



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 85 OF 2010

BETWEEN

THE BOARD OF GOVERNORS OF EKALAKALA

SECONDARY SCHOOL APPELLANT

AND

FRANCISCA KATUMBI NDWILI (suing as

Legal Representative of the Estate of

SHADRACK KYALO MWANIA) RESPONDENT

(An appeal from the judgment and decree of the High Court at Kenya at Embu

(W. Karanja, J.) dated 29th July, 2009

in

H.C.C.C NO 86 OF 2007)

JUDGMENT OF THE COURT

1. By a Plaint filed in the High Court, the respondent, in her capacity as the legal representative of the estate of Shadrack Kyalo Mwanja (deceased), commenced proceedings against the appellant seeking *inter*

alia damages under the Law Reform Act, Chapter 26, Laws of Kenya and the Fatal Accidents Act, Chapter 32, Laws of Kenya for fatal injuries that were sustained by her husband (deceased) in a road accident.

2. On 2nd August, 2007, the deceased was a lawful passenger in the appellant's school bus registration number KAN 854 U and was traveling to the then Rift Valley Province on an

educational trip. At Ngoliba, along the Matuu-Thika road, the school bus rammed into the rear of a lorry registration number KAA 964 V occasioning the deceased fatal injuries from which he died. The respondent averred that the accident occurred as a result of negligence on the part of the appellant's driver hence the appellant was vicariously liable.

3. On 29th October, 2007, the parties herein recorded a consent judgment on liability in favour of the respondent, which was apportioned at the ratio of 95:05% to the appellant and respondent respectively. The matter that fell for consideration by the trial court was the assessment of the damages payable.
4. The appellant testified that the deceased was employed as a teacher at the appellant's school and was also a pastor at the Redeemed Gospel Church. PW2, Mary Nduku Mwambi (Mary), the then Acting Senior Principal Human Resource Officer at the Teachers Service Commission, produced the deceased's pay-slips and a letter dated 31st October, 2007 wherein she had made a projection that the appellant would have earned an income of Kshs. 85,612/= per month in fifteen years if he had not passed away. She further testified that the deceased received a salary increment every year. PW4, Jones Muthiani Kabingo, a pastor at the Redeemed Gospel church, testified that the deceased was a pastor in the said church. He stated that the deceased earned an additional monthly salary of between Kshs. 10,000/= and Kshs. 15,000/= from the church depending on the amount of contributions given by the congregation. The respondent testified she was a housewife and that her three minor children, the deceased's parents and herself were totally dependent on the deceased.
5. The learned Judge (W. Karanja, J)(as she then was), arrived at the sum due under the Fatal Accidents Act by using a multiplicand of 50,000/= as follows: $50,000/= \times 12 \times 16 \times \frac{2}{3} = 6,400,000/=$ in her judgment dated 29th July, 2009. After deducting 5% contribution she awarded Kshs. 6,137,000/= as damages to the respondent which was made up as follows:

Special damages (funeral expenses) - Kshs.	50,000/=
Pain and suffering - Kshs.	10,000/=
Under Fatal Accidents Act -	<u>Kshs. 6,400,000/=</u>
Subtotal - Kshs.	6,460,000/=
Less 5% contribution -	<u>Kshs. 323,000/=</u>
Total - Kshs.	6,137,000/=

6. It is against the said judgment that the appellant has filed this appeal based on the following grounds:
 - ***The Learned Judge erred in law and in fact in proceeding on the wrong principles vii-a-vis the evidence before her and laid down principles of law thus arriving at a judgment that was erroneous in the circumstances.***
 - ***The learned judge erred in law and in fact in failing to consider the appellant's submissions and authorities on the question of general damages.***
 - ***The learned judge erred in law and in fact in her assessment of the quantum of damages and thus arrived at an erroneous award that was manifestly excessive in the circumstances.***
 - ***The Learned Judge erred in law and in fact by giving undue weight to the evidence of PW2, the Human Resource Director with the Teachers Service Commission to the detriment of the appellant.***
7. At the hearing of this appeal, Mrs. Lucy Njiru, learned counsel for the appellant, submitted that the only issue in this appeal was quantum of damages. She contended that the learned Judge ignored the deceased's pay-slips that were produced. She stated that as per the said pay-slips, the

