IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CIVIL APPEAL NO. 345 OF 2012

BETWEEN

VINCENT SULULU ……1ST APPELLANT

CHRISTINE AKINYI OKOCHI …….....…….2ND APPELLANT

AND

ROSE WANJIRU ……..……RESPONDENT

(An Appeal from the judgment and Decree of the High Court of Kenya at Bungoma (Muchelule, J.) delivered on 19th September, 2012

in

H.C.C.A. NO. 81 OF 2011)

****

JUDGMENT OF THE COURT

1. This is a second appeal from the original judgment of Mrs. Kidula, Chief Magistrate, in **Bungoma C.M.C.C. No. 389 of 2010.** In that suit, the appellants herein were the plaintiffs, whereas the respondent was the defendant.

2. The respondent was the owner of a motor vehicle registration number KAU 107A, a matatu, hereinafter referred to as *"the vehicle"*. On 21st November, 2009 **Henry Barasa Namachanja,** hereinafter referred to as "**the deceased"** was travelling as a fare paying passenger in the motor vehicle when it got involved in an accident, occasioning fatal injuries to the deceased.

3. The appellants as the legal representatives of the estate of the deceased, filed a suit against the respondent under the **Law Reform Act** as well as the **Fatal Accidents Act** seeking general and special damages.

4. The parties agreed on liability in the ration **80:20** in favour of the appellants and the task of the trial court was to assess the damages payable.

5. The trial court awarded the appellants the following sums:

(a) General damages for pain and suffering ….. Kshs. 100,000/=

(b) Loss of dependency… Kshs.2,188,800/=

c) Special damages … Kshs. 174,845/=

The appellants were also awarded costs of the suit and interest.

6. Being dissatisfied with that judgment, the respondent preferred an appeal to the High Court, **HCCA No. 81 of 2011**. The respondent questioned the multiplier and the multiplicand that were used in computing loss of dependency. The respondent also contended that special damages had not been strictly proved.

There was no appeal against the award of Kshs.100,000/= for pain and suffering.

7. The High Court upheld the award of Kshs.174,845/= on account of special damages.

8. As regards the award for loss of dependency, the High Court reduced it to Kshs.1,123,200/=. The learned judge observed that the deceased, who was a police officer, was 42 years old at the date of death and left behind a widow and three children aged 10, 7 and 5. The deceased's gross salary was Kshs.37,771/=. The trial court had found that his net salary was Kshs.19,000/= and adopted a multiplier of 18 and a dependency ratio of 2/3 in arriving at the figure of Kshs.2,736,000/=, less 25% contribution, coming to a net sum of Kshs.2,188,800/=.

9. The learned judge noted that Kshs.5,606/= of Kshs.19,000/= that had been taken to be the net salary represented a SACCO dividend which was paid once every year, meaning that the actual net salary was Kshs.13,498.80, which he rounded up to Kshs.13,500/=.

The court also reduced the multiplier from 18 to 13, saying that the trial court should have taken into account the risky work of a police officer as well as other imponderables of life. It computed the award for loss of dependency under the Fatal Accidents Act as follows:

Kshs.13,500 x 12 x 13 x 2/3, less 20% contributory negligence, coming to net sum of Kshs.1,123,200/=.

The award of Kshs.100,000/= for pain and suffering as well as the award of Kshs.174,845/= for special damages were equally subjected to the 20% contributory negligence. The costs of the appeal were awarded to the respondent.

10. The appellants were aggrieved by the High Court judgment and preferred an appeal to this Court. They argued that the learned judge erred in law in applying the wrong multiplier and multiplicand and by failing to consider their written submissions and exhibits regarding the deceased's earnings. They also faulted the learned judge for considering new and irrelevant issues and for awarding full costs to the respondent whereas the appeal had only succeeded partially.

11. **Mr. Ombati,** learned counsel for the appellants, submitted that the deceased's last payslip showed that he was 41 years old. He would have worked up to the compulsory retirement age of 60 years. The correct multiplier was 19 years and not 13 years, counsel submitted.

12. Regarding the multiplicand, Mr. Ombati submitted that it was wrong for the learned judge to reduce the same from Kshs.19,000/= to Kshs.13,500/=. And regarding costs, counsel submitted that since the appeal had partially succeeded, the learned judge ought to have awarded half costs.

13. **Mr. Kenei**, learned counsel for the respondent, submitted that this being a second appeal, the appeal was limited to issues of law only. There were good reasons for reducing the multiplier and the multiplicand as stated by the learned judge, counsel submitted.

14. As regards costs, Mr. Kenei submitted that costs follow the event, and since the respondent had won the appeal she was entitled to full costs. In any event, he added, an award of costs is at the discretion of the court and an appellate court should not interfere with the exercise of a lower court's discretion unless there are good reasons for so doing.

