IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 301 OF 2012

BETWEEN

EASY COACH LIMITED.....APPELLANT

AND

JOHN THOMAS AKALONGO

ROSE OWANO AKALONGO

(The Administrators of the Estate of Nipher Akalongo Otembo).....RESPONDENTS

(An Appeal from a Judgment of the High Court of Kenya at Busia (Muchemi, J.)

dated 11th June, 2012

in

H.C.C.C. NO. 4 OF 2008)

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JUDGMENT OF THE COURT

1. On or about the 9th October, 2007, **Nipher Akalongo Otembo** (the deceased) was travelling along Kisumu-Busia road as a fare paying passenger in the appellant's bus registration No. KAV 066S. The bus plunged into Suo River and the deceased suffered fatal injuries. After obtaining a limited grant of letters of administration, her parents, John Thomas Akalongo and Rose Owango Akalongo, the respondents in this appeal filed a suit in the High Court at Busia and claimed damages. After hearing the case, Muchemi J found the appellant and its driver 100% liable and awarded the respondents a total of Kes.6,600,000/= damages. This appeal is against that award.

2. In its memorandum of appeal comprising 6 grounds, the appellant faulted the learned trial Judge for granting damages to the deceased's siblings who were not legal dependants of the deceased; and for applying both a multiplier and a multiplicand which had no legal basis and thus ended up making an award that was so inordinately high as to amount to an erroneous estimate of the loss suffered by the respondents.

3. Presenting the appeal before us, Mr. Murimi, learned counsel for the appellant, argued that the award in this case was under the Fatal Accidents Act in favour of both the deceased's parents and siblings. As is clear from Section 4 of the Fatal Accidents Act, legal dependants of deceased persons are their spouses, children and parents. Deceased persons' siblings are not their legal dependents. In the circumstances, the learned Judge erred in making an award in this case in favour of the deceased's siblings.

4. Mr. Murimi also faulted the learned Judge for basing the multiplier on the career expectation of the deceased instead of basing it on the average age of the deceased's parents. Counsel relied on the High Court decision in the case of **Kenya Horticultural Exporters Ltd v. Julius Munguti Maweu, [2010] eKLR** in support of that submission. Considering that the deceased's mother and father were respectively 49 and 51 years old, counsel cited to us the cases of **Roger Dainty v. Mwinyi Omar Haji & Another, [2004] eKLR** in which the deceased was 24 years old and a multiplier of 10 was applied and **Moses Ngarachu Muthoria v. D K Githenya & Another, [2001] eKLR** in which the deceased was 25 and a multiplier of 15 was applied and urged us to find that the learned Judge should have applied a multiplier of 10 years.

5. At the time of her death, the deceased was on a three month contract earning Kes.90,000/= per month. Counsel faulted the learned Judge for basing the multiplicand on that salary instead of basing it on the sum of Kes.5,000/= the deceased's mother said she received from the deceased every month. He argued that in the absence of evidence that the deceased's contract of employment was going to be perpetually renewed, the learned Judge should have alternatively based the multiplicand on the minimum wage of Kes.4,000/= per month for skilled workers. In the further alternative, counsel submitted that the learned Judge should have made a global award of between Kes.60,000/= and Kes.100,000/= as was done in the cases of **Daniel Wenwa Owao v. Lake Tanners & Another(Nairobi HCCC No. 254 of 1987); Victoria Ngendo v. K. Njoroge(Nairobi HCCC No. 1438 of 1989)**; and **Monica Muthoni Mwanga v. Peterson Wanjohi& Another(Nairobi HCCC No. 633 of 2001)**.

6. With those submissions, counsel urged us to allow this appeal and reduce the award to about Kes.2,400,000/= which the appellant thinks would be a reasonable award and which sum it has already paid to the respondents as a sign of good faith.

7. Mr. Kweyu, learned counsel for the respondents, dismissed this appeal as unmeritorious afterthought. He said this is because in the High Court, the appellant did not contest the claim by the deceased's siblings and the learned Judge was not invited to base the multiplier on the ages of the deceased's parents. Instead counsel for the appellant had proposed a multiplier of 14, which they now want reduced to 10 without any reasonable basis. Counsel cited the case of **Sheikh Mushtaq Hassan v. Nathan Mwangi Kamau Transporters & 5 Others, (1982-88) 1 KAR 946,** in which damages were awarded to the deceased's siblings for loss of dependency and submitted that the learned Judge cannot therefore be faulted for the award she made in this case.

8. Counsel further argued that the payment of Kes.2,400,000/= was a condition for the grant of stay of execution and was not made out of the appellant's act of philanthropy. He said there is no basis for disturbing the learned Judge's award. On the multiplier, counsel argued that the deceased, at the age of 24 with a Diploma in Journalism and Public Relations, was a young lady with a bright future. At the time of her death, she was working for Kenya Aids Indicators Survey earning Kes.3,000/= per day which translated to Kes.90,000/= per month. She has previously worked for the Arid Lands Information Network, Eastern Africa where she was earning Kes.50,000/= per month. Counsel argued that the learned Judge cannot in the circumstances be faulted for basing the multiplicand on the deceased's last salary. He said besides the Kes.5,000/= the deceased gave to her mother, she also supported her father and siblings. Moreover, counsel concluded, the claim in this case was under both the Law Reform and Fatal Accidents Acts. He urged us to dismiss this appeal with costs.

9. We have considered these rival submissions and carefully read the record of appeal. As we have pointed out, this appeal is only against the quantum of damages awarded.

10. Counsel for both the parties agree that the law is now settled on the principle applicable in an appeal

against an award of damages. As this Court stated in the cases of **Butt v. Khan (1982-88) 1KAR 1**, and **Idi Shabani v. Nairobi City Council (1982-88) 1KAR 68** and many others thereafter, an appellate court can only disturb an award of damages if the same is so inordinately high or low as to represent an entirely erroneous estimate or if it is based on a wrong principle.Is that the case in this appeal?

11. As we have stated, the appellant challenges the award in this case on two points: that there was no legal basis for awarding damages for loss of dependency to the deceased's siblings and that there was no evidence to support both the multiplier and the multiplicand that the learned Judge applied.

12. On the first point, counsel for the appellant submitted that the award in this case was for loss of dependency only and that under the Fatal Accidents Act, which governs awards under that head, the only dependants of deceased persons, as per the definition of that term in **Section 4** thereof, are their spouses, their children and their parents. Counsel therefore faulted the learned Judge in this case for making an award to both the parents and siblings of the deceased.

13. This argument is not entirely correct. Paragraph 1 of the amended plaint makes it quite clear that the claim in this case was under both the Law Reform and the Fatal Accidents Acts. In basing the multiplier on the deceased's career prospects, we have no doubt that the learned Judge considered and made an award under the Law Reform Act. This view is fortified by the fact that in her entire judgment, the learned Judge never made mention of the sum(s), if any, that the deceased used to give to either her parents or her siblings. So the issue of making an award for loss of dependency to the deceased's siblings does not arise. We therefore do not need to consider the provisions of Section 4 of the Fatal Accidents Act, which as we have said, defines the dependants of deceased persons. That leaves us with the issue of the multiplier and the multiplicand that the learned Judge applied.

14. The learned Judge applied a multiplier of 30 years, which the appellant considers so inordinately high as to represent an erroneous estimate. Is that so? We think not.

15. It is not in dispute that at the time of her death, the deceased was 24 years old. So to the retirement age of 60, she had a remaining working life of 36 years and perhaps more as she was in the private sector whose retirement age is, in most cases, more than the Government one of 60 years. So the multiplier of 30 years that the learned Judge applied is not so inordinately high as to represent an erroneous estimate. Although put in her position we would have applied a lesser multiplier, the law is that we should not substitute our view with that of the trial Judge. We therefore have no legal basis for disturbing the multiplier of 30 that the learned Judge applied. The appeal on that issue must also fail.

16. We are, however, of the view that the appellant is on firm ground on the issue of the multiplicand. It is not in dispute that at the time of her death, the deceased was working for Kenya Aids Indicators Survey earning Kes.3,000/= per day which translated to Kes.90,000/= per month. In the circumstances, counsel for the appellant urged us to find that the deceased's salary was uncertain and use the minimum wage of Kes.4,000/= for skilled workers as the basis for determining the multiplicand.

17. We reject this argument for two reasons. One, there is no evidence that the deceased's contract would not have been renewed. The fact that the contract with Kenya Aids Indicators Survey had no renewal clause does not mean it would not be renewed. Secondly, there is also no evidence that the deceased could not secure another job after the expiration of her contract with Kenya Aids Indicators Survey. Moreover, there is evidence that she had previously worked for the Arid Lands Information Network, Eastern Africa and earned Kes.50,000/= per month while at the time of her death she was earning Kes.90,000/= per month. That is evidence of upward progression and the reasonable deduction from that is that the deceased would perhaps have secured another job with even better pay.

18. But this is all surmise. The deceased could have very well ended up with a less paying job. To be fair to both sides, we find that an average of the two known salaries that the deceased earned less what she would have spent on herself, should be a reasonable basis for determining the applicable multiplicand. That is, Kes.50,000/= plus Kes.90,000/= less 50% thereof which works to Kes.35,000/= but we round to Kes.30,000/=. Applying this as the basis for the multiplicand and the multiplier of 30 years works to a

final award of (30,000 times 30 times 12 divide by 3) =Kes.3,600,000/= which we award to the respondents plus costs thereon both in this appeal and in the court below. The said sum shall attract interest at court rates from the date of the High Court judgment until payment in full and final settlement is made of course making allowance for the part payment already made to the respondents.

19. We accordingly allow this appeal to the extent stated above.

DATED and Delivered at Kisumu this 18th day of December, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR