REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 96 OF 2013

INNOCENT KETIE MAKAYA DENGE …….....……APPELLANT

VERSUS

PETER KIPKORE CHESEREK……1ST RESPONDENT

VERONICA JEPCHUMBA …….....2ND RESPONDENT

(Suing as the legal representatives of the Estate of ANDREW KIMUTAI CHEBOI)

(An Appeal from the Judgment and Decree of the Principal Magistrate Honourable D. Alego (PM), in Eldoret CMCC No. 374 of 2012, dated and delivered on 18th July 2013)

JUDGMENT

1. This appeal arises from the judgment and decree of the Chief Magistrate's court at Eldoret in CMCC No. 374 of 2012.

   The appellant was the defendant in the lower court. He had been sued by the respondents in their capacity as the legal representatives and Administrators of the Estate of *Andrew Kimutai Cheboi* who had lost his life after sustaining fatal injuries in a road traffic accident.

2. In their plaint dated 17th May, 2012, the respondents pleaded that on 7th August 2010, the appellant, his servant or agent negligently managed or controlled motor vehicle Registration No. KAQ 246 R as a result of which it veered off the Eldoret Kapsabet road and violently knocked down the deceased who was a pedestrian causing him fatal injuries. They prayed for special and general damages under the *Law Reform Act* and the *Fatal Accidents Act.*
3. In his statement of defence dated 4th June, 2012, the appellant denied liability and attributed negligence to the deceased.
4. After a full trial, the learned trial magistrate entered judgment on liability at 100% for the respondents against the appellant. She awarded the respondents a total sum of Kshs. 1,490,650 in both special and general damages.
5. The appellant was aggrieved by the decision of the trial court on quantum of damages. He proffered an appeal to the High Court relying on the following grounds:

   (i) That the learned magistrate erred in law and fact in the assessment of the damages awardable to the respondents, leading to excessive amounts contrary to the well-established principles in law.

   (ii) That the learned trial magistrate erred in law and fact in adopting the wrong principles

in assessment of damages awardable to the respondent.

(iii) That the learned trial magistrate erred in law and fact in awarding Kshs. 30,000/- for pain and suffering.

(iv) That the learned trial magistrate erred in law and fact in failing to discount the multiplier under loss of dependency.

(v) That the learned trial magistrate erred in law and fact in awarding damages for loss of consortium.

(vi) That the learned trial magistrate erred in law and fact in awarding special damages of Kshs.80,650/- contrary to the principles established under the law.

(vii) That the learned trial magistrate erred in law and fact by awarding damages both under the Law Reform Act as well as the Fatal Accidents Act contrary to the well laid down principles in law.

(viii) That the learned trial magistrate erred in law and in fact by failing to discount the total award by 10% to cater for lump sum payment and/or for the accelerated payment.

6. By consent of the parties, the appeal was prosecuted by way of written submissions; those of the appellant were filed by his advocates *Onyinkwa & Co. Advocates* on 7th September, 2015 while those of the respondents were filed on 4th November, 2015 by the firm of *A.K Chepkonga & Co. Advocates*.

   The appellant in his submissions while conceding that assessment of damages is a matter of judicial discretion submitted that in this case, the trial magistrate failed to exercise her discretion judiciously as the general damages of Kshs.30,000/- awarded under the head of pain and suffering were excessive as the deceased had died immediately after the accident; that the multiplier of 26 years used in calculating damages for loss of dependency was unjustified and that a multiplier of 15 years would have been more appropriate; that the trial magistrate erred in awarding damages for loss of consortium in the sum of Kshs. 150,000 while no evidence was led to prove loss of consortium and the trial court did not establish any basis for such an award. It was the appellant's submission that the court should set aside the said award in its entirety. Relying on the authority of ***Kemfo Africa Limited t/a Meru Express Services (1976) and Another vs Lubia & another (1987) KLR 30,*** the appellant submitted that the trial magistrate erred in not deducting the Kshs. 100,000 damages awarded for loss of expectation of life from the damages awarded under the Fatal Accidents Act and invited the court to do so on appeal.

7. Finally, counsel submitted that the total amount of damages awarded to the respondents should be discounted by a reasonable amount to allow for lumpsum payment and where appropriate the widow's re-marriage. He proposed that the amount be discounted by 10%. For this proposition, he relied on the authorities of ***Wangui Kiberenge Kibugi V Peter Kinyanjui (NRB) HCC No. 2899 of 1993 (1993) LLR 8211*** and ***Anne Wanjiku Ngugi & Another Vs Attorney General (2005) eKLR.***
8. The respondents on their part submitted that the damages awarded by the trial court should not be disturbed as the trial magistrate in arriving at her decision had exercised her discretion judiciously. They submitted that there was no evidence that the deceased had died on the spot and in their view, he had died while undergoing treatment; that the adoption of a multiplier of 26 years was appropriate in the circumstances of this case and that the trial magistrate was correct in awarding damages for loss of consortium. Counsel further contended that the submission by the appellant that Kshs. 100,000 awarded as damages for loss of expectation of life should be deducted from the damages under the Fatal Accidents Act was based on a misapprehension of the law and that the total award made under the two regimes of the law should remain intact.
9. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. As the

first appellate court, I am duty bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See ***Selle V Associated Motor Boat Company ltd (1968) EA 123; Williamson Diamond Ltd V Brown (1970) EA 1.***

10. I have considered the evidence tendered before the trial court, the learned trial magistrate's brief judgment, the grounds of appeal, the submissions filed by the parties and all the authorities cited.

    This being an appeal challenging the trial magistrate's decision on quantum of damages only, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the damages awarded by the trial court. In the celebrated case of ***Kemfro Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another (Supra),*** the Court of Appeal expressed itself as follows;-

    "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…".

    In ***Mariga V Musila (1984) KLR 251*** the same court also stated as follows:

    "The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the

    judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles..".

    See also: ***Arkay Industries Ltd V AMani (1990) KLR 309*** and ***Butt V Khan (1982-88) KAR 1.***

11. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of general damages awarded to the respondent in view of the evidence on record. I will start with the damages awarded under the Law Reform Act. It is important to point out at this juncture that general damages under the Law Reform Act are awarded for the benefit of the deceased's Estate in two categories only namely for pain and suffering and secondly, for loss of expectation of life.
12. In this case, the appellant has not challenged the sum of Kshs. 100,000 awarded for loss of expectation of life. His only complaint was that this ought to have been deducted from the amount awarded for loss of dependency. I will deal with this complaint later but for now, since the validity of this award is not challenged, the same is upheld.
13. With regard to the award of Kshs. 30,000 for pain and suffering, the Record of Appeal at page 92 shows that the trial magistrate did not lay any basis for this award nor did she assign any reason for awarding Kshs.30,000/- for this head as opposed to any other amount. Damages under this head are usually determined by the length of time the deceased endured pain and suffering before death. Contrary to the submissions by the appellant, there is no evidence on record to prove that the deceased died on the spot. The death certificate produced as exhibit 2 proves that the deceased died at the Moi Teaching and Referral Hospital (MTRH) on the same day the accident occurred. This suggests that the deceased died while undergoing treatment and did not die at the scene of the accident. This means that the deceased must have endured pain and suffering as he was being transported to the hospital and before succumbing to his injuries. Though it is not clear from the evidence how long it took for the deceased to die after the accident, an award of Kshs. 30,000 for pain and suffering in the circumstances of this case was not in my view inordinately high as to be unreasonable. I thus find no good reason to interfere with this award. It is accordingly upheld.

14. Turning to the award for loss of dependency under the Fatal Accident's Act, there is evidence that the deceased was a businessman and a farmer. PW2 who was the deceased's wife testified that he used to earn Kshs.15,000/- per month from his timber and construction stones business and that he was the family's sole breadwinner. They had been blessed with four children and the deceased was responsible for paying their school fees, provision of food and clothing. In computing damages under this head, the trial magistrate used a multiplicand of KShs.10,000. This was not challenged on appeal and the same is consequently upheld. In fact, the only figure in the formula for calculating loss of dependency that was contested on appeal is the multiplier of 26 years.
15. Turning to the multiplier, my analysis of the evidence shows that the deceased died at the young age of 34 years. He was a businessman which means that his working life was not dependent on any prescribed retirement age. There is evidence that he was in good health prior to the accident. He would thus have continued with his business and would have continued earning probably upto about 60 years of age given the kind of business he was engaged in and the vagaries of life. The multiplier of 26 years adopted by the trial magistrate was in the circumstances not unreasonable. The same is upheld.
16. I have noted that the appellant did not challenge the dependency ratio of 1/3 adopted by the trial magistrate. As noted earlier, there is evidence that the deceased was a married man who was the sole breadwinner for his wife, the 2nd respondent and four children. In the premises, I find that a dependency ratio of 2/3 would have been more appropriate in this case. I am however not going to interfere with the discretion of the learned magistrate in adopting the lower dependency ratio of 1/3 since the same has not been raised as an issue in this appeal. The said dependency ratio is thus maintained. The damages for loss of dependency awarded by the trial court in the sum of Kshs.1,040,000 is therefore upheld.

17. At this stage, I wish to point out in passing that only dependants recognized under the Fatal Accidents Act are supposed to benefit from damages awarded for loss of dependancy**.** ***Section 4(1)*** of the ***Fatal Accidents act*** defines dependants as the wife, husband, parent and child of the deceased person. It is thus clear that siblings like the 1st respondent in this case are not recognized as dependants under the Act and should not share in the damages awarded for loss of dependency. Only the deceased's spouse, the 2nd respondent in the context of this case and the deceased's children should benefit from the award.
18. That said, I now turn to the appellant's submission that the award of loss of expectation of life should have been deducted from the amount awarded for loss of dependancy and that the total award should have been discounted by a reasonable amount to allow for lumpsum payment or remarriage of the widow.

    With much respect to learned counsel for the appellant, I do not find much substance in these submissions. The appellant correctly submitted that the respondents were entitled to seek for damages under both the Law Reform Act and the Fatal Accidents Act in view of the provisions of ***Section 2(5)*** of the ***Law Reform Act*** which confirms that the right conferred by or for the benefit of the Estate of a deceased person shall be in addition to and not in derogation of the rights conferred on the dependants of a deceased person under the Fatal Accidents Act.

19. The issue of whether damages awarded under the Law Reform Act should be deducted from those awarded for los of dependancy was addressed by the Court of Appeal in the ***Kemfro Africa Limited case*** (Supra) where the court after analyzing Section 2(5) of the Law Reform Act and Section 4(2) of the Fatal Accidents Act held interalia as follows:

> ***"The words 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 be taken into account and not necessarily deducted. It is sufficient 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".***

20. In the instant case, I agree with the appellant's submissions that the trial magistrate in her judgment did not give any indication that in assessing damages for loss of dependancy, she had taken into account the award for loss

of expectation of life. However, after re-evaluating the evidence, I find that though the trial magistrate did not expressly state that she had taken that award into account, it is apparent that she may have actually done so and this may explain why she adopted a dependancy ratio of 1/3 even though the evidence clearly pointed to a dependancy ratio of 2/3.

21. In addition, the court in the ***Kemfro Africa Limited*** case emphasized that the award should only be deducted from the damages awarded for loss of dependancy if it was proved that the people named as dependants were the same ones who would inherit the net estate of the deceased the rationale being that the dependants should not be allowed to benefit twice from the same death. In practice however, the awards under the Law Reform Act are only conventional sums capped to a minimum in order to ensure that the beneficiaries of an Estate are not over compensated for their loss.

As observed earlier, in this case, a conventional sum of Kshs. 100,000/- had been awarded. Taking all relevant factors into account, I am satisfied that the trial magistrate did not commit an error of law in failing to deduct the awards under the Law Reform Act from the amounts awarded for loss of dependency.

22. With regard to the submission that the total award should have been discounted, as noted earlier, that appellant relied on two authorities for this proposition. I have noted that the case of ***Wangui Kiberenge Kibugi V Peter Kinyanjui (Supra)*** was not attached to the appellant's submissions and only an extract from ***Odunga's Digest*** on ***Civil case Law and Procedure Volume II*** was availed. In ***Anne Wanjiku Ngugi & Another V Attorney General (supra)*** Hon. *Angawa J* did not lay any basis for discounting a sum of Kshs.50,000 from the total amount awarded to the plaintiff in that case to allow for lumpsum payment or early re-marriage. She did not cite any law or authority which she relied on to justify the said discount. Personally, I am not aware of any law or legal principle which allows for such discounts to be made from the total award due to a successful litigant and therefore, am not persuaded that the trial magistrate erred in not discounting any amount from the total sums awarded to the respondent.
23. With respect to the award of KShs. 150,000/- for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law.

There is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. The Law Reform Act and the Fatal Accidents Act which are the two statutes which govern the award of damages in fatal accident claims recognize only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency.

24. In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own.

In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside.

25. Lastly, on special damages, I agree with the appellant that though Kshs.80,650 was pleaded, only Kshs.24,200 was specifically proved. It is trite law that special damages must be specifically pleaded and proved.

The trial magistrate evidently erred in law when she awarded the respondents a sum of Kshs.80,650 as special damages when only KShs.24,200 had been proved. I therefore set aside the award of special damages in the sum of Kshs.80,650 and in its place substitute it with an award of KShs.24,200.

26. In conclusion, I set aside the judgment entered by the lower court and substitute it with a judgment for the respondents against the appellant on the following terms;

General Damages for Pain and suffering – Ksh. 30,000.00

General Damages for loss of expectation of life – Kshs. 100,000.00

General Damages for loss of dependancy – Kshs. 1,040,000.00

Special damages - - Kshs. 24,200.00

TOTAL - Kshs. 1,194,200.00

The above sum of Kshs. 1,194,200 shall attract interest at court rates from today's date until full payment.

The appellant shall bear the respondents costs in the lower court but as the appeal has partially succeeded, each party shall bear his or her own costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of December 2015

In the presence of:

Mr. Magut holding brief for Mr. Onyinkwa for the Appellant.

No appearance for the Respondents though duly notified.

Mr. Lobolia Court Clerk.