REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 88 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

GABRIEL MWEBIA suing as the legal representative of the estate of

DALMAS MUTETI NJAGI.....APPELLANT

AND

GEORGE BUNDI KOOME.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.G. Sogomo, SRM dated 3rd October 2017 at the Senior Resident Magistrates Court at Tigania in Civil Case No. 43 of 2016)

JUDGMENT

1. On 6th April 2015, the deceased had parked his motorcycle registration number KMDC 856V along the Meru – Maua Road in Nchiru area. He died after the defendant negligently drove his motor vehicle registration number KCC 793K knocked him down Following the accident, the deceased's personal representative claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The respondent was found fully liable and the appellant awarded Kshs. 100,000/- for loss of expectation of life, Kshs. 300,000/- for loss of dependency and Kshs 38,515/- as special damages making a total of Kshs. 438,515/-. What is in dispute in this appeal is the award for loss of dependency.

2. In the judgment, the trial magistrate expressed himself as follows;

> *In regard to the loss of dependency the court was not shown how the deceased contributed to the family kitty and to what extent. In any event the deceased was a student and dependency if any must have been him as a beneficiary. However, the court award(s) the plaintiff Kshs. 300,000/- in the deceased's lost years so that it may not appear that he died "just like that."*

3. Thrust of the appellant's appeal contained in the memorandum of appeal dated 10th October 2017 and learned counsel's submissions is that the trial magistrate erred in assessing damages under the ***Fatal Accidents Act*** by failing to adopt the multiplier approach having regard to the fact that the deceased was 21 years old and would have entered the job market and expected to earn an income with which he would support the dependants. In so doing, the appellant contends the trial magistrate ignored the evidence and submissions on record. As a result, the sum of Kshs. 300,000/- awarded was insufficient and inordinately low.

4. On the respondent's side, counsel submitted that the trial court was correct and that the trial magistrate not only considered the evidence and came to the right assessment considering that the deceased was aged 21 years at the time of death, was a student and any damages would be speculative.

5. The appellant claim under the ***Fatal Accidents Act*** was particularized as follows, *"That at the time of his death, the deceased was aged 21 years old and enjoyed good health. He was a hardworking student, boda boda rider and businessman and earned about Kshs. 20,000/- per month which he used to financially support his family."*

6. Gabriel Mwebia (PW 1) recounted what was in the plaint and statement which he adopted as evidence. He stated that the deceased was a student, boda boda rider and businessman selling maize and cabbages where he used to earn Kshs. 20,000/- supporting his parents and sister. He produced a letter from Mbaine Secondary School dated 12th April 2016 stating that the deceased joined the school in 2012 upto Form three in 2014. In cross-examination, PW 1 stated that the deceased was not through with school at the material time and that he was a part time businessman while in school. He told the court that at the time he was riding his mother's motorcycle.

7. As this is an appeal on the quantum of damages, I must keep in mind the general principal upon which this Court, as an appellate court, will interfere with an award of damages. In ***Bashir Ahmed Butt v Uwais Ahmed Khan*** **[1982-88] KAR 5**, the Court of Appeal held as follows;

> *An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 ….*

8. Whether to adopt the multiplier or lumpsum approach is a matter of choice for the court. At this stage I would note that the trial court referred to the award for loss of dependency as lost years which are awarded under the ***Law Reform Act***. I consider this a mistake as the parties agitated the claim on the basis that it was under the ***Fatal Accidents Act*** and I shall consider it as such. Ringera J., in ***Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another*** quoted by Koome J., in ***Albert Odawa v Gichimu Gichenji*** **NKU HCCA No. 15 of 2003[2007] eKLR** where he expressed the following view;

> *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 dependancy, and the expected length of the dependancy 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.*

9. Although the appellant pleaded that the deceased was earning Kshs. 20,000/- a month, PW 1 did not give any evidence to show the nature and extent of what the deceased was earning in business hence the court was right to adopt a lumpsum approach in the absence of proof of a multiplicand. I cannot say the trial magistrate erred in using the lumpsum approach to award damages for loss of dependency.

10. The next question is whether the sum of Kshs. 300,000/- for loss of dependency was reasonable in the circumstances. At this stage, I would also note that although the deceased sister was listed as a dependant, she was not in law a dependant as she is not contemplated as such in **section 4** of the ***Fatal Accidents Act***. Although there is evidence that the deceased was a student, PW 1 did not give any evidence of his future prospects. In fact, the letter from Mbaine Secondary School suggested that he was in that school until form three in 2014. It appears therefore he had dropped out of school by the time he died.

11. I accept that the deceased parents are entitled to recompense as was stated by the Court of Appeal in ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 4 Others*** **[1986] KLR 457** where it held that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for

their parents whenever they are in a position to do so to the extent of their abilities. In this case the paucity of evidence leads me to conclude that the trial magistrate's assessment cannot be said to have violated any of the principles in ***Butt v Khan*** **(Supra)**.

12. The appeal is dismissed with costs to the respondent which I assess at **Kshs. 20,000/-**.

DATED and DELIVERED at MERU this 6th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Kiogora instructed by Kiogora Ariithi & Associates Advocates for the appellant.

Mr Munene instructed by J. K. Kibicho & Company Advocates for the respondent.