- deceased's monthly salary was Kshs. 19,210/= and that the trial court ought to have used the said figure as the multiplicand. She maintained that the learned Judge relied on extraneous evidence when she adopted a multiplicand of Kshs. 50,000/= per month. According to Mrs. Njiru, the learned judge relied on the projections made by Mary of what the deceased would have earned in fifteen years. She submitted that the projections were dependent on many factors such as the deceased getting higher education, discipline, performance and promotion which were not automatic. She maintained that the learned Judge erred in ignoring these factors and in failing to rely on the pay-slips.
8. Mrs. Njiru contended that the learned Judge failed to consider the appellant's monthly expenses, in assessing the damages under the Fatal Accidents Act. She further submitted that the lump sum awarded was not discounted and the same was excessive. She pointed out that the appellant had already paid Kshs. 2,000,000/= to the respondent. She finally urged this Court to allow the appeal.
 9. Mr. Musyoka Annan, learned counsel for the respondent, in opposing the appeal, maintained that the letter dated 31st October, 2007 produced by Mary was not only a projection of what the deceased would have earned but also contained details of the deceased's salary prior to his death. He further maintained that the pay-slips were one facet of evidence produced to show the deceased's earnings. Mr. Musyoka submitted that had the deceased pursued a Masters Degree he would have been earning a monthly gross salary of Kshs. 44,000/=. He contended that there was no evidence that the deceased would not have been promoted.
 10. Mr. Musyoka emphasized that apart from his teaching job, the appellant obtained additional income as a Pastor. He submitted that the sum awarded as damages was discounted and that the deceased's living expenses were considered in the trial court's judgment. He finally submitted that assessment of damages was purely at the discretion of the trial court which according to him was exercised properly.
 11. Being a first appeal, this Court has the duty of re-evaluating the evidence, assessing it and making its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court we neither saw nor heard the witnesses. See **Selle v Associated Motor Boat Company Ltd. [1968] EA 123.**
 12. We have considered the record of appeal, the grounds of appeal, submissions by learned counsel and the law. What this Court is being called upon to do in this appeal, is to set aside the multiplicand used by the trial court in assessing the damages under the Fatal Accidents Act. It is trite law that assessment of damages is purely at the discretion of the trial court. Therefore, for this Court to interfere with the discretion of the trial court we must be satisfied that the learned Judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award she made is too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. See **Kemfro Africa Ltd t/a Meru Express Service, Gathogo Karimi v. A.M. Lubia and Another [1982 – 88] 1 KAR 727.**
 13. We cannot help but note from the record that the Learned Judge in the judgment dated 29th July, 2009 held as follows:

'After considering the figures given by both counsel and the projection by PW2, I find a net salary of Kshs. 50,000/=justifiable.I will therefore apply a multiplicand of 50,000/= and a dependency of 2/3 . '

Case law relating to how a suitable multiplicand should be determined under the Fatal Accidents Act are varied; some propose that the multiplicand should be the deceased's basic pay less statutory deduction and living expenses (see **Dainty -vs- Haji & another- Civil Appeal No. 59 of 2004**); others propose that the multiplicand should be the deceased's basic pay in addition to allowances he is paid less statutory deductions and living expenses(see **Kenya Horticultural Exporters Ltd -vs- Julius Munguti Maweu- Civil Appeal No. 9 of 2004**); while others propose that the multiplicand should be the deceased's net salary less living expenses (see **Kenya Bus Services Ltd. -vs- Dina Kawira Humphrey – Civil Appeal 295 of 2000**). In **Gammel -vs- Wilson (1981) 1ALL ER 578**, Lord Scarman at page 593 held,

'The problem in these cases which has troubled the Judges since the decision in Picketts case, has been the calculation of annual loss before applying the multiplier (i.e the

estimated number of lost working years accepted as reasonable in the case)... The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest was reasonably likely to achieve. Subtle mathematical calculations, based as they must on events or contingencies for a life which he will not live, are out of place, the Judge must make the best estimate based on known facts and his prospects at time of death.'

We find that the learned Judge clearly misdirected herself by using a multiplicand of Kshs. 50,000/= which was not supported by any evidence. We further agree with the appellant's counsel that learned Judge ignored the deceased's pay-slips that were produced. The deceased herein died on 1st August 2006, hence we shall use the deceased's payslip at the time of his death which is the July, 2006 pay-slip to calculate the multiplicand. From the payslip, we will add the deceased's basic salary of Kshs. 20,655/=, House allowance of Kshs. 12,000/=, Medical allowance of Kshs. 2,246/= and Transport allowance of Kshs. 1,482/= to get the deceased's total earnings of Kshs. 36,383/=. We find the multiplicand that should have been used by the trial court was the deceased's total earnings less statutory deductions (Kshs. 36,383/= - Kshs. 6,705/= ,being the tax payable).The multiplicand should have been Kshs. 29,678/=. Therefore the amount of damages under the Fatal Accidents Act should have been calculated as $29,678/= \times 12 \times 16 \times 2/3 =$ Kshs. 3,798,784/=. We further find that the trial court did give a discounted figure in the damages awarded and also considered the deceased's living expenditure.

14.The upshot of the foregoing is the appeal herein is allowed. Accordingly, the damages awarded under the Fatal Accidents Act, by the trial court is hereby set aside and an award of Kshs. 3,665,844.80/= is entered in favour of the respondent being damages under the said Act. Therefore, the total damages awarded are as follows:

Special damages (funeral expenses) - Kshs.	50, 000/=
Pain and suffering - Kshs.	10, 000/=
Under Fatal Accidents Act -	<u>Kshs. 3,798,784/=</u>
Subtotal - Kshs.	3,858,784/=
Less 5% contribution -	<u>Kshs. 192,939.20/=</u>
Total	Kshs. 3,665,844.80/=

The appellant shall have half of the costs of this appeal.

Dated and delivered at Nyeri this 25th day of July, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR