REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 119 OF 2017

NANCY NJERI KIORIA.....APPELLANTS

DAVID MAINGI KIORIA (Suing as the legal representative of the

estate of **BEATRICE WANJIKU KIORIA Deceased)**

VERSUS

YH WHOLESALERS LTD.....1ST RESPONDENT

ABDINOOR ABDULRAHAMANI ALI...2ND RESPONDENT

(Being an appeal from the Ruling and order delivered on 3rd November, 2015 by Hon. D. N. Musyoka (Principal Magistrate) Senior Principal Magistrate's Court at Kikuyu in CMCC No. 272 of 2012).

JUDGMENT

1. The Appellants filed this suit as the legal representatives of the deceased, 26 year old Beatrice Wanjiku Kioria who died in a Road Traffic Accident on 21st April, 2012. The particulars of the dependents were given as the mother and the brother, the Appellants.

2. On 26th May,2015 the following consent was recorded by the parties:

> **"Judgment be entered for the Plaintiff against the Defendants jointly and severally with the Plaintiff shouldering 10% contribution negligence and Defendants 90% contributory negligence.**
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> **Death certificate P exhibit 1**
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> **Letters of Administration P exhibit 2**
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> **Police Abstract P exhibit 3**
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> **Burial permit P exhibit 4**
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> **Receipts for 8,650/= P exhibit 5**
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> **Search 500/= P exhibit 6**
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> **Receipt for grant (1150/=) P exhibit 7**
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> **Letters of Employment for 22,000/= P exhibit 8**
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> **Demand letter P. exhibit 9."**

3. The trial magistrate entered judgment in favour of the Appellants as follows:

(a) Special damages Ksh. 19,800/=

(b) Pain and suffering Ksh. 50,000/=

(c) Loss of expectation of life Ksh.150,000/=

(d) Loss of dependency Ksh.1,200,000/=

Total Ksh. 1,419,800/=

Less 10% contribution

4. The Appellants were dissatisfied with the said judgment and made an application dated 15th September, 2015 seeking the following orders:

i) The award for Loss of Dependency be reviewed to the extent that the wage/salary applied by this Honourable Court of Ksh.10,000/= be reviewed and revised upwards to Ksh.22,000/= as agreed by the consent of counsel for the parties on 26th May, 2015.

ii) That the costs of this application be provided for.

5. It is stated in the grounds and the affidavit in support of the application that the salary agreed by the parties was Ksh.22,000/= and not the Ksh.10,000/= applied by the trial magistrate

6. The application was opposed as per the grounds of opposition dated 24th September, 2015 which stated as follows:

1) That the application is bad in law, incompetent, misconceived and an abuse of the court process.

2) That the application fails to meet the requirements as set out under Order 45 Rules 1 & 2 of the Civil Procedure Rules under which an application for Review can be considered.

3) That there is no error apparent on the face of the record to warrant a review.

4) That the Applicant has not shown any other sufficient reason why the Award should be reviewed.

5) Such other grounds as may be adduced at the hearing hereof.

7.The application was argued by way of written submissions. The trial magistrate ruled against the application. That is what has triggered this appeal. The appeal is based on the following grounds:

(a) That the trial magistrate erred in holding that the deceased would have utilized Ksh.8,000/= on herself and that the trial magistrate further erred in subjecting the remainder of the Ksh.10,000/= to a dependency ratio of ½.

(b) The trial magistrate erred by failing to allow the application when the parties had recorded a consent order reflecting the salary of the deceased as Ksh.22,000/=.

(c) That the application and the Appellant's submissions were not considered.

(d) That the decision by the trial magistrate was based on the wrong principles of the law.

8. The appeal was canvassed by way of written submissions which I have considered.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

10. The law on consent was outlined by the Court of Appeal in the case of **Board of Trustees National social Security Fund v Michael Mwalo [2015] eKLR** as follows:

"The position is clearly set out in Seffon on Judgments and orders (7th Edition) Vol 1 Page 124 as follows:

> **Prima facie, any order made in the presence and with the consent to the proceedings or action, and on those claiming under them ...cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement, contrary to the policy of the court..., or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."**

11. The same passage was followed by the Court of Appeal in **Brook Bond Liebig Ltd v Mallya [1975] EA 22 at 269** in which Law Ag P said:

> **"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."**

12. Order 45 Civil Procedure Rules provides for conditions for review as follows:

> **"1 (1) Any person considering himself aggrieved –**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."**

13. The Court of Appeal in the case of **Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR** held:

> **"An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."**

14. The consent recorded by the parties included a letter of employment by Samjac Office & School Supplies which reflected that the deceased was employed as a clerk/marketing at a salary of the deceased as Ksh. 22,000/=. There was no consent on the income after statutory deductions. No payslip was exhibited and no evidence was recorded. There was also no consent in the multiplicand and multiplier to be applied. It seems the figures were thrown to the court without any evidence of how much the deceased expended on the family.

15. As stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd & 2 others [2015] eKLR**:

> **"The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of his dependents, 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 dependents. From this it should be possible to arrive at the annual value of dependency which must then be capitalized by multiplying by a figure representing so many years of purchase. As emphasizes above, the net income determines the multiplicand and it is only net of statutory deductions"**

16. In arriving at the multiplicand of Ksh.10,000/=, the trial magistrate reflected in his judgment that he agreed with the submissions by the Respondent's counsel to apply a multiplicand of Ksh.10,000/= bearing in mind that the deceased did not use all her money on the dependents. A multiplier of 20 years was adopted by the trial magistrate who then proceeded to calculate the loss of dependency as follows: Ksh. 10,000 x 12 x20 x1/2.

17. If the 1/3 dependency ratio which is commonly applied in comparable cases was applied, the amount would have come to about Ksh.7,334/= dependency per month (i.e. Ksh.22,000x12x20x1/3). The dependency applied by the trial magistrate boils down to Ksh.5,000 per month. Taking into account that the Ksh.22,000/= was not subjected to statutory deductions, the multiplicand applied by the trial magistrate is reasonable. In any event the trial magistrate appears to have deliberately arrived at the multiplier and multiplicand and the same could not have been reviewed on the basis of an error on the face of the record.

18. In the upshot, I find no merits in the appeal and dismiss the same with costs.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Kiambu this 18th day of July, 2018

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