REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT APPEAL 161 OF 2015

1. HUSSEIN AHMED HANSHI

2. MATAN MOHAMED.....APPELLANT

VERSUS

1. PETER GICHURU NJOROGE

2. BILTON KARISA FUNDI

3. BHINDER TRADING CO. LTD.....RESPONDENTS

J U D G M E N T

1. This appeal challenges the decision of the trial court, Hon. B. Ekumbi, dated 24.04.2015 in the original Mombasa RMCC No. 779 of 2016 by which the trial court held the appellant wholly liable to the Respondent for personal injuries arising out of a road traffic accident and awarded damages in the sum of Kshs.2,280,000 under various heads. The judgment is impugned on the single issue of the quotum of damages awarded.

2. The memorandum of Appeal is fashioned as follows:-

i) The Learned Trial Magistrate erred in fact and in law in finding that the Plaintiff was entitled to general damages that were excessive as to amount to a wrong estimate.

ii) The Learned Trial Magistrate erred in law and infact in finding and adopting multiplicand of 18,000/- in the assessment of damages for Loss of Dependency without evidential proof of earnings hence making an excessive award in the circumstances.

iii) The Learned Trial Magistrate erred in law and in fact in adopting an excessive multiplier thus arriving at an excessive award in the circumstances.

iv) The Learned Trial Magistrate erred in fact and in Law in applying his mind to the wrong principles of law while disregarding precedent presented before him causing him to award under both Fatal Accident Act and Law Reform Act leading to a double compensation on the deceased therefore arriving at the wrong decision.

v) The Learned Trial Magistrate erred in law and in fact in failing to discount the award under

the Law Reform Act from the ultimate award thereby making a double award to the 1st & 2nd Respondents who were both the personal representatives of the estate of the deceased and the dependants of the deceased.

vi) The Learned Trial Magistrate erred in fact and Law in failing to analyse and apply the law to the evidence before him leading to a double award hence failing to discharge his duty of ensuring justice for all the parties before him.

vii) The Learned Trial Magistrate erred in fact and in Law in failing to consider the Defendants'Submissions and more specifically on damages awarded under Loss of Dependency and also on the aspect of double compensation by completely disregarding them thereby exempting himself from arriving at a decision based on merit.

3. I will regroup the grounds into three broad grounds, 1, 2 & 3 allege the award to be excessive with specific challenge to the application of the multiplier formula, grounds 4&5 challenge the award under both Fatal Accidents Act and Law Review Act as being repetitive while grounds 6 & 7 fault the trial court for failure to consider or adequately give consideration to the evidence and submissions tendered. I propose to deal with grounds alleging double award and conclude with the grounds challenging the quantum assessed. The grounds on the treatment of evidence and submissions traverse the two and will be subsumed in both.

a) **Was there double compensation?**

4. In the judgement the trial court made award of Kshs.20,000/- for pains and suffering as well as Kshs.100,000/- for loss of expectation of life: Both awards are due and were indeed made under the law Reform Act. Under the fatal Accidents Act, the trial court awarded a sum of Kshs.2,160,000 for lost dependancy.

5. The Law on whether or not the damages due under the two statutes are due to the same persons is well legislated under the two statutes. The law can be summarized as being in addition to and not in derogation from each other.

Section 2(6) of the Law Reform Act provides:-

"the rights conferred by this Act for the benefit of the estate of the deceased persons shall be in addition to and not in derogation of any rights conferred on dependants of the deceased persons by the fatal accidents Act"

6. The suit against the Appellant was expressed to have been brought by the Respondent in his capacity as the Personal Representative and dependant of the deceased under both statutes. It is not in doubt that the Court of Appeal in **KEMFRO vs C.A.M LUBIA and ALIVE LUBIA (1982-1988) KAR 727** laid the law that where damage under both Acts vest in the same person(s) the court takes into account awards made under Law Reform Act while making an award under the Fatal Accidents Act.

7. However the court was succinct when it said :-

.....To be taken into account and to be deducted are two different things. The words in section 4(2) of the fatal accidents are 'taken into account'. The section says which should be taken into account and not necessarily deducted. For me it is enough if the judgement of the lower court shows that in reaching the figure awarded under Fatal accidents Act, the judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in mathematical deduction as suggested.

8. As a first appellants court, I have read the judgement appealed of from and note that it did not take into account the award under Law Reform Act while considering the award under Fatal Accidents Act. However, there is to this court no magic in the use of those words, "taking into account" in the

judgement. What matters is whether or not the judgement meets the ends of justice or if it visits Prejudice on the Appellant. I find that no prejudice has been visited in Agreement case.

9. Moreover in the matter before court, the Amended plaint reveals that while the father was the personal representative and a dependant, the mother was not a representative and therefore the net award did not vest in the same persons and it would not be necessary to take into account one award and discount it against the other. That grand of Appeal therefore fails.

b) **Was the award excessive?**

10. This court as an appellate court will not interfere with the assessment of damages, being an exercise in judicial discretion merely because it would have made a different assessment. It works from the position that it does not enjoy the benefit of having seen and heard the witnesses testify and observed their demeanor a benefit enjoyed by the trial court. It would therefore require a lot of caution before an appellate court ventures in interfering with a finding made in exercise of discretion. In fact it must be demonstrated that there was an outright error in principles before and interference can be justified. See ***Selle vs Associated Motor Boat Company Ltd (1968) EA 123 and Peter Kariuki vs Attorney General (2014) eKLR.***

11. In the appeal before court, the evidence led on the deceased's earnings was by PW 2, the plaintiff, who says at page 12 of the supplementary Record of Appeal:-

> ***"the deceased was attending computer classes and he was a photographer. As a photographer he was earning Kshs.20,000/- per month."***

In cross-examination she said:-

> ***"the deceased used to send to me Kshs.10,000/- per month."***

12. In her judgement having considered that as the only evidence on earnings without any controverting evidence from the Defendant, the trial court rendered itself as follows:-

> ***"PW 1 told the court that the deceased used to earn Kshs.20,000 per month. He admitted in cross examination that he did not have any proof of this. In as much as there was no evidence adduced to support this, nevertheless, it does not escape my mind that most entrepreneurs in the informal sector do not keep proper accounts and records. That does not mean that they do not earn income. In fact SMEs contributes significantly to the GDP of the country. I am of the view the Kshs.18,000 per month is reasonable and justified.***

13. To this court, the trial court was merely reiterating that what superior courts have repeatedly said that records or documents are not the only way to prove income. The court then proceeded in its judgement:-

> **"I will therefore ampute the claim as follows:-**
>
> **1/3 x 18,000 x 30 x 12 = 1,710,000/- = 2,160,000/-"**

14. And there comes the problem with the trial court. In fact not one problem but a few. The First problem is that dependency is a matter of fact not dogma. There is nothing dogmatic about the dependency ratio being pegged at 1/3. Secondly, the multiplier formular is a helpful and important formula but not the only formula available. In **Mwanzia vs Ngalali Mutua & Kenya Bus Services** Ringera J Said:-

> ***"It is plain that is useful and practical where facts such as the age of the deceased, the amount of annual dependency and the expected length of dependency are known or are knowable without undue speculation"***

Thirdly, the workings just don't seems to be accurate. My calculation of 1,800 x 1.3 x 30 x 12 gives me Kshs.2,160,000/-

The sum 1,710,000/- seems to be an error in typing but it is on record all the same.

15. However, having said that dependency is a matter of fact, the trial court having received evidence that the deceased would give to the dependants Kshs.10,000/- per month, to this court, it was not open to the court that another sum be ascertained and subjected to a dependency ration. To leave that known sum and venture elsewhere would be, with due respect to the trial court to engage in undue speculation.

16. To this court the workings would be straight forward in multiplying that sum proved to have been available to the dependants by the number of years the court settled upon as the multiplier.

In adopting the calculation it did employ, and in the manner it did, the trial court erred in principle and this entitles this court to interfere. The error is that the dependency ratio was improperly invoked and the sum proved to have been available to the dependants was ignored.

17. That the deceased was not married and without evidence that he was to remain so single for the rest of his life and taking into account that the dependency by the parents also depended on their own lifespan, I form the opinion that the trial court in settling on a multiplier of 30 years was equally in error.

18. It is unfortunate that no evidence was led as to the age of the parents to the deceased. However, if the deceased's age is any guide, then I would approximate the parents to be aged about 40-45 years old. I also take it that the deceased would establish own family and may at some stage reduced his support to the parents. Doing the best I can in the assessment, I would adopt a multiplier of 20 years, noting that the payment is accelerated and made in lumpsum.

19. The workings therefore is as follows:-

10,000 x 12 x 20 = Ksh.2,400,000/-

20. The upshort is that the appeal succeeds to the extent that the finding and adoption of dependency ratio of 1/3 and the multiplier of 30 are set aside and therefore the award under the heading lost dependency.

21. In summary, this court sets aside the award by the trial court under that heading and in its place substitutes an award of Kshs.2,400,000/-.

The consequence is that the damages due to the respondent is summarized as follows:-

Pains and suffering	**Kshs. 20,000/-**
Loss of expectation of …	**Kshs. 100,000/-**
Loss of dependancy	**Kshs. 2,400,000/-**
Total	**Kshs. 2,520,000/-**

22. On costs, I take cognizance that the Appellant has succeeded on a point of law but the effect is that the award has been enhanced for which reason I order that each party bears own costs.

Dated, signed and delivered this **2nd** day of **September** 2016

HON. P.J.O. OTIENO

JUDGE