



REPUBLIC OF KENYA



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**Kaume & another (Suing as legal representatives of the Estate of Karanya Festus Kaume) v
Ikiao (Civil Appeal 132 of 2022) [2023] KEHC 18347 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 132 OF 2022**

EM MURIITHI, J

MAY 31, 2023

BETWEEN

FRANCIS KARAYA ITURU 1ST APPELLANT

HARRIET KAGWIRIA 2ND APPELLANT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF KARANYA
FESTUS KAUME**

AND

ISAIAH MITHIKA IKIAO RESPONDENT

*(An appeal from the Judgment and Decree of Hon. J. M Njoroge
(C.M) in Meru CMCC No. E404 of 2021 delivered on 24/8/2022)*

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated August 20, 2021 in which the Appellants sued the Respondent seeking general damages under the Law Reform Act and Fatal Accidents Act, special damages of Kshs 351,480/= and costs of the suit plus interest. The gist of the claim was that on April 27, 2021, the deceased was a motor cycle rider along Mikinduri - Meru Road when the Respondent, his driver, agent, employee and/or servant so negligently controlled Motor Vehicle Registration No xxxx that it hit the deceased occasioning him fatal injuries. The deceased was prior to his death aged 27 years and at the prime age working as a petrol station manager of LYOMN Investments earning a salary of Kshs 24,000 per month. The deceased also operated a cereals shop at Kianjai and was the sole bread winner of his family, and as a result of his untimely and premature death, his estate has suffered loss and damages.
2. The Respondent denied the claim by his statement of defence dated October 26, 2021 and prayed for the Appellants' suit to be dismissed.



3. The parties recorded a consent on liability at the ratio of 80:20 in favour of the Appellants against the Respondent and upon full hearing on quantum, the trial court awarded Kshs 20,000 for pain and suffering, Kshs 100,000 for loss of expectation of life, Kshs 2,000,000 for loss of dependency, special damages of Kshs 150,000 less double entitlement of Kshs 100,000 totalling to Kshs 2,170,000 less 20% contribution = Kshs 1,736,000.

The Appeal

4. On appeal, the Appellants filed their memorandum of appeal on September 23, 2022 raising 2 grounds as follows:
 1. The learned trial magistrate erred in law and fact by deducting Kshs 100,000/= being loss of expectation of life from the total award.
 2. The learned trial magistrate erred in law and fact by using the minimum wage despite the fact that the deceased was employed.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others [1968] EA 123*).

Evidence

6. PW1 Francis Karaya Ituru, one of the Appellants, adopted his witness statement dated August 20, 2021 as his evidence in chief and prayed compensation and costs. He produced the grant ad litem, death certificate, police abstract, post mortem report, demand letter, receipt of Kshs 351,480, letter of appointment and the chief's letter as exhibits to support his case.
7. PW2 Patrick Mutuma Ntiritu, testified that, 'I stay in Nairobi and a business man operating a Petrol station. The deceased was my employee Letter of Appointment P Exh 7. He was working at Kaguma Petrol Station. I own Lymon Investments. He was employed on April 1, 2021. He was earning Kshs 24,000/= plus 2,700 as house allowance. He had finished a month. The salary was paid to his wife in cash.'
8. On cross examination, he stated that, 'I didnt carry the contract. I don't have documents of registration of Lymon Investments. I have no employees register. I have no tax returns.'

Submissions

9. The Appellants fault the trial court for deducting the sum of Kshs 100,000 for loss of expectation of life from the total, and rely on [*Hellen Waruguru Waweru \(suing as the Legal Representative of Peter Waweru Mwenja \(deceased\) v Kiarie Shoe Stores Limited \(2015\) eKLR*](#) and [*Ainu Shamsi Hauliers Limited v Moses Sakwa & another \(suing as the Administrators of the Estate of Ben Siguda Okach \(deceased\) \(2021\) eKLR*](#).
10. The Respondent restates the duty of the appellate court and cites [*Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates \(2013\) eKLR*](#) and [*Butt v Khan \(1978\) eKLR*](#). He submits that the trial court's deduction of the award of loss of expectation of life from the gross total awarded was correct and appropriate in law, and cites Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited



(2015) eKLR, *Kioko Peter v Beatrice Keli Mbuvi (suing as Legal Representative of the Estate of Amos Mutunga (Deceased)) (2022) eKLR* and *Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others (2014) eKLR*. He urges the court to dismiss the appeal with costs.

Analysis and Determination

11. Although the Appellants had raised 2 grounds of appeal, they seem to have abandoned the ground on the adoption of the minimum wage and thus the issue for determination is whether the deduction of the award of Kshs 100,000 for loss of expectation of life from the total award has any bearing in law.
12. There is no requirement for deduction of the one award under *Law Reform Act* from the other under the *Fatal Accidents Act* as discussed by this court in KBT HCCA No 1 of 2018, (Formerly NAKURU HCCA No 147 of 2015) *David Keni Julius Cheretei v Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii - Deceased)*, as follows:

' 6. In *Hellen Wanguru Waweru (Suing as the legal representative of Peter Waweru Mwenga (deceased) v Kiarie Shoes Stores Limited (2015) eKLR*, the Court of Appeal (Waki, Nambuye & Kiage JJA) explained the principle of double compensation under the *Law Reform Act* and the *Fatal Accidents Act* as follows:

18. Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.
19. Finally on the third issue, learned counsel for KSSL, Mr CK Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.
20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.



21. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.
 7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.
 8. The words 'to be taken into account' and 'to be deducted' are two different things. The words 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.'
22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Kshs 100,000 awarded for Loss of life expectation to Kshs 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.



7. It is therefore clarified by the Court of Appeal in *Hellen Waruguru Waweru* (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited (supra), which binding on this Court, that that there is no requirement for the trial court to discount or reduce the damages in *Fatal accidents Act* with the awarded recovered under the *Law Reform Act*. The submission by the appellant that the trial court 'the trial magistrate erred by failing to deduct the award [under the *Law reform Act* of Kshs 100,000 for loss of expectation of life and Kshs 50000/- for pain and suffering] and thus made a double award is therefore erroneous.'

13. The Court has previously held that there is no legal basis in law for the deduction of the award under loss of expectation of life from the final award or the award under the *Fatal Accidents Act*.

ORDERS

14. Accordingly, for the reasons set out above, this court finds that the Appellants' appeal has merit and it is allowed in the following terms:

1. The trial court's deduction of the sum of Kshs 100,000 for loss of expectation of life from the total sum awarded of Kshs 2,270,000 is hereby set aside.
2. The Appellants shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mutegi Advocate for the Appellant.

Mr. Kinoti for Ms. Oteko Advocate for Respondent.