15. We have carefully perused the record of appeal and considered the grounds of appeal and submissions by counsel, as well as the authorities filed. The jurisdiction of this Court on a second appeal in Civil matters is prescribed by **section 72(1)** of the **Civil Procedure Act**. The section states:

> ***"72 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely — (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."***

16. This Court has re-affirmed the above quoted provisions in several decisions, such as **AGNES KWAMBOKA OMBUNA v BIRISIRA KERUBO OMBUNA [2014] eKLR**. We think that the grounds of appeal raised by the appellant are within the confines of **section 72** cited herein above.

17. In the first ground of appeal, the learned judge was faulted for applying the wrong multiplier and multiplicand in calculating damages for loss of dependency, hence arriving at an incorrect award. In **ROGER DAINTY v MWINYI HAJI & ANOTHER [2004] eKLR** this Court held that what is a reasonable multiplier is a question of fact to be determined from the peculiar circumstances of each case.

18. In the same appeal, the court held:

> ***"To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work the deceased was doing, the prospects of promotion and his expectation of working life."***

We may also add that other important factors for consideration are the age of the deceased and what his anticipated retirement age was.

19. In **BOARD OF GOVERNORS OF KANGUBIRI GIRLS HIGH SCHOOL & ANOTHER v JANE WANJIKU & ANOTHER [2014]eKLR**, this Court stated that:

> ***"The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason."***

20. In this appeal, the deceased was aged 41 years old and was an Administration Police Officer in the rank of a Corporal. The first appellate court reduced the multiplier from 18 to 13. In **ROGER DANITY V MWINYI OMAR HAJI & ANOTHER** (supra) the deceased was 27 years old at the time of his death. The appellant's advocates suggested a multiplier of 25 at the trial, while the respondents' advocates suggested a multiplier of 10. The learned judge accepted a multiplier of 10.

On appeal, this Court found no justification for interfering with the trial judge's determination of 10 as the reasonable multiplier.

In the matter before us, we do not agree that the learned judge erred in adopting a multiplier of 13, bearing in mind the circumstances that he took into account in arriving at that multiplier, and which the trial court had not considered.

21. Turning to the issue of the multiplicand, we accept the respondent's advocate's submission that it is the net income that should be taken into consideration, not the gross sum. The logic behind that holding

is simple: what was available to the deceased and was being expended towards maintenance of his family was his monthly gross income, less statutory deductions. A one-off income in a year cannot be taken into account in considering a deceased person's monthly income for purposes of determining a reasonable multiplicand.

22. In **CHUNIBAHI J. PATEL & ANOTHER v P.F. HAYS & OTHERS [1957] E.A. 748,** the Court of Appeal for Eastern Africa, commenting on the formular for assessing damages in fatal accident cases stated:

> ***"The court should find the age and expectation of the working life of the deceased and consider the ages and expectation 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."***

23. The deceased's payslip for July 2009 showed that his basic salary was Kshs.23,165/=, medical allowance Kshs.750/= hardship allowance Kshs.1,200/=, housing supplementation Kshs.2,050/= police risk allowance Kshs.5,000/= and SACCO share dividends – Kshs.5,606/=, making his total earnings Kshs.37,771/=.

If the SACCO share dividends are subtracted, the monthly gross income was Kshs.32,165/=. The statutory deductions were: WCPS contribution of Kshs.463/=, PAYE of Kshs.3,918.25 and NHIF of Kshs.320/=, a total of Kshs.4,701.25. The gross income of Kshs.32,165/= less statutory deductions of Kshs.4,701.25 leaves a balance of Kshs.27,463.75 which should have been the correct multiplicand.

24. In computing a reasonable multiplicand, voluntary deductions or any deductions from the deceased's salary that were not statutory in nature, for example, SACCO contributions and loan repayments, should not have been subtracted from the gross earnings. This is because such deductions formed part of the deceased's regular income which he would have expended in maintaining his dependants but chose either to save or utilize in repayment of a loan, which, more often than not, was acquired for the benefit of the deceased's dependants.

25. The trial court as well as the first appellate court cannot be faulted for not subtracting the deceased's loan repayments and savings that went to Harambee SACCO in computing the multiplicand. It is the appellant's advocates who erred in advancing their clients' claim. But since the appellants did not raise any complaint regarding the aforesaid non-statutory deductions, we have no basis of interfering with the High Court's assessment of the multiplicand. We therefore dismiss the ground of appeal on the issue of the multiplicand.

26. The last ground of appeal relates to costs. It trite law that costs follow the event. Before the trial court, the plaintiffs, now the appellants, having succeeded in their case, were entitled to full costs of the suit.

As regards costs of the appeal before the High Court, we agree with the appellants that the appeal was partially successful. It follows therefore the respondent was entitled to half of the costs, and we so find and order. The appellant is also entitled to half of the costs of this appeal. Interest on the actual sums payable plus costs of the initial suit as well as those of the first appeal shall be with effect from the date of the respective judgments.

DATED** and **DELIVERED** at **KISUMU this 2nd day of June, 2016.

D. K. MARAGA

…….……

JUDGE OF APPEAL

D. K. MUSINGA

……..

JUDGE OF APPEAL

A. K. MURGOR

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR