.

17. In conclusion in grounds **(k) and (l)** the appellant's sought to rely on **Kemfro Africa Limited t/a '' Meru Express Services (1976) & Another Vs Lubia & Another (No. 2) (1985) eKLR** where it was held that;

> ''..... the principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 wholly erroneous estimate of the damage.....''
>
> They urged the Honourable court to allow the Appellants appeal in its entirety.

RESPONDENT'S SUBMISSIONS

18. The Respondent's filed their submissions on 23rd May, 2016. On the issue of liability it was their submission that the court was right in holding the appellant's vicariously liable 100%.He urged court to dismiss the appeal on the grounds of liability.

19. On the issue of special damages of Kshs 77,200/= it was their submission that the same were pleaded and receipts in support of the same produced in court. The appellants did not raise any question in regard to this so the same should not be interfered with. The award on pain and suffering was sufficient since the deceased did not die immediately after the accident.

20. On the ground of loss of expectation of life the respondent submitted that the deceased was a person of good health doing business and she would have worked until the age of 60 years. He went on to say that the appellants ground of appeal that that the Trial magistrate had failed to deduct general damages recoverable under the Fatal Accident's Act was misleading ,since the Court of Appeal in **South Nyanza Sugar Co.Ltd Vs James Martin Matoke, Civil Appeal No 91 of 1997**; held that the principal of law is that in awarding damages under the Law Reform Act, the court must take into account any amount awarded under fatal accident act and it does not mean that the court should award only one .Further the bench of three Judges in this same case concurred that, it is not wrong to award both under the Fatal Accidents Act and the Law Reform Act as the same dose not amount to double award. The Respondent therefore urged court not to disturb the award.

21. In regard to the multiplier and the multiplicand that the appellant argued was way too high, the respondents submitted that the deceased was aged 43 years at the time of her death, she therefore had another 17 years to reach the age of retirement at 60 years. It was proved in court by PW4, the deceased's husband, that she was in business at that time of her death and upon her death the business stopped. He went on to say that the Trial magistrate had used a multiplier of 15 years instead of 17 years which was reasonable, He went on to urge court not to disturb the award since the same was reasonable based on the circumstances.

22. In conclusion the respondent went on to state that there are principles set out in the Court of Appeal in **Jabane Vs Olenja, Civil Appeal No.2 of 1986** in which a court should consider before interfering with an award namely:-

i. Each case depends on its own facts

ii. Comparable injuries should attract comparable awards

iii. Inflation should be taken into account.

23. He went on to submit that the appellants have failed to prove any of the above principles were not taken into account in giving the award, since the court in its judgement considered all evidence tendered in court and submissions before arriving at its decision. He therefore urged court to dismiss the appeal with costs and interest.

DETERMINATION AND ANALYSIS

24. Having looked at the evidence adduced in the lower court I choose to rely on the principles in the case of **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)***

These then are the principles this court will follow and apply.

25. The Appellants argued that an award of Kshs.120, 000/= is too much for pain and suffering, and from the evidence we find that the deceased had even gone to ICU before her death. It was the evidence of PW3 that the deceased did not die at the scene of the accident because she saw her being pushed onto a bed in the hospital to get treatment. Further PW4 Borniface Kasinga stated that when he reached the hospital he found the deceased at I.C.U. I do find that the above sum was reasonable.

26. The appellants also challenged the multiplier of 15 years. I am of the view that the deceased died at the age of 43 years, assuming he would have worked until retirement age of 60 years then she had 17 years to work all factors remaining constant. Bearing in mind the vicissitudes of life or other imponderables which would have shortened the deceased's working life, and that the deceased would have enjoyed a retirement age of 60 years, I find that a multiplier of 15 years applied by the Trial Magistrate was reasonable.

> *In **E.A Growers Limited-vs.- Charles Nganga Ngugi ,(2015) eKLR** was that damages under the heads of loss of earnings, pain and suffering and loss of expectation of life are usually grouped under the Law Reform Act. The only head of damage under the Fatal Accidents Act is the loss of dependency though its assessment will invariably involve reference to the loss of earnings for the years the deceased would have worked (lost years).*

The respondent having brought the suit against the appellant in his capacity as the legal representative of the deceased's estate and thus it is undisputable that he was entitled to an award under all or any of the heads of damages.

27. Caution must be exercised in awarding damages under the Law Reforms Act and the Fatal Accidents Act to ensure that the awards are not duplicated. See **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727**where the court said:

> ***"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act…This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act'…anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya."***

28. Section 2(5) of the Law Reforms Act, Cap 26, and Laws of Kenya reiterate the above quoted provision. It stipulates:

> ***"(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act…"***

29. What is required in order to avoid double compensation is for the court to have in mind and therefore take into account the award under the Law Reform Act when making an award under the Fatal Accidents Act. In my view this is the better way of construing Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act Cap 26 Laws of Kenya. Otherwise there will be no need of having to bring the suit under both statutes only for the award in one to be deducted from the award made in the other. Indeed, in the **Kemfro Africa Ltd** case (supra), the Court of Appeal declined to deduct Kshs. 25,000/= that had been awarded under the Law Reform Act from the award of Kshs. 150,000/= awarded under the Fatal Accidents Act Cap 32 Laws of Kenya on the basis that the trial court had taken into account the said award.

30. In the present case, I have carefully examined the judgment of the trial court. Having considered the fact that the deceased was an innocent passenger who also had dependants and if not for her death she would still be operating her business, whether the deceased would be in employment or not it did not take away the fact that at 43 years, she still supported her family even in all other ways not quantifiable and therefore was a great pillar in her family. I therefore do not see any error in giving a global sum.

31**.** In view of the foregoing, I find and hold that this appeal has no merit and is dismissed with costs to the Appellant. The upshot is that the trial courts judgment is upheld.

Orders accordingly.

Dated and delivered at Machakos this 1st day of March, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Muthee Kariuki for the Appellant

Muteti for A. K. Mutua - for the Respondents

Kituva - Court Assistant