REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 711 OF 2019

THOMAS WAMBUA.....1ST APPELLANT

HARRISON MWAURA NYOIKE.....2ND APPELLANT

VERSUS

MARTHA WAMBUI KIRIRI

(Suing on behalf of the estate of the late MARTIN KARIUKI WAMBUI.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon.D.O. Mbeja (Mr)

Senior Resident Magistrate on 8th November, 2019

in Milimani CMCC No. 1929 of 2017)

JUDGMENT

The late Martin Kariuki Wambui was involved in a road traffic accident on the 23rd of August, 2016 along the Katema-Timboroa lane junction in Nairobi. The respondent who is the deceased's mother instituted the Civil Suit number 1929 of 2017 before the Milimani Chief Magistrate's Court seeking damages arising from the accident. In his judgment delivered on 8th November 2019, Hon. D.O. Mbeja (SRM) awarded the respondent damages as follows:-

Pain and Suffering – Kshs. 50,000

Loss of expectation of life – Kshs. 100,000

Loss of dependency - Kshs.2,059,152

Special damages - Kshs. 1,580

Total - Kshs.2,210,732

The trial court found the appellants 100% liable. The deceased was pushing a trolley when he was hit by the accident vehicle and h died on the spot. The appellants are dissatisfied by the trial court's assessment of damages, specifically the finding on dependency ratio of 2/3. The four grounds of appeal are:-

1. The Learned Magistrate erred in fact and in law in using multiplicand of two thirds in awarding of loss of dependency.

2. The Learned Magistrate erred in fact and in law in using a multiplicand of two thirds that was too high in view of the evidence tendered.

3. The Learned Magistrate erred in fact and in Law in failing to consider the Appellants' Submissions of Quantum where they used a multiplicand of one thirds which was in light of the evidence tendered.

4. The Learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

Counsel for the appellant submitted that the four grounds of appeal raises two issues of quantum and multiplicand. It is counsel's position that the trial court erred by using a dependency ratio of 2/3 which is quite high in view of the evidence on record. According to the appellants, a 1/3 ratio would have been ideal in the circumstances of the case. Counsel referred to the case of **WEST KENYA SUGAR CO LTD –V- PHILIP SUMBA JULAYA (Suing as the administrator and personal representative of the Estate of JAMES JULAYA SUMBA (2017) eKLR** where the court adopted a 1/3 dependency ratio for a 27-year-old farmer.

On the issue of quantum, it is submitted that there is double award under both the Law Reform Act and the Fatal Accidents Act. Counsel referred to the case of **HELLEN WARUGURU (Suing as the legal representative of Peter Waweru Mwenja (Deceased) –V- Kiarie Shoe Stores Limited (2015) eKLR** where the Court of Appeal stated as follows:-

> **"Finally on the third issue, learned counsel for KSSL, Mr. C. K. 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.**
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> **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.**
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> ***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."***

Counsel for the appellants also referred to the case of **SEREMO KORIR & ANOTHER –V- S.S. (Suing as the legal representative of the estate of MS (deceased) 2019 (eKLR)** where it was held:-

> **"Similarly, I am in agreement with the appellants that the suit, having been brought by the respondent on behalf of himself and the deceased's mother, they both stand to benefit under both the *Law Reform Act* and *Fatal Accidents Act* which would amount to double compensation, if no deduction is made."**

According to the appellants, the award made under the Law Reforms Act ought to have been deducted from the award made under the Fatal Accidents Act.

The appeal is vehemently opposed. Counsel for the responded submitted that the court lacks jurisdiction to entertain the appeal as the decree which is the subject of the appeal is missing. Counsel referred to the case of **CHEGE –V- SULEIMAN (Civil Appeal No. 12 of 1987)** and that of **NANCY WAMUYU GICHOHI –VS- JANE WAWIRA GICHUHI, (Civil Appeal No. 15 of 2013)** but the specific authorities were not provided to enable the court verify the citations.

Regarding the merits of the appeal, it was submitted that the only issue being raised in the appeal relates to the 2/3 multiplicand applied by the trial court. The deceased was aged 24 years old and was the one taking care of his mother. Counsel relies on the case of **JOSHUA MULINGE –V- BASH HAULIERS LTD & ANOTHER (Machakos Civil Appeal No. 18 of 2020; (2021) eKLR** where it was held:-

> **"In his judgement, the learned trial magistrate in arriving at the dependency ratio took into account the fact that the deceased was taking care of not only her family but also her parents. As held in the authorities cited, one of the factors that the Court ought to take into account in deciding the said ratio are the personal circumstances of both the deceased and the dependants. In this case the trial court took into account the deceased's burden which was clearly a relevant matter. There was evidence on record that her parents depended on her. Accordingly, there is no basis upon which I can find that the adoption of the dependency ratio of 2/3rds was perverse or that there was no evidence at all in support of it or that it was based on a misapprehension of the law."**

This being a first appeal, this court has to evaluate the evidence afresh in line with the grounds of appeal before drawing its own conclusion. The appeal raises two issues namely the 2/3 dependency ratio and whether there is double compensation.

Before the trial court, the respondent testified that she lives in Nakuru. She left employment in 2014 and she is the deceased's mother. She has two other children who are minors. The deceased was not married and was her only hope. She was able to pay rent and feed her other two children through assistance from the deceased. In her written witness statement that was adopted as her evidence, the respondent stated that the deceased was working as a loader and used to earn about Kshs.15,000 monthly. The deceased used to wholly support the family by buying food, clothing, cash payment and settlement of bills. The other evidence adduced by PW2 (CHEY WAFULA) and DW1 (Corporal Benjamin Ego) deals with the issue of liability which is not one of the grounds of appeal.

The appellants contend that since the only dependent is the mother, the trial curt ought to have adopted a 1/3 dependency ratio instead of the 2/3 ratio. In the case of **BUTT –V- KHAN (1981-88) KLR**, it was held:-

> **"The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates."**

The appellants are not opposed to the multiplicand of 30 years adopted by the trial court as well as the estimated monthly income of Kshs.8,579/80. The trial court stated that the deceased used to support his mother and was dedicated to his family.

The deceased was not married. The two other children of the respondent do not qualify as the deceased's dependents under the Fatal Accidents Act. The issue is whether the dependency ratio depends on the number of dependents. That is to say, whether the more the number of the dependents the higher the dependency ratio. The respondent entirely relied on her son as per her evidence. The sum of Kshs.8,579 was adopted as the monthly income. 2/3 of that sum amount to about Kshs.5,700. According to the respondent, she would use the money from her son to pay rent, buy food and settle other bills. In my view, the sum of Kshs.5,700 monthly is not excessive. Even though the deceased would have been left with about Kshs.3,000 for his own upkeep, I am satisfied that the multiplicand of 2/3 dependency ratio is reasonable. This would have changed had the deceased lived longer and started his own family. I do hold that the finding by the trial court on the dependency ratio of 2/3 is not contrary to common practice or inordinately excessive. The respondent's age was not given but this length of dependency is not an issue in the appeal.

The next issue relates to the contention that there is double compensation. Should the court always deduct an award made under the Law Reform Act (pain and suffering and loss of expectation of life) from the award made under the Fatal Accidents Act (Loss of dependency? The presumption is that normally awards made under the Fatal Accidents Act are higher than those made under the Law Reform Act. This presumption cannot be the standard norm as at times low awards can be mad under the Fatal Accidents Act especially those involving elderly accident victims.

For the submission on double compensation, reliance is always placed on the Court of Appeal decision in the cases of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS & ANOTHER –V- A.M. LUBIA & ANOTHER (1982-88), KAR 727 and that of HELLEN WARUGURU WAWERU (Supra)**. It appears that the court has developed two interpretations on the Court of Appeal's decision in those two cases. The second case was meant to explain the Court of Appeal's position on the issue of double compensation. The Court in the Hellen Waruguru case was of the view that there was misinterpretation of the Kenfro Africa Limited case. The main emphasis in the later decision is that the court in making an award under the Fatal Accidents Act should "take into account" what it has awarded under the Law Reform Act. At time there is automatic decision of the award made under the Law Reform Act which is not necessary. In my view all what the court has to do is to consider whether it is prudent to reduce the award made under the Fatal Accidents Act by reducing it by deducting what has been awarded under the Law Reform Act. At times the awards are quite minimal and there would be no reason to make any such deductions. However, this is not the only issue for consideration when the court is called upon to take into account the award made under the Law Reform Act.

In the case of **MOMBASA MAIZE MILLERS LIMITED –V- W.I.M. (Suing as the representative of J.A.M. (deceased) 2016, eKLR** Justice Majanja observed as follows:-

> **"In the judgment, the learned magistrate deducted the sum awarded for loss of expectation of life under the *Law Reform Act* on the basis of the principle of duplication of awards. This approach was erroneous and I would do note better than quote what the Court of Appeal stated in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR that;**
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> ***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."***

The beneficiary in this case is the deceased's mother. The deceased's other siblings were not included in the pleadings. They would qualify as dependents under the Law of Succession Act and get a share of the deceased's estate. I am of the considered view that the law does not call for automatic reduction of awards made under the Law Reform Act from awards made under the Law Reform Act. The Court of Appeal explained that its decisions 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" which are awarded under the Law Reform Act.

I have equally noted that counsel for the appellants did not raise the issue of double compensation before the trial court. In their written submissions dated 4th September, 2019, M/S Kairu & McCourt proposed an award of Kshs.10,000 for pain and suffering, Kshs.100,000 for loss of expectation of life and Kshs. 347,968 for loss of dependency making a total award of Kshs.457,968. The contention that there is double compensation does not arise. I am alive to the fact that the deceased's mother is the only beneficiary from the award. I do find that the award by the trial court is not inordinately excessive and I see no reason to deduct the award under the Law Reform Act from that made under the Fatal Accidents Act. There are several cases where no such deductions were made. In the case of **MUCHOKI –V- ATTORNEY GENERAL (2004) 2 KLR 518,** Visram J awarded KShs.90,000 under the Law Reform Act and Kshs.200,000 under the Fatal Accidents Act.

I do find that the award by the trial court is reasonable and need not be disturbed. The appeal lacks merit and is hereby dismissed with costs.

Dated and signed at Nairobi this **28th** day of February, 2022

S.J. CHITEMBWE

JUDGE