



IN THE COURT OF APPEAL

AT MOMBASA

(CORAMI: VISRAM, KARANJA & KOOME, JJA)

CIVIL APPEAL NO 151 OF 2018

BETWEEN

CONSOLIDATED WITH

CIVIL APPEAL NO 153 OF 2018

&

CIVIL APPEAL NO 168 OF 2018

MAHENZO KATHENGI and

NDEKE CHAMBEYU

(Suing as the legal representatives of the estate of

HAMISI CHAMBEYU MUNYAKA.....APPELLANTS

AND

MAGUNADU COMPANY LIMITED.....1ST RESPONDENT

PATRICK KINYUA KARANI.....2ND RESPONDENT

(Being an Appeal from the judgment and Decree of the High Court of Kenya at Mombasa (P. J Otieno, J.) dated 23rd July, 2018)

in MSA CIVIL APPEAL NO. 36 OF 2014)As consolidated with CIVIL APPEAL NO. 26 & 35 OF 2014)

JUDGMENT OF THE COURT

[1] This is a second appeal, the sole legal issue raised is the extent an appellate court, and in this case the High Court, can interfere with the award of damages. A brief background is that on 7th July, 2009 at Mackinon Road, along Mombasa Nairobi Road, an accident occurred involving two motor vehicles Reg. No. KAT 979 U- ZB 6044, Scania Semi- Trailer (Semi- Trailer) and an unregistered motor vehicle identified as Chasis No. LH-172-09639, KG No. 4033, Toyota Hiace (Toyota). As a result of the said accident three persons who claimed to have been passengers traveling in the Toyota Hiace perished. Consequently three suits were filed at Mombasa Chief Magistrates Court by the deceased legal representatives, being **CMCC Nos. 3594, 3595, & 3596** all of **2009** against the 1st and 2nd respondents as the owner and driver of the semi- trailer respectively.

[2] It would appear there was another case being **Voi SRMCC No. 13 of 2010** (Voi case) because the learned trial magistrate in **CMCC No. 3596 of 2009** directed that the determination of the question of liability in the three cases would await and abide the outcome of the Voi case. That was done, on 13th August, 2013 in **CMCC No 3595 of 2009** and parties confirmed to the court the test suit had been determined and liability was apportioned at 100% against the two respondents. On the basis of that confirmation, a consent was recorded that the respondents be held 100% liable and that the trial court would only take evidence on the question of quantum of the damages due to the claimants.

[3] Having taken evidence in the three matters, leading to the judgments subject of the appeal before the High court, the learned trial magistrates delivered separate judgments on diverse dates during the months of February and March 2014 in which the following awards were made:-

In Mombasa CMCC No 3595/2009 delivered on 7th March, 2014

I. Pains and suffering Kshs. 15,000

II. Loss of expectation of life Kshs. 110,000

III. Loss of dependency Kshs. 980,000

Total Kshs 1,105,000

Plus costs and interests

In Mombasa CMCC No. 3596/2009 delivered on 4th March, 2014

I. Pains and suffering Kshs. 30,000

II. Loss of expectation of life Kshs. 100,000

III. Loss of dependency Kshs. 960,000

IV. Special damages Kshs. 50,000

Total Kshs 1,140,000/

Plus costs and interests

In Mombasa CMCC No 3594/2009 delivered on 4th March, 2014

I. **Pains** and suffering Kshs. 30,000

II. Loss of expectation of life Kshs. 100,000

III. Loss of dependency Kshs. 960,000

IV. Special damages Kshs. 50,000

Total Kshs 1,140,000

Plus costs and interests

[4] The respondents were aggrieved by the aforesaid awards and order of costs and appealed before the High court. The three matters were by consent of the parties consolidated and heard as **Civil Appeal No 36 of 2014** consolidated with **No 26 & 35 of 2014** which is the subject matter of the instant appeal. Upon weighing the matters the learned Judge found that the fulcrum of the appeal was the assessment of damages for lost dependency and agreed with the other awards.

[5] In regard to No 26 of 2014, the Judge found that the deceased was aged 25 years old and was working in the quarry but faulted the trial court for assessing the monthly income at Ksh. 6,000 as the multiplicand which in his view should have been hinged on the minimum wage for a quarry or mine worker outside the municipalities which he assessed at Ksh. 3,778. This is the multiplicand the Judge used and thus reduced the loss of dependency which had been awarded by the trial magistrate to **Ksh. 604,840**. The same case applied in **No. 35 of 2014**, as the Judge used the same reasoning and multiplicand and reduced the award for loss of dependency to the same amount as the same facts applied. In respect to **No. 36 of 2014**, the deceased was a stone mason, and the only error the Judge found was the fact that the trial court treated him as having been working within a municipality while the facts pleaded showed that he worked in Mackinon area which was outside the established municipality. For that reason the multiplicand was similarly reduced to Ksh. 3,270 thereby reducing the loss of dependency to **Ksh. 532,200**.

[6] The aforesaid is the gravamen of the instant appeal, the appeal which is predicated on some 7 grounds. The crux of all the grounds boil down to the issue that the learned Judge erred in law and fact by interfering with the multiplicand of Ksh. 6,000 when there was no ground of appeal challenging the same; by disturbing the exercise of discretion by the trial magistrate in assessment of damages which was reasonable and not excessive in the circumstances; by holding that the deceased persons were employed outside of Mombasa Municipality without any evidence and finding that the trial magistrate relied on the 2013 minimum wage regulation which was not the case as the assessment of Ksh. 6000 and 6,130 were based on other factors and considerations. For those reasons counsel urged us to allow the appeal.

[7] This appeal was disposed of by way of written submissions and oral highlights made by respective counsel during the plenary hearing. Mr. Nyabena learned counsel for the appellants submitted that the learned trial Judge erred by interfering with the multiplicand that was used by the trial court when the matter was not raised in the grounds of appeal before the High Court. In challenging the decision by the Judge on the multiplicand being the only issue of law that arise from this appeal, counsel cited the decision in the case of; - (*Selle v Associated Motor Boat Company, Ltd. (1968) E.A 123*. where the principles that guide first appellate court are well articulated. Counsel went on to fault that the High Court Judge for interfering with the trial magistrates' discretion in the assessment of damages; the trial magistrate had used a multiplicand of Ksh. 6000 and 6,130 respectively which was based on the evidence adduced before the court that the deceased persons were working as quarry miners and a mason respectively. The Judge nonetheless did not demonstrate how the trial magistrate took into account irrelevant factors or left out others or whether the award was too high or too low as to amount to an erroneous estimate or assessment. The Judge went outside the evidence adduced in court and introduced the minimum wage regulation that was not part of the evidence relied on in No 26 and 35 of 2014. Counsel made reference to the case of *Mary Wairimu Njuguna -v- Kenya Power & Lighting Co Ltd [2016] e KLR* to drive the said point home and urged us to allow the appeal.

[8] Opposing this appeal was Mr. Ajigo learned counsel for the respondents, who relied on his written submissions but did not make any oral high lights. In the submissions the respondents supported the judgment of the High court which in

his view accords to the principles set out in the cases of *Selle -v- Associated Motor Boat Co Ltd (supra)*. Counsel went on to point out that the Judge properly evaluated the matter by reproducing a summary of the salient matters that were before the magistrate's court. The Judge was also fully aware of the principles to bring to bear and therefore gave justification for interfering with the multiplicand in each case by holding that where there were no employment records or records to support the earnings of a claimant, "courts should adopt the minimum wage". Counsel urged us to dismiss all the appeals with costs.

[9] The above is a brief summary of the salient issues that were germane in this appeal. We have considered and deliberated on the record of appeal, rival submissions and the authorities cited. We take note that this is a second appeal therefore we should only deal with points of law as it expected the two courts below thrashed the facts to a pulp. See the case of; - *Breweries Limited -vs-Godfrey Odoyo - Civil Appeal No. 127 of 2007*,

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is preserve".

[10] Bearing in mind the aforesaid caution, the only legal issue that is discernible is whether the Judge erred by interfering with the multiplicand that was used by the trial court. In doing so the Judge correctly appreciated the position of the law that documents are not the only way to prove income and that dependency is a matter of fact to be proved by evidence. However the Judge contradicted himself and proceeded to disregard the evidence of the deceased's widow and the assessment of the multiplicand of Ksh. 6000 awarded by the trial court. This is what the Judge posited in that respect in a pertinent paragraph of the judgment;

" Even though counsel should have led the witness better to be more clearer, that failure should not by itself be a basis to deny the respondent damages when there was indeed evidence that she was married to the deceased and was expecting his child as at the date of death.

Accordingly I find an error in the decision by the trial court to settle on a multiplicand of 6,000. That finding to me was never discerning of the court even if the duty of assessment of damages is a matter for discretion and known to be a difficult one. Exercise of discretion must be based on some reason and evidence. Even though there was no documentary evidence of employment and income, it is now trite that in such circumstances a court should adopt the minimum wage. Minimum wages are set by statute and are therefore provision of the law the court is expected to take note of and apply at all times even if parties don't refer the court to same. In this case however, the plaintiff did draw the court's attention to the Regulation of Wages (General) Order, 2013, by the submissions dated 23.11.2013. It showed the minimum wage for a quarry or mine worker outside, Nairobi, Mombasa and Kisumu was Kshs. 9,372.15. That was the sum the trial court ought to have adopted rather picking the sum of Kshs. 6,000 from the air. In resorting the Order, the court was perfectly within its rights but in applying the 2013 edition, there was an error. This is because the death was on 7/7/2009 hence the relevant Order ought to have been that published in legal Notice No. 68, dated 15/4/2009. It set the minimum wage for miners outside municipalities at Kshs.3,778/=. That is the multiplicand the trial court ought to have adopted but which it did not adopt. Having adopted the wrong order the decision must be interfered with and corrected by application of the correct order."

[11] Did the trial magistrate err in assessing the multiplicand of Ksh. 6000 such that the Judge was entitled to interfere with that exercise of that discretion? In particular the appellant in **No. 26 of 2014** gave evidence that her deceased husband was earning Ksh. 10,000 per month but no documents were produced while the respondents urged the trial magistrate to award Ksh. 3000 but the magistrate found the latter too high and the former too low and awarded Ksh. 6000 without relying on any document. Similarly, in **No. 35 of 2014** which was a judgment by the same magistrate, the trial court relied on the evidence of the widow who testified that her husband was earning Ksh. 8,000 as a stone miner but the court applied the same multiplicand of Ksh. 6000. In both cases none of the parties produced documents to support the multiplicand each was proposing. Indeed, the submissions by counsel for the respondents in regard to **No. 35 of 2014** suggested a multiplicand of Ksh. 8,274 and a dependency ratio of one-third which he termed as a minimum wage.

[12] Moreover, the documents in regard to the regulation of the minimum wage were not relied upon by any party in those two matters. They seem to have been produced in the High Court by the respondents. This therefore lends credence to the question whether the Judge misdirected himself by relying on documents that were not before the trial court and whether he ignored despite having appreciated and referred to it, the principle that a court cannot only be guided by documents in assessing the earnings of a claimant. See the case of *Jacob Ayiga Maruja & Another -v- Simeon Obayo [2005] e KLR* where this Court differently constituted posited as follows:-

“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail”.

[12] We think the Judge in this case went beyond the set parameters in holding that a claimant can only support his claim through documents; by relying on documents of minimum wage that were not adduced in evidence and for ignoring the evidence and submissions that were made before the trial court. In our view if those documents were not relied upon during trial, to the extent that the magistrate assessed the multiplicand based on the material that was before court, it was a misdirection by the Judge to interfere with the assessment in the manner that he did. For the aforesaid reasons we find both appeals emanating from **No. 26 of 2014** and **No. 35 of 2014** have merit. We set aside the award of loss of dependency of **Ksh. 604,480** awarded in both appeals and substitute therefor with the sum of **Ksh. 980,000** and **Ksh. 960,000** respectively as per the trial court’s judgment.

[13] We move to **No. 36 of 2014** which was determined by a different trial magistrate. This is what the trial magistrate said about the multiplicand

“It has been pleaded that the deceased was a casual laborer and used to earn Ksh 15,000 per month. No proof was provided to support the earnings of the deceased and the parties submitted that the minimum wage to be adopted by the court. I will use the minimum wage as the multiplicand. PW1 testified that the deceased was a mason and in the absence of prove of the deceased profession, I will consider him to be a general labourer as per the Legal Notice No 70 the Regulations of Wages (General) (Amendment) Order of 2009 was Ksh 6,130/- and I adopt the same as the multiplicand...”

[14] As far as this conclusion was concerned the Judge did not fault the application of the minimum wage as postulated above but found fault as he put it in his own words as follows;-

“Unlike the other two appeals, the decision in this appeal was made by a different court. The decisive factors on assessment of damages for lost dependency were different but not so materially. Here the deceased was pleaded and proved to have been a mason. However there was no evidence of his daily or monthly earnings hence the minimum wage rule was applicable. That position of the law the trial court correctly found and applied. It cannot be said that in adopting the minimum wage as the multiplicand the trial court erred. The court applied the law as it ought to have been applied. The only error the trial court committed is to treat the deceased to have been working with a municipality of Mombasa, Nairobi and Kisumu. The facts pleaded and proved was that the deceased worked in Mackinon area outside any established municipality. He was certainly outside Mombasa or any other Municipality identified under the order. The minimum wage therefore applicable to him under the Order was Kshs.3,270. Based on that figure general damages for loss dependency work out thus; $3270 \times 20 \times 12 \times \frac{2}{3} = 523,200/=$.”

[15] With tremendous respect to the Judge, there is no indication in the evidence adduced before the trial court that the deceased was working outside the municipality. The fact that the accident occurred at Mackinon area, was not the same as saying he was working in the area of Mackinon. The trial magistrate gave reasons for the multiplicand he used of Ksh 6130 which was drawn from the Minimum Wage guideline for 2009. In our view this was well justified, reasonable and not perverse as to warrant interference. It is not clear to us how the Judge established the deceased was working outside of the municipality to interfere with the award. Accordingly we find merit also in appeal **No. 36 of 2014** which we allow by setting aside the award of loss of dependency of Ksh. 523,200 and substituting thereto with the original award of **Ksh. 980,800**.

[15] In effect the appeal is allowed, we set aside the judgment of the High court and substitute it with an order dismissing it with costs to the appellants. The appellants shall also have the costs of this appeal.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR