REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 40 OF 2017

1. JAMES NJIIRI

2. JAMES MUTHEE

3. EDWARD KARUMBA.....APPELLANTS

VERSUS

1. FPU

2. MJK.....RESPONDENTS

(Being an appeal from the Judgment and Decree of the Chief

Magistrate Court at Malindi by Hon. S. Wewa delivered on 26.7.2017)

CORAM: Hon. Justice R. Nyakundi

Mr. Mogaka for the Appellants

Mr. Wambua Kilonzo for the Respondents

JUDGMENT

James Njiiri, James Muthee and **Edward Karumba**, hereinafter referred as the applicants who were the defendants in the original trial filed this appeal challenging the Judgment by **Hon. Wewa (PM)** on assessment of quantum under the Law Reform Act and Fatal Accidents Act.

The memorandum of appeal forming the basis of their case on appeal comprises of the following grounds:

1. **The Learned trial Magistrate erred in Law and in fact by awarding Kshs.100,000/= for pain and suffering before death;**

2. The Learned trial Magistrate erred in Law and in fact by awarding Kshs.150,000/= for loss of expectation of life;

3. The Learned trial Magistrate erred in Law and in fact by applying a dependency ratio of 2/3; a multiplier of 31 years for the deceased who died aged 29 years; and a multiplicand of Kshs.17,061 as the deceased's monthly income when calculating loss of dependency and thus; the trial Magistrate was wrong in law and in fact by awarding Kshs.4,231,128/= for loss of dependency;

4. The Learned trial Magistrate erred in Law and in fact by failing to deduct the award made for loss of expectation of life from the total award as required under law; since the beneficiaries under the Law Reform Act and the Fatal Accidents Act are the same in order to avert double compensation.

5. The Learned trial Magistrate erred in Law and in fact in failing to consider all the evidence and submissions on record.

Procedural History

Francisca Pendo and **Mwaka Jefwa Kalu,** as legal representatives of the estate of the deceased of one BJ also known as **BJC,** filed suit on his behalf against the appellants seeking general damages and special damages under the Law Reform and Fatal Accident Act.

The deceased was on or about 20.11.2013 was lawfully riding a bicycle, when the 3rd appellant so negligently drove, managed and or controlled motor vehicle registration number KBW 519X , that the same lost control and hit the deceased from behind and as a result whereof the deceased sustained injuries.

By way of the plaint an action was commenced on 23.5.2016, the particulars of negligence of the 3rd appellant are as pleaded in paragraph 4 of the plaint. The deceased died intestate at the age of 29 years and was survived with the **Widow FU, mother – MJK, 5 children naming MN, PLB, EBJ, FTB.**

From these facts the respondents moved to call evidence to discharge the burden of proof on a balance of probabilities to award of damages under the Law Reform and Fatal Accidents Act.

PW 1 FP, gave evidence on oath that following the death, she applied for a grant of Letters of Administration together with his mother the 2nd Respondent. The respondents position was that the life of her husband was cut short as a result of the negligent acts of the 3rd appellant. She did give particulars of financial support the deceased provided to her, the children and the mother in law. The evidence given by the respondent confirmed the expenses incurred to inter the body which included funeral expenses, transport, coffin and other accessories.

In all, the respondent seemed to have proved specials of Kshs.36,225/= as confirmed from the judgment of the court. The benefit for the estate of the deceased for loss dependency was assessed at Kshs.4,231,128/= applying an inclusive of daily income of Kshs.1,500/= and ratio of dependency of 2/3. On the other hand at a glance under the Law Reform the Learned trial Magistrate awarded Kshs.150,000/= for loss expectation of life. According to the Judgment Kshs.72,450/= was also awarded to cater for funeral expenses incurred whereas pain and suffering of Kshs.100,00/= on ground that the deceased met his death after 4 hours from the time the accident occurred.

The appellants case is that the approach taken by the Learned trial Magistrate was erroneous and against the well laid down principles on lost years, loss of expectation of life and other expenses.

According to the appellants, there is need to interfere with the Judgment to indicate what was factored in exercising discretion to award damages under the various items.

Submissions by the appellant Mr. Mogaka counsel for the appellant submitted and build a strong case for this court to evaluate and subject the trial court record to a fresh scrutiny.

The appellant counsel further noted and argued that there are a number of decisions of the court as to the nature and measure of damages which the Learned trial Magistrate failed to appreciate and apply to the facts of this case. The cases on point refers to: **Lakhani & 2 others – vs- Ismail Kamau [2004] eKLR , Lucy Njoki Chege –vs- James macharia Kungu & Another [2005] eKLR, Kamunya –vs- Kibe [2005] eKLR, The Regulation of Wages (General) (Amendment) Order, 2013 Legal Notice No. 197.**

According to counsel broadly, submitted on issues which in his view clearly submitted that the trial Magistrate erred in not finding that the assessment was excessive and exaggerated.

In counsel contention the multiplier of 31 years applied by the trial Magistrate in respect of the deceased meant that he was accorded retirement age of public servants which in his view was an error of fact and Law. He proposed a multiplier of 15 years and multiplicand of 1/3 to be appropriate.

Mr. Wambua Kilonzo for the respondents contended that the resultant award was based on clear principles of law and analysis of the total evidence adduced by the respondents. It was the respondents case and submissions that the deceased earned Kshs.1,500/= per day which translates to Kshs.45,000/= per month. The respondent counsel further submitted that the deceased was a fish monger though no cogent evidence was placed before court on this assertion. Since it was not disputed that the deceased was a mason, counsel contended that the average of Kshs.17,061/= being minimum wage rate was a correct income to be applied to calculate lost years.

I have considered the evidence of both counsels, submissions and the Judgment of the trial court. Further, the authorities submitted by the respective counsels in the lower court held view on appeal as a guide to the assessment of damages under the Law Reform and Fatal Accidents has and been taken into account.

Analysis

In the instant appeal what is at stake between the appellants and the respondents linkers around the question of the appropriateness of the award of damages on lost years in the terms of the Fatal Accident Act. For our purposes the duty of an appellate court is well set out in the case of **Ann Wambui Nderitu vs Joseph Kiprono Ropkoi & Another CA. No. 345 of 2000** where the court held:

> ***"As a first appellate court we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P. stated in Peters v Sunday Post Ltd. [1958] EA 424, at Pg. 429:***
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> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness."***
>
> ***This court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did. See Ephantus Mwangi &***

Another vs Wambugu [1983] 2 KCA 100:" or in accordance with the principles and guidelines in **Robert Nsioki Kitavi v Coastal Bottlers Ltd [1982] – 198 IKAR 891 – 895**

"The appellate court will only interfere with a trial Judge's assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate."

The other related aspect of this appeal is whether the respondent could be entitled to a benefit under the Law Reform Act. In this appeal the appellants are essentially seeking a review on the award of general damages as stated in the judgment of the trial court.

There are very clear principles on the sums recoverable against the defendant who caused the fatal injuries survives the death of the deceased is provided for under the Law Reform Act Miscellenous Provisions (Section 2) and the Fatal Accident Act under Section 4 and 5 of the Act.

As provided for in the Fatal Accident Act the claim by the respondent against the appellant was brought as legal personal representative and on behalf of the estate of the deceased for the benefit of the dependants. It is general principle of law that when assessing damages recoverable on both the Law Reform Act and Fatal Accidents Act the amount recoverable under the Law Reform Act shall be taken into account but deducted in the final assessment of damages so as to avoid double payment to the same beneficiary.

It is imperative to conceptualize the exercise of discretion in assessment of damages under the Law Reform Act and Fatal Accidents Act. The determination of damages will involve the principles laid down in various judicial decisions. The case of **Yorkshire Electricity Board v Naylon 1968 AC 52G** where the court held that:

"It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L. C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a 'positive measure of happiness' or of a 'predominantly happy life."

As further drawn from a comparative decision in **Gammel v Wilson & others and Furness and another v B and S Massey Ltd [1982] AC.** The court shall consider the following principles as held in by **Lord Scarman** thus:

"The correct approach in law to the assessment of damages in these cases on loss of expectation of life and lost years.

In these cases presents my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his life line.

The loss is pecuniary as such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to award the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters… But in all cases it is a matter of evidence and a reasonable estimate based on it." (emphasis underlined mine)

This mechanism and legal approach taken by the English courts and its primacy in assessment of damages in lost years is the interpretation applied in our courts as can be seen from the decision by the Court of Appeal in **Sheikh M. Hassan v Kamau Transporters [1982-88] IKAR 946** where it was held that:

"The sum to be awarded is never a convential one but compensation for pecuniary loss.

(ii). It must be assessed justly

(iii). Deduct the victims living expenses during the lost years for they would not form part of the estate.

(iv). A young child's present or future earnings in most cases would be nil.

(v). An adolescent would usually be real, assessable and small.

(vi). Calculate the annual gross loss.

(vii). Apply the multiplier estimated number of lost working years accepted as reasonable in each case.

(viii). Deduct the victims probable living expenses of a reasonably satisfying enjoyable life for him or her."

The narrative approach taken by the courts in our jurisdiction of the award of lost years in cases with similar fact to the present appeal reveals the following in **Samuel Kabi & another v William Njau Kamau [2000] eKLR** in the case of **Lotepa Njuguna Mwaura v Builders Den Ltd Nakuru HCA No. 182 of 2003** The deceased was 35 years old. The court awarded loss of dependency using a multiplier approach of 17 years and multiplicand of Kshs.25,000/= and the dependency ratio of 2/3.

In **Muruangu Jeffer v Jackton Ochieng & another** an award of Kshs.1,600,000/= for loss of dependency for a deceased who died at age of 30 years survived by a widower and 10 year old son.

In the instant case the undisputed facts from the evidence are that:

The claimants FPU and MJK were given authority by way of grant of Letters of Administration to file suit and claim damages for the benefit of the estate of the deceased BJ. That the deceased was involved in a road traffic accident on 20/11/2013 along Malindi – Mombasa road while going about his lawful duties and activities when he was fatally knocked down by the appellants motor vehicle registration number KBW 519X. That the appellants under vicarious liability were blamed for the accident on particulars of negligence as pleaded in paragraph 4 of the plaint. That consent on liability was remedied at 10%:90% as against the appellants. That during his lifetime, the deceased was working as a mason and self employed. That the deceased who died at the age of 29 was survived by the widow **F, mother MJ, Children: MN** aged 8 years old, **PB aged 6 years old**, **EBJ aged 3 years** old and lastly **FB aged 1 year old.**

The trial Magistrate based on the above fundamental material and evidence awarded the respondents loss of dependency by taking an approach of income of Ksh.17,061/= and a multiplicand of 31 years and dependency ration 2/3.

The appellant counsel in his appeal has contested the final award from the above calculations on grounds that it resulted in an erroneous estimate of the award under this claim on loss of dependency. Learned counsel submitted and asked this court to interfere with the assessment to adopt a monthly income of Kshs.9,372/= and a multiplier of 15 years. I have on my part given due considerations to the evidence and submissions by the appellant counsel.

First and foremost the Court of Appeal has reaffirmed the various variables to be taken into account on proof of income and employment when it comes to the question whether one has to produce bank statements, book of accounts, receipts, testimonials as the safest way to determine the parameters that one was in active employment or his income earnings. That position has been made clear in the case of **Jacob Ayigo v Simon Obayo [2005] eKLR** where it was expressly stated as follows:

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to 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 this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."***

In the instant appeal the court had probative evidence that the deceased income per month totalled to Kshs.45,000/= from his occupation as a mason. There was also no evidence of how much he spent to cater for his social activities and the income devoted for the benefit of his spouse, parents and children. However, all these matters do not fall under the scientific precision but striking a balance of the evidence adduced by the parties and exercise of judicial discretion. Without departing from the principles in **Jacob Ayigo case (supra)**. I am persuaded that an income of Kshs.17,130/= a month was on the higher side in view of the facts and evidence before the trial court.

I would agree with the appellant counsel for the minimum wage basis approach to apply to the claim in this appeal. However, even with that legal proposition the multiplier set should not be so speculative to render the assessment of damages an erroneous estimate of the award. The minimum wage guidelines order of 2017 for Malindi Municipality classifies various categories of employment and work benefit activities which may be applicable to the deceased. This is more so in a case of this nature, there was no credible evidence whether the deceased practiced his occupation of masonry. I would therefore adopt a minimum wage of Kshs.12,946 to the circumstances and facts of this case as income for loss of dependency.

More importantly is the rationale arrived by the Learned trial Magistrate that the ratio for loss of dependency be calculated at 2/3. I am therefore upon conscientious consideration of the matter find nothing wrong in the adoption of a multiplicand of 31 years.

Strictly speaking, even the factoring in of the vicissitudes of life concept, one cannot state with certainty the numbering days a right for a human being. I consider that to be in the future and sometimes in the realm of the unknown as even medical science cannot predict with certainty the lifespan of being. I also take judicial notice that from the latest world bank data life expectancy in Kenya is between 64 and 69 years.

In the instant case, the deceased was a young man aged 29 years who had already started a family and was also supportive of his parent. To calculate the number of years between the day his life was prematurely terminated by the wrongful act of the appellant and the length of time he would have lived and retired from active employment or occupation is a matter of speculation and conjecture.

Having said so I see no error of principle or fact in the Learned trial Magistrate adoption of a multiplicand of 31 years. I accordingly, under the appellate jurisdiction as stated in the case of **Butt vs Butt** with due respect to the Learned trial Magistrate this factor on minimum wage of a mason clearly weighed heavily in her mind and affected the exercise of her discretion in the matter. I will therefore, interfere with the Judgment with regard to the segment on minimum wage of Kshs.17,120/= by substituting it with Kshs.12,946/= as income for the deceased. I am also satisfied that the ratio of 2/3 dependency applied to the facts of this case was appropriate application of the legal principle by the Learned trial Magistrate in this case.

For the above reasons, the appellants appeal partially succeeds and the following orders abide the decision of this court.

(a). Claim on loss of dependency is herein under formulated:-

12,946 x 12 x 31 x 2/3 = Kshs.3,210,608/=

(b). Special damages totaling Kshs.108,625/= as provided for in the Judgment of the trial court is hereby affirmed.

(c). Inorder to avoid double payment the conventional sum of Kshs.150,000/= and the award of Kshs.50,000/= for pain and suffering under the Law Reform Act is hereby discounted as a benefit to the claimant.

(d). The net award therefore remains to be Kshs.3,210,608 subject to liability of 10% plus costs and interest from the date of Judgment of the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE