



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 125 OF 2015

BETWEEN

ALBERT KUBAI MBOGORI.....APPELLANT

AND

VIOLET JEPTUM RAHEDI.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Waweru, J.) dated 14th October, 2013

in

H.C.C.C No. 676 of 2009)

JUDGMENT OF THE COURT

2. This is a first appeal against the decision of the High Court dated 14th October, 2013. The appellant is mainly challenging quantum of damages awarded to the respondent under the **Fatal Accidents Act** by the High Court (Waweru J.) in High Court Nai. Civil Case No. 676 of 2009.

3. The brief circumstances of the case as presented before the High Court were as follows: according to the appellant, who was the defendant in the High Court, he was driving home on the night of 1st December, 2007 at around 8:45 p.m. He found a police road block along the Bomas/Langata junction, and he stopped as expected. He stated that while his motor vehicle was still stationary, the vehicle which was immediately in front of his was reversed into his car. The occupants of the said vehicle, a woman and man alighted from the vehicle and started accusing him of causing the accident. An argument ensued and other members of public joined in. Sensing that the argument was getting out of hand, the appellant went back to his car and drove off. After driving for a short distance, he decided to drive back to the road block and inform the policemen manning the road block about what had transpired. Before he could get out of his car, three men, one of whom he recognized as the occupant of the vehicle which hit his vehicle, appeared beside his door. They tried to take his car keys from the ignition through the window which was open but they were unsuccessful. They then dragged the appellant out of the car and onto the ground. The three men were joined by other men and they all began assaulting the appellant. One of the men brandished a Somali sword at the appellant and tried to cut him. In self defence, he took out his gun intending to fire into the air so as to scare away his attackers. However, one of them hit his hand causing the gun to

discharge. The attackers ran away and the police men who were manning the road block came to where the appellant was lying. They informed him that he had shot a motorist, one Edward Benjamin Rahedi (deceased) in the head.

3. The deceased was rushed to hospital but unfortunately, he died on 26th January, 2008 while receiving treatment for the gunshot wound. Consequently, the appellant was charged with the offence of murder in H.C.C.R.C No. 8 of 2008. Following a full trial, the learned Judge acquitted the appellant of the murder charge and found him guilty on the lesser charge of manslaughter, and sentenced him to 14 months imprisonment.

4. Following the conviction, the deceased's widow (the respondent) filed suit against the appellant seeking damages under the **Law Reform Act** and the **Fatal Accidents Act**. She imputed negligence on the part of the appellant for firing his firearm and causing the deceased's death. She testified that the deceased who was then 44 years old; was of good health and still had many productive years ahead of him. At the time of his demise, he was a businessman running a wines and spirits business operating under the business name Raron Agencies. His monthly net income was Kshs. 350,000/=. He was substantially responsible for the family's upkeep. She listed herself, their two children, the deceased's father, the deceased's mother-in-law, brother-in-law as well as his niece as the deceased's dependants. She maintained that she had to close the business because she could not run it and even had to dispose of the stock worth Kshs. 1,600,000/= to meet the family expenses.

5. While admitting that he had shot the deceased, the appellant in his statement of defence averred that it was an accident. He denied the particulars of negligence as pleaded by the respondent. He claimed that he never intended to harm the deceased.

6. After considering the evidence before the court, the learned Judge found that the appellant was negligent, hence 100% liable and entered judgment in favour of the respondent on 14th October, 2013. The terms of the judgment were as follows:-

i.-Pain and Suffering-- Kshs.-100,000/=

ii.-Loss of expectation for life-- Kshs.-150,000/=

iii.-Under Fatal Accident Act-- Kshs.-12,000,000/=

iv.-Special damages-- Kshs.-61, 401.08/=

It is that judgment that has provoked the current appeal which is anchored on a total of 18 grounds. They can be aptly summarized as hereunder:-

The learned Judge erred in law and fact by –

- ***Failing to appreciate that the respondent had sold the deceased's business before his death.***
- ***Awarding damages for loss of income from the deceased's business whereas there was no proof of the same.***
- ***Failing to take into consideration while computing loss of income the fact that the respondent had sold business stock worth Kshs. 1,600,000/=.***
- ***Failing to take into consideration that the respondent was in gainful employment while determining the degree of dependency on the deceased's income.***
- ***Assessing the deceased's income at Kshs. 100,000/= per month.***
- ***Failing to deduct the damages awarded under the Law Reform Act from the damages awarded under the Fatal Accidents Act.***
- ***Awarding damages which were manifestly excessive and punitive.***
- ***Considering extraneous matters in arriving at his decision.***

7. Mr. F. N. Njanja, learned counsel for the appellant, urged that the award of Kshs. 12,000,000/= under

the **Fatal Accidents Act** was manifestly excessive. He submitted that a court ought to consider the deceased's income, his/her age and multiplicand in assessing damages under the said Act. Mr. Njanja faulted the learned Judge for relying on the lifestyle described by the respondent, that is, the schools which the children attended and the extracurricular activities they engaged in, to determine the deceased's income. In his opinion, the learned Judge in so doing failed to note that the lifestyle described was not only supported by the deceased but also the respondent who was in gainful employment. To him, the amount of Kshs. 30,000/= per month would have been a reasonable estimate of the deceased's income. Mr Njanja also assailed the learned Judge for not considering that the business records were very badly kept, and that no allowance was given for payment of income tax and other operational expenses. It was learned counsel's submission that the learned Judge ought to have awarded a sum of Kshs. 6,000,000/= as damages.

8. On his part, Mr. Fred Ojiambo, learned Senior Counsel, appearing for the respondent, urged that the Court as an appellate Court ought to be slow to interfere with the award of damages which is discretionary in nature. The Court could only interfere with such an award if there was misdirection on the trial court's part.

Towards that end, he cited the case of **The Administrator, HH The Aga Khan Platinum Jubilee Hospital –vs- Munyambu [1985] eKLR**. According to him, the appellant had not demonstrated that the trial Judge had misdirected himself in awarding the said damages. He maintained that the damages awarded were reasonable. With regard to the respondent's income, it was learned counsel's submission that the issue was never raised before the trial court. As such, the court was not given the opportunity to consider it and make a determination one way or another, and it could not therefore be raised for the first time before this Court. On the contention that the learned Judge had not considered taxes that would have been payable to the exchequer, Mr. Ojiambo submitted that the learned Judge had actually considered the issue and scaled down the figures. On this issue, we note that the learned Judge did actually in his judgment indicate that he had arrived at the figure of Ksh.100, 000/= per month "*after payment of tax and business expenses*". Accordingly he urged us to dismiss the appeal.

9. As noted herein above, the appellant challenges the damages awarded under the **Fatal Accidents Act, Section 4 (1)** of the **Fatal Accidents Act** stipulates that-

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:..” *Emphasis added.*

It is clear that the trial court in assessing damages thereunder exercises its discretion. Consequently, an appellate court will not normally interfere with an award of damages which is discretionary, unless it is demonstrated that the trial Judge misdirected himself in arriving at the award in question. This was succinctly articulated in **Bashir Ahmed Butt -vs- Uwais Ahmed Khan [1982-88] KAR 5** thus,

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 predecessor of this Court while discussing assessment of damages under the **Fatal Accidents Act** in **Chunibhai J. Patel and Another –vs- P. F. Hayes & Others [1957] EA 748, 749**, stated,

“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.

The trial Judge appreciated these guiding principles, this is as evidenced in his sentiments set out herein below:-

“In order to assess damages under the Fatal Accidents Act, I must first determine the deceased’s income, the extent of his dependant’s dependency and the multiplier to be used.”

The evidence tendered in respect of the deceased’s income was not satisfactory. In as much as the respondent testified that the deceased’s income from his business was in the range of Kshs. 350,000/= per month there was no evidence to substantiate the claim. In fact, the financial statements which were adduced in evidence were contradictory in terms of the profits. Furthermore, the expertise of Paul Otieno, who described himself as an accountant and said he used to do book keeping for the deceased, and who had prepared the statement in question was put to task. He admitted that despite being an accountant he was not registered with the Institute of Certified Public Accountants which licenses accountants to practise in this country. He neither explained the inconsistencies in the statements nor shed light as to the actual income received by the deceased. The trial Judge in his own words observed,

“PW2’s explanation during his testimony in chief for the discrepancies in the profit declared for the year 2002 was that the profit shown in the year 2003 financial statement was purely for tax purposes, though, he explained further, the declared profit was supported by the documents given to him by the deceased. In cross-examination he said that the books of accounts given to him by the deceased for preparation of the financial statement for the year 2003 were not correct and could not tally with the books given to him for the preparation of the financial statement of the previous year 2002. He denied any collusion with the deceased to defraud the Government of any tax. He also stated that he never himself submitted any accounts to the taxman on behalf of the deceased’s business.

The plaintiff herself testified that the deceased’s income from his business was about Kshs. 350,000/= per month. That income is not supported by any evidence placed before the court. The financial statement prepared by PW2, if he was qualified to prepare them, are themselves contradictory. One financial statement declares a profit of Kshs. 2,233,495/= for the year 2002 while the other statement declares a profit for the same year as Kshs. 39,939/=. If the smaller figures were not true and were meant only to deceive the taxman and thus deprive the Government of tax lawfully due to it, it is something that the court will not condone. It also put into doubt the larger profit declared in the same year. Why should it not be equally false and designed only for a particular purpose?”

10. We have cited verbatim the learned Judge’s observation above to show that he actually took time and considered all the evidence that was placed before him objectively whether it was in favour of the deceased or not. Having found as he did, the trial Judge went ahead to assess the deceased’s income based on the lifestyle he and his family led. The appellant assails the learned Judge for doing so. Ideally, proof of income would be in terms of documentary evidence like pays slip, tax returns, bank statements etc. However, this is not to say where there isn’t such documentary evidence that income cannot be proved. In **Jacob Ayiga Maruja & Another -vs-Simeon Obayo [2005] eKLR**, this Court held,

“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.”

In our view, the trial Judge did not err in taking into consideration the family's lifestyle in determining his income. In doing so, the trial Judge found that-

“But the plaintiff placed before the court anecdotal evidence of the deceased's and his family life style that tended to indicate a very large income. These included the very expensive sport of tennis pursued by their two children and the expensive schools they attended. There is evidence that the children regularly attended tennis tournament not only locally but also abroad at considerable expense to their parents, not to mention coaching fees, etc. There was also evidence that the deceased was servicing a modest mortgage as well as a bank loan. The deceased was himself driving a modest Nissan Sunny car....”

The deceased's family lifestyle is indicative of a fairly high income.

.....

But in equity I cannot shut my eyes to the fact that the deceased had some income, albeit not fully declared. I am satisfied from the material placed before the court that the deceased operated a wine and spirit business from which he derived an income sufficient to take care of his wife, two children, and his father, and generally lead a good lifestyle.”

The above depicts a Judge who considered all the issues that were placed before him. Indeed the sum of Ksh. 100,000/= per month awarded by the Court was quite conservative given the kind of lifestyle the deceased and his family led. In our considered view had proper books of accounts been kept and presented in evidence, the award would have been much higher.

11. The question we must ask ourselves is whether the learned Judge considered any irrelevant or extraneous matters to arrive at the said figure. We are satisfied that he did not. Indeed he went at great length to analyse the evidence and explain how and why he arrived at the figures he did. We find no non judicious exercise of discretion here. Therefore, there is no reason to interfere with the learned Judge's finding that the deceased earned a net income of Kshs. 100,000/= per month.

The degree of dependency on the deceased's income is a matter of fact. In **Boru -vs-Onduu [1982-1988] KAR 299**, the Court expressed that,

“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation.”

Notwithstanding the fact that the respondent worked as a secretary at the National Cereals and Produce Board, there was no evidence by the appellant that the trial Judge misdirected himself in holding that the deceased applied 2/3 of his income towards his family. Equally, there was no dispute that at the time of his demise the deceased was 44 years. Taking into account that the deceased was running his own business and could have continued doing so until his early 70's, the multiplier of 15 years applied by the trial court was reasonable in the circumstances.

12. Accordingly, the assessment of damages by the learned Judge under the **Fatal Accidents Act** in following manner $Kshs. 100,000/= \times 12 \times 15 \times 2/3 = Kshs. 12,000,000/=$ was reasonable.

Last but not least, it was the appellant's contention that the damages awarded under the **Law reform Act** ought to have been deducted from the award under the **Fatal Accidents Act** to avoid double compensation. Chesoni Ag. JA as he then was, in **Kemfro Africa Limited t/a 'Meru Express Services (1976) & another -vs- Lubia & another (No. 2) [1985] eKLR** explained that-

“An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act and so it appears that

legislature intended that it should be considered.

Section 2(5) of the Law Reform Act says this:

“(5) The rights conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act...”

In my view what section 2(5) of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

.....

To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Accidents Act are ‘taken into account’. The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial 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 a mathematical deduction as suggested...”

The same was restated by this Court in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) -vs- Kiarie Shoe Stores Limited [2015] eKLR that;

“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.”

In this case the trial Judge granted damages for pain and suffering, and loss of expectation of life under the **Law Reform Act**. The damages awarded under the **Fatal Accidents Act** were for loss of dependency hence, there was no duplication.

13. In conclusion therefore, we find and hold that there is no reason to interfere with the quantum of damages as awarded by the trial Judge. As Lord Morris put it in West (H) & Son Ltd. -vs- Shepherd [1964] AC 326,

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

In other words we cannot substitute the learned Judge’s figure with the one that we would have preferred to award or what we think would have been a more desirable or appropriate award. As explained earlier, our duty as an appellate Court is clearly set out. We have in discharging that duty come to the conclusion that the award in question was not inordinately high as claimed by the appellant. In the circumstances, we

find that this appeal is for dismissal. The same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR