REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 45 OF 2016

ALEX KOECH.....1ST APPELLANT

EMMANUEL KIPLIMO BETT.....2ND APPELLANT

-VERSUS-

PATRICK K. NGUGI (suing as the Administrator of the estate

of JOHN MUYA, Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree of the Resident Magistrate in Iten PMCC No. 15 of 2014 delivered on 22 February 2016 by Hon. N.C. Adalo, RM)

JUDGMENT

[1] This appeal arises from the decision of the Resident Magistrate**, Hon. N.C. Adalo,** in **Iten PMCC No. 15 of 2014.** That suit had been filed by the Respondent**, Patrick Kimani Ngugi** in his capacity as the legal representative of the estate of **John Muya**, now deceased. It was averred before the lower court that, on the **24 June 2013**, the Deceased was travelling aboard **Motor Vehicle Registration No. KBB 383L, Mitsubishi Canter**, as a lawful passenger when the said motor vehicle violently collided with **Motor Vehicle Registration No. KAW 040D, Mitsubishi Lorry**, owned by the Appellants. The accident was alleged to have occurred along **Nyaru-Eldoret** Road at **Kaptagat Forest** or thereabout and that, as a result thereof, the Deceased was fatally injured. The Respondent blamed the Appellants for the accident.

[2] Accordingly, the Respondent filed **Iten PMCC No. 15 of 2014**: **Patrick Kimani Ngugi vs. Alex Koech & Another**, claiming General Damages under the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya**; General Damages under the **Law Reform Act, Chapter 26** of the **Laws of Kenya**, Special Damages, costs of the suit plus interest and any other or further relief the Court may deem fit to grant.

[3] The lower court record shows that a consent was entered on liability on **27 November 2015**, whereby liability was settled at 80:20 in favour of the Respondent. This was after the Respondent had given his evidence herein. The parties were thereafter invited to file their written submissions on quantum. In effect therefore, no evidence was led by or on behalf of the Appellants. Having given due consideration to the Respondent's evidence as well as the written submissions filed by the parties, the Learned Trial Magistrate awarded a total sum of **Kshs. 2,040,780/=** made up as follows:

Pain and suffering	:	Nil
Lost Years	:	Kshs. 2,400,000/=
General Damages	:	Kshs. 100,000/=
Special Damages	:	Kshs. 50,850/=
Sub-total		**Kshs. 2,550,850/=**
Less liability of 20%	:	Kshs. 510,070/=

Total **Kshs. 2,040,780/=**

[4] In the result, Judgment was entered in the Respondent's favour in the sum of **Kshs. Kshs. 2,040,780/=** together with interest and costs and a Decree issued to that effect on **6 July 2017**. Being dissatisfied by the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal, raising the following grounds:

[a] That the Learned Magistrate erred both in fact and law by misapprehending the evidence on record and as a result arrived at an erroneous decision on quantum of damages;

[b] That the Learned Magistrate erred both in fact and law by making an award of general damages which is so inordinately high as to amount to a wholly erroneous estimate;

[c] That the Learned Magistrate erred both in fact and law by failing to apply or applying the wrong principles in assessment of damages thus awarding damages that were so excessive in the circumstances;

[d] That the Learned Trial Magistrate erred both in fact and law by failing to consider the award under the Law Reform Act in reduction of the award under the Fatal Accidents Act;

[5] On account of the foregoing, the Appellants prayed that the Judgment and Decree of the subordinate court be set aside and be substituted with a proper finding on both quantum of damages and liability; that the Court be pleased to make any other or further order as may be just and expedient in the circumstances; and that the costs of the appeal be awarded to them.

[6] The appeal was disposed of by way of written submissions, pursuant to the directions issued herein on **29 May 2018**. Accordingly, the parties filed their written submissions herein on **24 July 2018**. In his written submissions, the Appellants' Counsel, **Mr. Kiprono**, raised two issues for determination by the Court, namely:

[a] What the duty of a Court is in a first appeal; and

[b] Whether the award of damages is manifestly excessive as to warrant review by an appellate court.

[7] **Mr. Kiprono** relied on the cases of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123; Re Estate of Susan Mboga Mandu (Deceased) [2011] eKLR; Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR; Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5;** and **Aphia Plus Western Kenya & Another vs. Mary Anyango Kadenge & Another [2015] eKLR** to support his submission that an award of **Kshs. 1,000,000/=** would suffice.

