REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. 6 OF 2020

TAJ VENTURES LIMITED.....1ST APPELLANT

CYRUS MAINA NGARI.....2ND APPELLANT

-VERSUS-

JANEROSE WANJIRU MUTAHI.....1ST RESPONDENT

JAMES WACHIRA MUTAHI.....2ND RESPONDENT

JUDGEMENT

1. Before this Court is the Memorandum of Appeal dated **4th March 2020** by which the Appellants **TAJ VENTURES LIMITED** and **CYRUS MAINA NGARI** seek the following orders:-

   "1. THAT this appeal be allowed.

2. **<u>THAT</u> the Honourable Court do proceed and set aside the award on general damages and reduce the same.**
3. **<u>THAT</u> this Honourable Court do proceed and set aside the apportionment of liability in favour of the Respondents as against the Appellants and assess the same afresh and apportion it between the parties.**
4. **<u>THAT</u> the costs of the subordinate court and this appeal be awarded to the Appellants herein."**

2. The Respondents **JANEROSE WANJIRU MUTAHI and JAMES WACHIRA MUTAHI** (suing as the legal administrators of the estate of the late **SAMUEL REUBEN MWAI MUTAHI**) opposed the appeal.

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

<u>BACKGROUND</u>

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** Toyota Probox was being driven by the 2nd Appellant heading towards Kerugoya from Karatina.

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

6. As a result of the collision the Deceased **Samuel Reuben Mwai Mutahi** who was a passenger in the vehicle being driven by the 2nd Appellant sustained fatal injuries and died at the scene.

7. The Respondents **Janerose Mutahi** and **James Wachira Mutahi** who are the parents of the Deceased instituted in the Magistrates Court at **Karatina** PMCC No. **44 of 2019** vide the Plaint dated **6th June 2019** seeking damages in respect of the death of their son.

8. The matter was duly heard in the Lower Court and the learned trial magistrate **Hon. V. S. KOSGEI Resident Magistrate** in a judgment delivered on **18th February 2020** found in favour of the Respondents and entered judgment in the following terms

"(a) Liability at 100% - Against the Appellants.

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

(i) Pain and Suffering - Kshs. 30,000

(ii) Loss of expectation of life -Kshs. 1,600,000

(iii) Loss of Dependancy - Kshs. 1,730,000

(c) Special Damages - Kshs. 29,550.00

(d) Costs and Interest from the date of judgment."

9. Being aggrieved by this judgment the Appellants filed this present appeal which was premised upon the following grounds:-

(1) <u>THAT</u> the learned trial magistrate erred in fact and in law by awarding inordinately high general damages to the Respondent.

(2) <u>THAT</u> the learned trial magistrate erred in fact and in law by failing to consider the Appellant's submissions and authorities on liability and quantum and hence, arriving at an erroneous decision.

(3) <u>THAT</u> 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) <u>THAT</u> the learned trial magistrate erred in fact and in law by apportioning liability at 100% in favour of the Respondents as against the Appellants.

(5) <u>THAT</u> the learned trial magistrate's judgment as whole is not supported by the evidence that was tendered in court by the parties.

10. As stated 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 in **GITOBU IMANYARA & 2 Others -vs- ATTORNEY GENERAL [2016] 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 Respondents had the requisite locus standi to file suit on behalf of the estate of the Deceased is not in any doubt. At **Page 24** of the Record of Appeal is a copy of a limited Grant Ad litem issued to the two Respondents

giving them authority to file suit on behalf of the estate of **Samuel Reuben Mwai Mutahi** (Deceased)

16. Similarly the fact of the accident is not in any doubt. **PW3 PC GABRIEL NDIEMA** produced in court the Police abstract **Pexhb 7** relating to an accident which occurred on **29th November 2018**. **PW3** stated that the accident involved the motor vehicle **KCQ 882W** Toyota Probox which was travelling towards Kerugoya from Karatina. That at the **Kamunyaka** area the driver of the Probox veered into the lane for oncoming traffic and collided first with motor vehicle Registration **KCH 143 P** being driven by **John Kimani** then went on to hit another vehicle Registration **KCH 676 P Toyota** Harrier being driven by one **Rose Wachira**.

17. **PW3** told the court that due to the accident some passengers in the 2nd Appellants vehicle were injured and some died. He stated that the 2nd Appellant was charged with the offence of **Causing Death by Dangerous Driving contrary to Section 46 (1)** of the **Traffic Act Cap 403, Laws of Kenya**.

18. The fact of the death of the Deceased is proved by the Post Mortem Report dated **6th December 2018** as well as the copy of Death Certificate Serial No. **047555** both of which indicate that the Deceased met his death due to fatal injuries sustained from a road traffic accident.

19. Although he denied having caused the accident the 2nd appellant admitted that the Deceased was a passenger in his vehicle at the time of the accident.

20. 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.

21. However the trial court relied on the evidence of **PW3** 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.

22. 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 fearing that a head on collision would occur swerved to the right lane thereby colliding with the two oncoming vehicles.

23. As pointed out by the trial court 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 contributory negligence on the part of the Deceased. 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 Appellants.

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

25. 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 justifiable 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."**

26. 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:-

“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…… 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.”

27. The Deceased herein died on **29th November 2018** which was the date when the accident occurred. Indeed the evidence was that the deceased died on impact at the scene.

28. Under the heading of '**Pain and Suffering'** the trial court made an award of **Kshs. 30,000**. Based on the authorities cited and given that death was immediate, I find that this award was appropriate. I am not inclined to interfere with the same.

29. 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 as follows;-

> **".....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 death."

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."

30. Under the heading of loss of life expectation the trial court made an award of **Kshs. 100,000**. This award I find to be in line with the decision in **Hyder Nthenya Musili & Another -vs- China Wu Yi Limited and Another [Supra]**. In this case pain and suffering was not prolonged thus I find the

award of **Kshs. 100,000** was appropriate and I do uphold the same.

31. Under the heading of loss of Dependancy 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. In determining the same, the important figure is the net earnings of the deceased. 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 lump sum and would if wisely invested yield returns of an income nature," [Own emphasis]

32. 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 that:-

"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."

33. The evidence of the Respondents was that the Deceased was aged **thirty five (35) years** when he met his unfortunate demise. Thy stated that the Deceased left behind one child who was in **class five** and stated that he was working as a driver.

34. The learned trial magistrate presumed the monthly salary of a driver to be **Ksh. 10,000** and proceeded to assess quantum for loss of dependency on that basis.

35. It is trite law that he who alleges must prove. **Section 107** of the **Evidence Act Cap 80 Laws of Kenya** provides that

"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

36. Therefore the burden lay on the Respondents to prove firstly that the Deceased was working as a driver prior his death and secondly the Respondents needed to tender 'proof of the monthly salary earned by the Deceased.

37. In **FRANKLINE KIMATHI MAARIU & Another -VS- PHILIP AKUNGU MITU MBOROTHI** (Suing as administrator and personal representative of **Anthony Mwitu Gakungu (Deceased) 2020 eKLR** the court held that

"In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or

the minimum wage as the appropriate mode of assessing the loss of dependency."

38. In the absence of any tangible proof that the Deceased was working as a driver and in the absence of any proof of how much the Deceased was earning I do fault the learned trial magistrate's decision to pluck a figure of **Kshs. 10,000** monthly salary out of the air and to use that as a multiplicand in assessing damages.

39. In the case of **Mwanzia Ngalali Mutua -vs- Bus Services (Msa) Ltd & Another** which was cited with approval in **Albert Odawa v Gichimu Gichenji (2007) eKLR** the court held as follows:-

"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 a sacrifice justice on the altar of methodology, something a Court of Justice should never do."

40. Likewise in **Moses MAIRUA Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR)** the court held that:-

"…….where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

41. In the absence of proof of the Deceased's profession and/or monthly salary the trial court ought have treated the Deceased as a general labourer and applied the minimum wage. In the case of **TOBIAS ODOYO OBURU -vs- JANE KERUBO MIRUKA & Another** (suing as the Legal representatives of **John Onywoki Sangani (Deceased) [2018] eKLR, Hon. Justice David Majanja** (Deceased) stated that:-

> **"In this case, I have found that there was no evidence of the actual income hence the trial magistrate ought to have reverted to the minimum wage to determine the multiplicand."**

42. Under the **Regulation of Wages (General) Order** as amended by the **(General) (Amendment) Order 2018**, which came into force on **1st May 2018** the wage of a general labourer outside of Nairobi, Kisumu and Mombasa was set at **Kshs. 7,240.95**. This was the applicable law in force at the time when the Deceased died. I find therefore that the correct figure that should have been adopted as a multiplicand to determine damages due to the Respondent

for loss of Dependency was **Kshs**. **7,240.95** and **not Kshs. 10,000** as applied by the trial court.

43. It was indicated in the Death Certificate that the Deceased was aged **34 years** when he met his death and the Deceased was survived by both his parents and one child.

44. The trial court applied a multiplier of **20 years** and a dependency ratio of **$^{2}/_{3}^{rds}$**. The age of retirement in Kenya is **Sixty (60) years** and given the vicissitudes of life this can be reduced to **fifty five (55)** years.

45. I therefore agree with the decision of the trial court to apply a multiplier of **twenty (20) years**. Given that the Deceased was a son he would have been expected to provide some support to his parents and the Deceased was equally the guardian of his minor child. Therefore I find that the dependency ratio of **$^{2}/_{3}^{rds}$** applied by the trial court was in order.

46. Based on the above the loss of dependency would therefore be assessed as follows **7,240.95 x 20 x 12 x $^{2}/_{3}$ =Kshs. 1,158,552.**

47. On Special damages it is trite law that special damages must be specifically pleaded and proved. In her judgment the trial magistrate noted that some of the receipts provided by the Respondents were totally illegible. The magistrate then proceeded to adopt as special damages the amount of **Kshs. 29,550.00** as had been proposed by the Appellants.

48. In **Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR**, the Court of Appeal states

> **"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. In fact, we do take judicial notice that it would be wrong 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]

49. Similarly in **Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR** the **Court of Appeal** held:-

"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."

50. Under the heading of a Special damages, the Respondents claimed for coffin, hearse, ribbons, flowers, eulogy (200 copies) search certificate making a total of **Kshs. 33,750**. In my view this is not an exorbitant or unreasonable claim. Following the decision in **Capital Fish Kenya Limited -vs- KPLC [Supra]** even where receipts are not available the courts will award a conventional sum for financial expense. Therefore in my view an award of **Kshs. 30,000** would suffice as Special damages.

51. Based on the foregoing this appeal partially succeeds. The judgment delivered on **18th February 2020** is hereby set aside and in its place the court makes the following awards.

(a) Liability 100% against the Appellants.

(b) <u>GENERAL DAMAGES</u>

(i) Pain and Suffering - Kshs. 30,000.00

(ii) Loss of Life Expectation - Kshs. 100,000

(iii) Loss of Dependency - Kshs. 1,158,552

(c) Special Damages - Kshs. 30,000

Total - Kshs. 1,318,552

Plus costs and interest from the date of the judgment in the Lower Court until payment in full. Each party to meet their own costs for this appeal.

Dated in Nyeri this 14th day of November 2025

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MAUREEN A. ODERO

JUDGE