REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. 7 OF 2020

TAJ VENTURES LIMITED.....1ST APPELLANT

CYRUS MAINA NGARI.....2ND APPELLANT

-VERSUS-

PURITY WANGITHI MBOGO (Sued as the legal representative and administrator of the estate of the late BONFACE KINYUA WANGITHI (Deceased) .....RESPONDENT

JUDGEMENT

1. Before this Court is the Memorandum of Appeal dated **7th March 2020** by which **TAJ VENTURES LIMITED** (1st Appellant) and **CYRUS MAINA NGARI** (the 2nd Appellant) seek the following orders:-

"1. **THAT** this appeal be allowed.

2. **THAT** the Honourable Court do proceed and set aside the award

on general damages and reduce the same.

3. **THAT** the Honourable Court do proceed and set aside the apportionment of liability in favour of the Respondent as against the Appellants and assess the same afresh and apportion it between the parties.

4. **THAT** the costs of the subordinate court and this appeal be awarded to the Appellants herein."

2. The Respondent **PURITY WANGITHI MBOGO** (suing as the legal representative of and administrator of the estate of **Boniface Kinyua Wangithi**) opposed the appeal.

3. The appeal was canvassed by way of written submissions. The Appellants filed the written submissions dated **6th August 2020** whilst the Respondents despite being granted an opportunity to do so did not file any written submissions.

BACKGROUND

4. This appeal relates to a road traffic accident which occurred on **29th November 2018** along the **Kerugoya- Karatina** Road at **Kamunyaka area**. The evidence in the Lower

Court was that a motor-vehicle Registration No. **KCQ 882 W** Toyota Probox was being driven by the 2nd Appellant heading toward Kerugoya from Karatina.

5. It was stated in evidence that the vehicle being driven by the 2nd Appellant swerved out of its lane into the opposite lane and collided with two oncoming vehicles being motor vehicle Registration No. **KCA 143 P** Daihatsu Rumika and motor vehicle registration No. **KCH 576 P** Toyota Harrier.

6. As a result of the accident the Deceased **Boniface Kinyua Wangithi** who was a passenger in the vehicle being driven by the 2nd Appellant sustained serious injuries. He was rushed to **Nyeri Hospital** where he succumbed to his injuries and died after one week.

7. The Respondent **Purity Wanguthi Mbogo** who is the mother of the Deceased instituted in the Magistrates court at Karatina Civil Suit No. **PMCC No. 46 of 2019** vide the Plaint dated **6th June 2019** seeking damages in respect of the death of her son.

8. The matter was heard in the lower court and the trial Magistrate **Hon**. **V. S. KOSGEI Resident Magistrate** in a

judgment delivered on **18th February 2020** found in favour of the Respondent and entered judgment in the following terms:-

"(a) Liability at 100% - against the Appellants

(b) <u>General Damages</u>

(i) Pain and Suffering - Kshs. 70,000/-

(ii) Loss of Expectation of Life - Kshs. 150,000.00

(iii) Loss of Dependancy - Kshs. 2,521,335.00

TOTAL - Kshs. 2,741,335

(c) Special Damages - Kshs. 24,075.00

(d) Costs and Interests from the date of Judgment."

9. Being aggrieved by the judgment of the lower court the Appellants filed this Appeal which is premised upon the following grounds;-

“1) That the learned trial magistrate erred in fact and in law by awarding inordinately high general damages to the Respondent.

2) That the learned trial magistrate erred in fact and in law by failing to consider the Appellants submissions and authorities on liability and hence arriving at an erroneous decision.

3) That the learned trial magistrate erred in law and fact by awarding damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.

4) That the learned trial magistrate erred in fact and in law by apportioning liability in favour of the Respondents as against the Appellants.

5) That the learned trial magistrate’s judgment as a whole is not supported by the evidence that was tendered in court by the parties.”

10. As sated earlier the appeal was opposed.

ANALYSIS AND DETERMINATION

11. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.

12. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusion **[see Peters -vs- Sunday post limited [1958] E.A. 424]**

13. In **SELLE** and **Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123** it was stated that

> "**An appeal to this court from 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 [the fact] 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."

14. Likewise **GITOBU IMANYARA & 2 Others -vs- ATTORNEY GENERAL [2006] eKLR,** the **Court of Appeal** stated as follows:-

"**An appeal to this court is by way of a 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."**

15. The fact that the Respondent had locus standi to file the suit in the lower court is not in any doubt. The Respondent was on **5th April 2019** issued with Grant of Letters of

Administration ad Litem authorising her to file suit on behalf of the estate of the Deceased.

16. The fact that an accident occurred on the material day is also not in any doubt. **PW2 PC GABRIEL NDIEMA** a police officer attached to the **Karatina Police Station** testified in the lower court trial and produced the police file relating to an accident which had occurred on **29th November 2018**. **PW2** stated that the accident involved a motor vehicle **KCQ 882 W** Toyota Probox being driven from Kerugoya towards Karatina. That at the **Kamunyaka** area the driver of the Probox veered into the lane for oncoming traffic and collided first with a motor vehicle Registration **KCH 143 P** being driven by one **John Kimani** and then went on to collide with a second motor vehicle Registration **KCH 676 P** Toyota Harrier being driven by one **Rose Wachira**.

17. **PW2** told the court that the driver of the motor vehicle Registration No. **KCQ 882W** was charged with the offence of **Causing Death** by Dangerous Driving in contrary to **Section 46 (1)** of the **Traffic Act, Cap 403, Laws of Kenya**.

18. A copy of the Police Abstract relating to this accident was also produced in the lower court. **Pexh 7**.

19. The fact of death of the Deceased is also not in any doubt. A copy of the Death Certificate Serial Number **0420404** indicates that **Bonface Kinyua Wangithi** passed away on **10th December 2018** following a Road Traffic Accident. There is also evidence of the Post-mortem form dated **19th December 2018** which indicate that the Deceased died as a result of serious injuries sustained in a road accident at the time of the accident.

20. The 2nd Appellant readily admitted that the Deceased was a passenger

in his vehicle at the time of the accident.

21. The Appellants have challenged the decision of the trial court to award liability at **100%** against the 2nd Appellant. The 2nd Appellant denied that his reckless driving caused the accident.

22. However the trial court relied on the evidence of **PW2**, who testified that the 2nd Appellant swerved from his lane and

was using an improper lane. This caused his vehicle to collide with two oncoming vehicles.

23. In his defence the 2nd Appellant denied having caused the accident. He claimed that as he drove along the **Kerugoya-Karatina** road he came across two people who were standing at a corner. That he saw two oncoming vehicles and one of the oncoming vehicles tried to overtake the other. The 2nd Appellant feared that a head on collision would occur so he swerved to the right lane thereby colliding with the oncoming vehicle Registration No. **KCA 143P**.

24. As pointed out by the trial court the 2nd Appellant's evidence contradicted his written statement in which he made no mention of the two people standing at the corner.

25. The fact of the matter is that the 2nd Appellant who had full control of his vehicle swerved into the lane of oncoming traffic. The accident occurred at about **6.20pm**. It was still light and visibility was good. No allegation has been made much less proved of any act of contributory negligence on the part of the Deceased.

26. But for the action of the 2nd Appellant in swerving into the lane of oncoming traffic the accident would not have occurred. I do agree with the trial magistrate that the defence was not credible. I therefore uphold the finding of **100% liability** against the 2nd Appellants.

27. The Appellants challenged the awards made by the lower court on quantum.

28. On the question of quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 2 KLR 55** set out the circumstances under which an appellate court may interfere with an award of damages as follows:-

> **"assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court**

only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

29. The **Court of Appeal** further postulated in the case of **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** as follows:

"<u>The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…..</u> A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?"

and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own. The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and is to be avoided for the sake of everyone in the country."

[Own emphasis]

30. From the evidence of **PW1**, the Deceased died on **10th December 2018** which was about one (1) week after the accident had occurred.

31. In **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, the court in discussing awards for pain and suffering and for loss of life expectation stated that;-

"……..The generally accepted principle therefore is that very nominal damages will be awarded on

these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

32. Similarly in **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR** the court observed as follows:-

"**The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The**

generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident."

33. In making an award of **Kshs. 70,000** for Pain and Suffering the trial Court took into consideration the fact that the Deceased had endured a long bout of pain before he succumbed to his injuries. I find no reason to interfere with this award which I find in the circumstances was appropriate.

34. For loss of Expectation of life the court made an award of **Kshs**. **100,000**. I find that this award was in keeping with judicial precedents and I will not disturb the same.

35. Under the heading of loss of Dependency the award is made under the **Fatal Accidents Act**. The principles to be considered were set out in the case of **BEATRICE WANGUI THAIRU -VS- HON. EZEKIEL BARNGETUNY & Another Nairobi HCCC No. 1638 of 1988** (unreported) where **Hon. Justice Ringera (Retired)** stated as follows:-

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all

too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. <u>In determining the same, the important figure is the net earnings of the deceased</u>. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lumps sum and would if wisely invested yield returns of an income nature." [Own emphasis]

36. Under Loss of dependency the Court will address two aspects being the multiplier and the dependency ratio. In

the case of **JANE CHELAGAT BOR -VS- ANDREW OTIENO ONOUU [1990 - 1994] E.A 47,** the **Court of Appeal** held thus

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the grounds of excess or insufficiency."**

37. For loss of Dependancy the trial court made an award of **Kshs. 2,521,335/=.**

38. As stated earlier the Death Certificate indicates that the Deceased was aged **twenty-five (25) years** when he met his untimely demise. The Respondent also filed in court a pay slip which indicated that as at **August 2018**, the

Deceased was earning a nett monthly salary of **Kshs**. **25,213.35**.

39. In their submissions the Appellants challenged the reliance by the trial court on this pay slip as proof of earnings. It was alleged that the document was slipped in together with the Respondents submissions without the leave of the Court. A close perusal of the court record indicates that this allegation is simply not true.

40. On **3rd December 2019** proceedings in the lower court indicate that **Mr. Warutere** counsel for the Respondent sought the leave of court to file a document which had inadvertently been left out. **Ms. Abobo** for the Appellant indicated that she had no objection to the application and the court proceeded to grant leave to the Respondent to file the document within seven (7) days.

41. In compliance with said leave the Respondent on **5th December 2019** (well within the seven (7) days allowed) file in Court a Supplementary list of documents dated **3rd December 2019**. That Supplementary list contained a copy of the Deceased's pay slip for the month of **August 2018**.

42. The Appellants in their submissions also suggested that there was no proof that the Deceased was working as a police officer. However the pay-slip which was produced in Court clearly indicates that the Deceased **Bonface Kinyua Wangithi** was a **police constable** stationed at the GSU Headquarters in Nairobi. The Deceased's Force Number, Identity Card Number and PIN Number are all cited on the pay-slip.

43. Based on the above I find that the trial Magistrate was correct in her finding that the Deceased was a police officer earning a nett salary of **Kshs. 25,215.35**.

44. In the case of **CHUNI BHAI I PATEL & Another -vs- P.F. HAYES and others [1957] E.A** the **Court of Appeal** stated as follows:-

> **"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."

45. However courts are not obliged to adopt the multiplier method.

46. In **Mwanzia v Ngalali Mutua Kenya Bus Ltd cited** in the case of **Albert Odawa Githenji Nku HCCA No. 15 OF 2003 [2007] eKLR**, the court made the following observation;

"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 dependency and the expected length of the dependency 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." [Own emphasis]

47. In this case there was no need for speculation. The age of the Deceased was known. The monthly salary which the Deceased was earning also evidenced by his payslip which was not controverted. The Deceased did not leave behind a wife or children. Therefore in the circumstances the multiplicand approach would be more suitable.

48. Taking the retirement age in Kenya as **Sixty (60) years**, and given that the Deceased died at the age of **twenty five (25)** he still had about **thirty five (35)** years of active working life ahead of him. Taking into account vicissitudes of life I do agree with the trial courts application of a multiplier of **25 years**. In the African set up a son is expected to provide assistance to the parents. I find that a dependency ratio of **$^{1}/_{3}^{rd}$** was appropriate. Therefore loss of Dependancy would be calculated as follows

25,213.35 x 12 x 25 x $^{1}/_{3}$ = Kshs. 2,521,335

49. Under the limb of Special damages the trial court awarded an amount of **Kshs. 24,075**. In her plaint the Respondent particularized various costs including Ambulance, medical costs, cervical collar, receipts from outspan Hospital, Nyeri PGH and Nairobi Hospital – all totaling approximately **Kshs. 64,885**. The Respondent however sought an amount of **Kshs. 37,183** as Special damages. The trial court awarded what the magistrate felt was appropriate.

50. Whilst it is trite law that Special damages should specifically pleaded and proved, the trial court may award a reasonable sum to cover medical and burial costs. In the case of **PREMIER DIARY LIMITED -VS- AMARJIT SINGH SAGOO and another 2013 eKLR** it was held thus:-

> **"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. <u>In fact, we do take judicial notice that it would be wrong</u>**

and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages." [Own emphasis]

51. Similarly, the **Court of Appeal**, in **Capital Fish Kenya Limited vs. The Kenya Power & lighting Company Limited [2016] eKLR,** said:

> **"We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved….. We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class."**

52. Finally I find that the learned trial Magistrate correctly applied the law and precedent in making the decision that she did. Accordingly I find no merit in this appeal. The same is dismissed in its entirety. The judgment delivered on **18th**

February 2020 is confirmed and upheld. Costs for this appeal to be met by the Appellant.

Dated in Nyeri this 14th day of November 2025.

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MAUREEN A. ODERO
JUDGE