[8] On behalf of the Respondent, **Mr. Kibii**, proposed the following issues for determination:

[a] Whether the award by the Magistrate was excessive with regard to general damages;

[b] Whether the award of general damages by the Learned Magistrate amounts to a travesty of justice considering the evidence on record;

[c] Whether the Appellant's appeal dated **12 June 2017** is incompetent and an abuse of the court process and therefore ought to be dismissed by this Court;

[d] Who should bear the costs of the appeal.

[9] Counsel for the Plaintiff defended the award by the lower court and cited **Dainty vs. Haji & Another [2005] 1 EA 43**, **Joseph Kimani Mugaga vs. John Njiru Nairobi HCCC No. 3690 of 1994** and **Phyllis Wangoi Njau vs. Pelican Haulage Contractors Limited Nairobi HCCC No. 2077 of 1999** to support his submissions.

[10] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded, but bearing in mind always that it did not have the advantage of seeing or hearing the witnesses. The holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** is instructive, namely:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[11] The Respondent testified before the lower court as **PW1.** His evidence was that he was at home in the evening of **24 June 2013** when it was reported to him that his son, the deceased herein, had died as a result of injuries sustained by him in a road traffic accident involving Motor Vehicle Registration No. **KBB 383L** and **KAW 040D**. According to him, the deceased who was then aged 24 years, was earning about **Kshs. 3,000/=** per day as a vegetable trader. He produced receipts in proof of the special damages claimed in the Plaint. He added that the deceased was a good son and that they depending on him for support. The Respondent called, as a witness, **Cpl. Henry Ille,** a police officer based at Kaptagat Police Base, and he testified before the lower court as **PW2** and confirmed that the accident occurred at about 4.00

p.m. on **24 June 2013** involving **Motor Vehicle Registration No. KBB 383L** and **KAW 040D.** As a result, six of the passengers in **Motor Vehicle Registration No. KBB 383L,** including the deceased herein, died on the spot. No evidence was adduced by the Appellants.

[12] Thus, having re-evaluated and reconsidered the entirety body of evidence adduced before the lower court, there appears to be no dispute that the deceased herein was a passenger in **Motor Vehicle Registration No. KBB 383L** and that the said motor vehicle was, on the **24 June 2013**, involved in a collision with **Motor Vehicle Registration No. KAW 040D** owned by the Appellant. There is similarly no controversy that the deceased died as a result of the injuries he sustained in the said accident. The Respondent alleged negligence against the Appellant, allegations which were not only unrebutted, but were conceded by the Appellant and a consent order recorded to that effect apportioning liability at 80% against the Appellant. In the premises, what is in contention herein is the question whether the Learned Trial Magistrate correctly assessed the damages due to the Estate of the deceased in the circumstances.

[13] It is to be borne in mind that assessment of damages is a matter of discretion; and that an appellate court will hardly disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited** (supra), the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages."**

[14] Before the lower court, the Respondent prayed for general damages under both the **Fatal Accidents Act** and the **Law Reform Act**. No award was made for pain and suffering, evidently because the deceased died on the spot. That however is an erroneous approach as there can be no doubt from the circumstances in which the accident occurred that the deceased suffered pain before he died. Hence I would endorse the holding in **Sukari Industries Limited vs. Clyde Machimbo Juma [2016] eKLR** that:

> **"... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years..."**

[15] Accordingly, I would award a sum of **Kshs. 10,000/=** for the deceased's pain and suffering. There was no contention regarding the sum of **Kshs. 100,000/=** that was awarded by the lower court for loss of expectation of life, which is the conventional award under this head. Thus, the only amount in contention is the award for loss of dependency under the **Fatal Accidents Act.**

[16] Having given due consideration to the authorities that were drawn to his attention, the Learned Trial Magistrate worked with a monthly income of **Kshs. 30,000/=** as per the evidence of the Respondent, and had the following to say in assessing damages due to the estate of the deceased:

> **"...The deceased was aged 24 years at the time of his death as recorded in the death certificate produced as exhibit in this case. He was a healthy young man at the prime of his age. It is a general assumption that an average citizen works until the age of 55 years, but looking at his job as a casual worker, there is no guarantee that he could have remained on the same job for the entire time. There are other risks in life which include illness that may lead to pre-mature death and risks involving the nature of work he was engaged in. With this kind of job and the increased incidences of poverty and diseases in Kenya today, I will adopt a multiplier of 20 years. The deceased was not married but his father stated that together with his siblings, they depended on him. Based on the case of Hassan (supra), I would then find that the deceased spent almost 2/3 of his salary on his living expenses including rent, food, clothing, entertainment, amongst other things, leaving him with only 1/3 of his earnings. A dependency of 1/3 would be sufficient...I award Kshs. 2,400,000/= for lost years computed as follows; 1/3 x 17 x 12 x 30,000/=.**

[17] Learned Counsel for the Appellant took issue with the lower court's approach and argued that the court erred in coming to the conclusion that the deceased's monthly income amounted to **Kshs. 30,000/=.** According to him, a very successful vegetable vendor may earn approximately **Ksh. 7,000/=** per month; and that since the deceased would spend some of his income on himself, a multiplicand of **Kshs. 5,000/=** is what was proposed by Learned Counsel for the Appellant. What then is the correct approach?

[18] In **Chunibhai J. Patel and Another vs. P.F. Hayes and Others [1957] EA 748**, the Court of Appeal for East Africa restated the formula to be applied in the following terms:

> **"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, 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 dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."**

[19] The Appellant had the opportunity to rebut the evidence of the Respondent, including his assertion that the deceased used to earn **Kshs. 3,000** per day, but did not. From that evidence, the lower court came to the balanced conclusion that a monthly earning of **Kshs. 30,000/=** would be reasonable taking judicial notice of the fact that a vegetable vendor is not successful in his business every day. I have no reason to fault that conclusion and would similarly agree that **Kshs. 30,000/=** is a reasonable amount in the circumstances.

[20] Indeed, in the **Hellen Waruguru Waweru Case**, the Court of Appeal held that:

> **"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-**
>
> **'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

[21] Nevertheless, the lower court fell into error in treating the sum of **Kshs. 30,000/=** as the net income, without a comment on the aspect of statutory deductions and taxes; which ordinarily would take up to 30% of one's monthly income. Accordingly, I would, on my part reduce the multiplicand by 30% to **Kshs. 20,000/=.** I would however not interfere with the lower court's finding that a multiplier of 20 years was appropriate, given her reasoning on the matter. The same goes for the dependency ratio of 1/3.

[22] It is also noteworthy that in his calculations, the Learned Trial Magistrate deducted the **Kshs. 100,000/=** that she awarded under the **Law Reform Act** for loss of expectation of life. She did not justify that deduction; but presumably, it was based on the practice that to award the same would amount to double compensation. However, the Court of Appeal restated the correct legal position as follows in the **Hellen Waruguru Waweru Case:**

> **"...learned counsel for KSSL, Mr. C.K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise." (emphasis added)**

[23] The reduction was thus reversed by the Court of Appeal on the basis that the words **"to be taken into account"** used in **Section 4(2)** of the **Fatal Accidents Act** and **"to be deducted"** are two different things; and that what is to be taken into account is not necessarily deducted. In coming to this conclusion, the Court of Appeal relied on the case of **Kenfro Africa Ltd t/a Meru Express Services 1976 & Another vs. Lubia & Another (No. 2) [1987] KLR 30**. And in terms of who qualify as beneficiaries, ***Section 4(1)*** of the ***Fatal Accidents Act*** defines dependants as the wife, husband, parent and child of the deceased person. It is thus clear that siblings are not recognized as dependants under the Act and are therefore not entitled to payment for loss of dependency. Accordingly, it is not the case herein that the beneficiaries of the estate under the **Law Reform Act** are the same as under the **Fatal Accidents Act**. and therefore the award of **Kshs. 100,000/=** was validly due to the deceased's estate. The Special Damages component was also properly awarded. The Respondent claimed **Kshs. 80,800/=** before the lower court, of which only **Kshs. 50,850/=** was specifically proved to the satisfaction of the lower court. I would uphold that aspect of the lower court's decision.

[24] In the premises, I would work out the sums due to the Respondent as hereunder:

Under the Law Reform Act:

- Loss of Expectation of life - Kshs. 100,000
- Pain and suffering - Kshs. 10,000

Under the Fatal Accidents Act

- Loss of dependency Kshs. 20,000 x 1/3 x 20 x 12=1,600,000

Special damages - Kshs. 50,850

Total - Kshs. 1,650,860

Less 20% contribution - Kshs. 330,170

Net total - Kshs. 1,320,690/=

[25] Hence, the appeal is allowed, but only to the extent aforestated; with the result that the total amount awarded to the Respondent is reduced to **Kshs. 1,320,690/=**. The Judgment of the lower court is accordingly hereby set aside and substituted with Judgment in favour of the Respondent in the aforesaid sum of **Kshs. 1,320,690/=** together with interest from the date of the lower court Judgment and costs of the lower court proceedings as well as the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE