REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 6 OF 2017

ABDIMANA ABULWAHAB.....1ST APPELLANT

DEPECIC KIMATHI.....2ND APPELLANT

VERSUS

G S M M

(SUING AS LEGAL ADMINISTRATOR OF

THE ESTATE OF THE LATE S W N).....RESPONDENT

[Being an appeal from the judgement and decree dated 4/9/2014

of Hon. Mr. Alex Ithuku, Senior Principal Magistrate

in Narok CMCC No. 223 of 2013]

JUDGEMENT

Introduction

1. The two appellants have only appealed against the quantum of damages in the sum of Kshs.1,587,200/- together with costs and interest at court rates, which award was made in favour of the respondent. The contention of the appellants is that the award was manifestly excessive that it warrants being reduced by this court.

2. The respondent has opposed the appeal and has urged the court to dismiss it. Additionally, he has filed a cross appeal in which he contends that the award of damages is inordinately too low and should be enhanced by this court.

3. It should be borne in mind that it was only the respondent, who testified in support of the claim and did not call any witness. His counsel also filed written submissions.

4. Furthermore, the appellants did not offer any evidence and they also did not call any witnesses in opposition to the respondent's claim. However, counsel for the appellants filed written submissions.

The case for the appellants

5. The appellants have raised 8 grounds in their memorandum of appeal to this court.

6. In ground 1, the appellants have faulted the trial court in law and fact by failing to consider the evidence of the respondent/plaintiff, for he failed to produce any documentary evidence to support the earnings of the deceased. In this regard the evidence of the respondent was that the deceased was a business lady, who was buying and selling used clothes at Ntulele. He further testified that the deceased was making about ksh.45,000/= per month. He did not produce any audited accounts to show the net annual earnings of the deceased. He also did not produce any annual tax returns to show her annual net income.

7. However, the respondent further testified that they were paying rent to their landlord in the sum of Sksh.15,500/- per month. He produced

a tenancy agreement dated 11/4/2013 as exhibit 14 in support of the monthly residential rent payment. In re-examination the respondent testified that the actual rent that they were paying was Ksh.15,500/= per month.

8. The trial court accepted the uncontroverted evidence that the deceased was paying a monthly rent of Kshs.15,500/- for their house. That court then found as a fact that the deceased must have been on regular income. It then found her monthly income was Kshs.20,000/-

9. The finding by the trial court that the deceased's monthly income was Shs.20,000/=, is not supported by evidence. As a first appeal court according to *Peters v. Sunday post Ltd (1958) EA 424*, I am only allowed to interfere with a finding of fact, if,

i) It is not supported by evidence or

ii) It is contrary to the totality of the evidence produced at trial

10. After re-assessing the entire evidence I find as a fact that the trial court was not entitled to find that the monthly income of the deceased was shs.20,000/-. After considering the submissions of counsel for the appellants in the light of the court's finding, I find that grounds one and two of the appellant's memorandum of appeal are meritorious and are hereby allowed.

11. In grounds three and four, the appellants have faulted the trial court both in law and fact in failing to find that the respondent had not discharged his evidentiary burden of proving his claims under both the Fatal Accidents Act [Cap 32] and the Law Reforms Act [Cap. 26], Laws of Kenya. In this regard, the evidence of the respondent was that the deceased was aged 37 years old. He also testified that they had two children namely SS aged 6 years old and E aged 4 years old.

12. It therefore follows that the issues of both the multiplier and the dependency ratio under the Fatal Accident Act must be ascertained. In this regard, counsel for the appellants has submitted that the trial court erred in using the dependency ratio of 2/3. Instead counsel has urged the court to apply a dependency ratio of ½ and not 2/3.

13. The uncontroverted evidence of the respondent was that the deceased used to cater for their family expenses including paying house rent, school fees for their children and other basic needs. Furthermore, the respondent testified that he used to do casual jobs, in regard to which he would earn Shs.20,000/= per month. He graduated from school in December 2013, while the deceased died on 20/8/2013.

14. In view of the foregoing uncontroverted evidence, I find that respondent was not in a position to contribute to the upkeep of their family. He also testified that he was being assisted by his brother to take care of his family.

15. In the circumstances, I find that the dependency ratio of 2/3 is proper. I further find that *Mary Njeri Murigi v.Peter Macharia and Another [2016] eKLR*, in which the court stated that:

> *"Thus, I agree that where a person is employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time."*

is not applicable to the instant appeal. It therefore follows that the minimum wage prescribed of Ksh.5,128/15 by the responsible minister vide Legal Notice No. 197 of 2013 is inapplicable. The reason being that the deceased used to pay house rent in the Shs.15,500/- per month, which I find to be reasonable in the circumstances.

16. Furthermore, I find that the usage of a multiplier of 10 years by the trial court is not borne by evidence. It is based on speculation. In adopting a multiplier of 10 years the trial court speculatively stated thus:

> *" while the plaintiff asked that we assume that she will work for 60 years the court has to factor in the various doubts, **virsititudes** and vagaries of life. Her business may collapse or rise. She may have died of other causes. The dependency may have deceased with time."*

17. There is no evidence that the deceased could not have carried out her business up to age 60 years, being the governmental retirement age. This retirement provides a useful guide in maintaining certainty and uniformity in the development of the law and should be followed. Exceptions to that guideline may be made depending on the circumstances of each case. It therefore follows that damages under the Fatal Accidents Act are hereby computed as follows. A multiplier of 23 years is proper, that is, 60 years less 37 years. The dependency ratio is also proper. The net income of Kshs.15,500/- per month is equally proper.

a) Loss of dependency therefore is:

15,500 x 2/3 x 23 x 12 ……Ksh.2,852,000

18. Furthermore, the trial court awarded Kshs.120,000/= under the Law Reform Act, made up of a conventional figure of Kshs.100,000/= and Shs.20,000/= for pain and suffering. Counsel for the appellants has urged the court to reduce the award of shs.20,000/- to Shs.10,000/= under this head. He has cited *Elizabeth Chelagat Tanui & Another v. Arthur* Mwangi *Kanyua, [2013] eKLR (High Court Nairobi)* in support of his submission.

19. In that case, the deceased appeared to have died on the spot, whereas in the instant appeal the deceased died in hospital while undergoing treatment. On the facts the two cases are distinguishable.

20. It also should be borne in mind that the award of damages is in the discretion of the court, according to *Kemfro Africa Ltd tla Meru Express & Another v. A. M. Lubia & Another (1982 – 88) 1 KAR 727 and Peter M. Kariuki v. A – G (2014) eKRL,* which are cited in *Simeon Kiplimo Murrey & 3 others v. Kenya Bus Management Services Ltd & 4 others (2014) eKLR.* According to those cases, the assessing of damages is within the discretion of the trial court.

21. An appellate court may interfere with the discretion of that court, where it is shown that that court either took into account an irrelevant factor or left out a relevant factor. An appellate court may also interfere if the award is too high or too low as to amount to erroneous estimate or that the award is not supported by evidence.

22. In the light of those principles of law, I find that the trial court did not fell in error in assessing and making an award of Shs. 20,000/- in respect of pain and suffering. I therefore confirm the award of Shs.120,000/= general damages in respect of pain and suffering, with the result that counsel's submission to the contrary is hereby dismissed for lacking in merit.

23. In ground 5, the appellant has faulted the trial court in arriving at its judgement against the weight of evidence. This ground of appeal is worded in general terms and in the circumstances of this instant appeal, it is not relevant. The reason being that liability was apportioned at 80% negligence on the part of the appellants and 20% contributory negligence on the part of the respondent.

24. As regards quantum of damages, the evidence of the respondent was not controverted because the appellants did not produce any evidence in their defence. The position in law therefore, according to *Chevron Kenya Ltd v. Oshwal Services station Ltd & 2 others (2013) eKLR,* is that where a party chooses not to give evidence it can be concluded that such a party did not have any evidence and that any evidence would not support the party's position.

25. In law therefore once the unchallenged evidence passes the tests of relevancy and probative value, it may only be challenged by other evidence and not by way of submissions. I therefore find that ground 5 lacks merit and is hereby dismissed.

26. In grounds 6 and 8, the appellants have faulted the trial court for not finding that the respondent had not discharged his legal evidential burden as required by law. I find from the uncontroverted evidence of the respondent that he discharged both the burden of proof and the standard of proof on a balance of probabilities as required in civil cases. These grounds of appeal therefore fail and are hereby dismissed.

27. In ground 7, the appellants have faulted the trial court for ignoring the principle of *stare decisis*, which requires a court to follow previous similar decisions to the case before it. There is merit in this ground of appeal in that the trial court found the net income of the deceased to be Kshs.20,000/= per month. The authorities cited by counsel for the appellants had decided that there must be evidence to support a finding of the net income of a deceased person. I further find that in other aspects the trial court followed the principle of *stare decisis.*

On the Cross Appeal

28. The respondent filed a cross appeal in which he raised four (4) grounds of appeal. He then proceeded to abandon grounds 1 and 3.

29. In ground 2 the respondent as the cross appellant has faulted the trial court for applying a multiplier of 10 years, which was inordinately too low so as to warrant its being interfered with by this court. Additionally the cross appellant has faulted the court for ignoring his evidence in applying a multiplier of 10 years. Counsel for the cross appellant submitted that his client could have worked well beyond the governmental retirement age of 60 years.

30. In support thereof, counsel cited the case of *Violet Jeptum Rahedi v. Albert Kubai Mbogori (2013) eKLR,* in which the court stated that a private business person cannot be limited by any formal retirement age, should such a person decide to carry on with his business for life. That court went further and stated that such a person should be able to carry on business probably into his late 60's /early 70's. Counsel therefore urged the court to apply a multiplier of 30 years.

31. In this regard, counsel for the appellant as the cross respondent supported the usage of a multiplier of 10 years as applied by the trial court.

32. I have already found that the usage of a multiplier of 10 years by the trial court was based on speculation. Its usage is hereby set aside. In the interest of certainty, uniformity and predictability of the law, the governmental guideline of the retirement age at 60 years should as a general rule be used. Exceptions to it may be made depending on the circumstances of each case.

33. Furthermore, if the governmental 60 years retirement age guideline is disregarded, it might result into uncertainty in this branch of the law. Each court will then embark on its own to determine the applicable multiplier for itself. Such a situation is comparable to the position of litigants in the 19th century chancery courts in England, wherein the relief granted to litigants depended on the size of the chancellor's (judge) "foot".

Conclusion

34. In the light of the foregoing findings, I hereby make the following orders.

Damages under the Fatal Accidents Act

a) <u>Loss of dependency</u>

(15,500 x 2/3 x 23 x 12) …….Shs.2,852,000/=

Add

Damages under the Law Reform Act

a) Loss of expectation of life …….Shs.100,000/-

b) Pain and suffering …….Shs.20,000/-

Add

Special damages …….Shs. 264,000/-

Total ………...**Shs.3,236,000/=**

Less

20% contributory negligence, agreed to by consent…….Shs.647,200/=

Shs.2,588,800/=

Less

Loss of expectation of life, pain and suffering …Shs.120,000/=

Shs.2,588,800/=

120,000

Shs. 2,468,800/=

I therefore set aside the judgement and decree of the trial court. In its place I hereby enter judgement for the respondent in the sum of Shs.2,468,800/- with interest at court rates.

Costs

In terms of section 27 of the Civil Procedure Act (Cap. 21) Laws of Kenya, I find that costs follow the event. The successful party has to have its costs. The appellant has succeeded on some grounds and lost in others. The respondent has similarly succeeded on some grounds and lost in others. In the circumstances, I make no order as to costs. Orders accordingly.

Judgement delivered in open court this 4th day of April, 2018 in the presence of absence of all the parties.

J. M. Bwonwonga

Judge

4/4/2018