



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NO. 3 OF 2019**

**JANE ALIAKA & SELA HOKA KUYA** (Suing as the legal representative in the estate of  
**PHILIP MWANDO KUYA**.....**APPELLANTS**

**VERSUS**

**OTIENO JAMES**.....**RESPONDENT**

[An appeal from the Judgment and Decree of the Honourable C. N. Oruo (SRM)]

Dated 11<sup>th</sup> December 2018 in Maseno PMCC No. 233 of 2014]

**JUDGMENT**

The Appellant has raised 4 issues appertaining to the quantum of damages awarded by the trial court. The said issues can be summarized as follows;

- a. The damages were inordinately low.**
- b. The judgment was at variance with the *pleadings and against the weight of the evidence.***
- c. By deducting the damages awarded under The Law Reform Act, from the total award, the trial court negated the said award under the Law Reform Act.**
- d. The trial court applied the wrong principles by making unlawful deductions from the total damages awarded.**

1. It is well settled that an appellate court should not be too quick to interfere with the trial court’s assessment of damages. Indeed, the appellate court should only interfere if it finds that the trial court had acted on some wrong principles of law; or if the trial court is found to have misapprehended the facts; or if the trial court either took into account an irrelevant factor or failed to take into account a relevant fact.

2. In determining whether or not the trial court acted on the wrong principles, the appellate court may, depending on the circumstances of the case, conclude that the trial court had erred if the damages awarded were either inordinately high or inordinately low.

3. The learned trial magistrate gave the following awards in his judgment;

- “a) Liability 80:20% in favour of the Plaintiff against the 1<sup>st</sup> Defendant.**
- b) Pain and Suffering ..... Kshs 80,000.00**
- c) Loss of Expectation of Life ... Kshs 100,00.00**
- d) Loss of Dependency ..... Kshs 410,560.00**
- e) Special Damages ..... Kshs 11,300.00**

<b>TOTAL</b>	<b>Kshs 601,860.00</b>
<b>LESS 20% Contribution ...</b>	<b><u>Kshs 120,373.00</u></b>
<b>SUB-TOTAL</b>	<b>Kshs 481,487.00</b>
<b>LESS Loss of</b>	
<b>Expectation of Life .....</b>	<b><u>Kshs 100,000.00</u></b>
<b>GRAND TOTAL .....</b>	<b><u>Kshs 381,487.00</u></b>

4. The Appellant did not challenge any of the specific sums awarded under all the heads of damages above.

5. The Appellant’s contention was that the trial court erred by deducting the award of Kshs 100,000/=, which had been awarded under the **Law Reform Act**; and by so doing negating the said award.

6. Pursuant to the provisions of **Section 2 (5) of the Law Reform Act**;

**“The rights conferred by this Part for the benefit of estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act .....**”

7. If perceived in a literal sense, that would imply that there ought to be an addition of the rights conferred under the **Law Reform Act**, to those conferred under the **Fatal Accidents Act**.

8. However, in the case of **SIMEON KIPLIMO MUREY & 3 OTHERS Vs KENYA BUS MANAGEMENT SERVICES LIMITED & 4 OTHERS, CIVIL APPEAL NO. 2 OF 2013**, the Court said that 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 hence an award for lost years under the former Act and for loss of dependency under the latter Act will go to the same persons.

9. The learned Judges went on to explain thus;

**“This principal does not mean that the estate of the deceased should be denied damages for pain and suffering and loss of expectation of life which are only awarded under the Law Reform Act for the benefit of the estate.**

.....

**The only award that could be duplicated is an award for lost years under Law Reform Act given to the same dependants who are set to benefit under the Fatal Accidents Act.”**

10. Nonetheless, as the Appellant has observed, an award made under the **Law Reform Act** should take into account an award made under the **Fatal Accidents Act**.

11. In this case the dependants who would be compensated under the **Fatal Accidents Act** are the same persons who would be compensated under the **Law Reform Act**.

12. In the case of **DAVID KAJOGI M’MUGAA Vs FRANCIS MUTHOMI, CIVIL APPEAL NO. 118 OF 2010**, Makau J. deducted the general damages awarded under the **Law Reform Act**, from the total award, in order to avoid duplication.

13. On the other hand, in the case of **HYDER NTHENYA MUSILI & ANOTHER Vs CHINA WU YI LIMITED & ANOTHER, HCCC NO. 53 OF 2014**, P. Nyamweya J. did not deduct the damages awarded under the **Law Reform Act**.

14. However, the learned Judge only apportioned the damages under the **Fatal Accidents Act**, to the Defendants.

15. In the case of **BENEDETA WANJIKU Vs CHANGWON CHEBOI & ANOTHER, HCCC NO. 373 OF 2008** Emukule J. explained as follows;

**“It is of course correct that both awards for loss of expectation of life and for pain and suffering go the benefit of the deceased’s estate. These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act.”**

16. By capping those awards to a minimal amount, the court would have taken into account the need to avoid duplication in the awards under the two statutes.

17. In this case, the trial court stayed true to the general rule of practice, that the awards for Pain and Suffering, and those for Loss of Expectation of Life were capped. By so doing, I find that the award of damages under the **Law Reform Act** and under the **Fatal Accidents Act** were not duplicated. If anything, by capping the awards under the **Law Reform Act**, the trial court had already taken into account the need to avoid duplication.

18. The concept of “*taking into account*” one award when assessing the award under the separate statute was recognized by the Court of Appeal in **KEMFRO Vs A. M. LUBIA & ANOTHER [1982 – 1988] KAR 727**, wherein the Court said;

**“The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be off set by the gain from the estate under the former Act.”**

19. I find that the learned trial magistrate erred when he simply deducted the whole award which he had made for Loss of expectation of life, without assigning any reason for so doing. I hold the considered view that if the trial court had delved into analyzing the question as to whether or not there ought to have been an outright deduction of the sum in issue, he would have arrived at a different decision.

20. In the result, the appeal is allowed, by reinstating the sum of Kshs 100,000/= for Loss of expectation of life, and thus awarding to the Appellant the sum of Kshs 481,487/=.

21. Costs of the appeal are awarded to the Appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF APRIL 2021**

**FRED A. OCHIENG**

**JUDGE**