REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Hon. D. K Kemei J)

CIVIL APPEAL NO. 159 OF 2018

LEON OJIAMBO OJIAN.....1ST APPELLANT

BONIFACE WANJAU.....2ND APPELLANT

VERSUS

LILIAN MUSHIELE WAFULA &

JUDY WAMBUA MASIKA (Suing as personal representatives

of the Estate of **ROBERT MASIKA KALINDA(**Deceased)**.....RESPONDENTS**

(Being an appeal from the whole judgement delivered by the Honourable Magistrate C.K Kisiangani (Ms.) on 14th March 2018 in Machakos CMCC No. 631 of 2015)

BETWEEN

LILIAN MUSHIELE WAFULA &

JUDY WAMBUA MASIKA (Suing as personal representatives

of the Estate of **ROBERT MASIKA KALINDA (**Deceased)**……...…….....PLAINTIFFS**

VERSUS

LEON OJIAMBO OJIAN.....1ST DEFENDANT

BONIFACE WANJAU.....2ND DEFENDANT

JUDGEMENT

1. By a Plaint dated 12th August 2015, the respondents herein sought for both general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 51,660.00/- plus costs and interest against the appellants.

2. The deceased was on board the 2nd Appellant's motor vehicle registration number KBU 928N as a passenger which was being driven along Tawa Road near Ngwani when it lost control, veered off the road causing the deceased to sustain fatal injuries that led to his demise. The respondents set out the particulars of negligence at paragraph 4 (a) to (h) of the plaint. According to the respondents, the 1st appellant to take due regard to the safety of the passengers on board motor vehicle registration number KBU 928 N. The respondents blamed the appellants for the death of the deceased herein. They pleaded particulars pursuant to the Fatal Accidents Act in which they pleaded that the deceased's dependants were Lilian Mushiele Wafula (widow), Judy Wambui Masika, (mother), Austin Wafula (son) and Nigel Masika (son).

3. Through Messrs Kairu and McCourt Advocates, the Appellants filed their statement of defence dated 7th November 2015.The Appellants pleaded particulars of negligence at paragraph 5 of their statement of defence. According to the Appellants, the deceased failed to take any or any adequate precaution for his own safety, 1st Appellant's instructions on safety precautions, traffic rules and regulations when travelling. The Appellants denied that the deceased earned as salary of Kshs. 30,000/-. The Appellants plead that the accident was solely and/or

substantially contributed by the deceased's own negligence. However, during the further hearing of the case on the 13th June 2017 the Appellants closed their case without calling any witnesses.

4. On 9th May 2017, ***PW1, Lilian Mushiele*** testified in support of the deceased's case. She notified the court that the deceased had been her husband. It was her testimony that they were travelling back from attending a funeral and that the deceased was on board another motor vehicle that was ahead. According to her, they reached the scene of the accident and found a road traffic accident had already happened. She stated that the road was straight and that the accident was self-involving. She stated that the deceased died on the spot.

5. PW1 produced police abstract as *Pexh 1*, postmortem report as *Pexh 2*, two birth certificates as *Pexh 3(a)* and *(b)*, death certificate as *Pexh 4*, grant of letters ad litem as *Pexh 5*, chief's letter as *Pexh 6*, letter from Metro Trans Ltd as *MF1 7*, work Sheets (bundle) as *MF1 8*, demand letter and statutory notice as *Pexh 9(a)* and *(b)*. She testified that the deceased was aged 36 years at the time of the accident and that they had 2 children aged 18 and 12 years old. She stated that the deceased was a supervisor at Metro Trans (MF17 and MF18). According to her, the deceased was the sole breadwinner by paying rent, fees and electricity. She stated that she only supplemented his earnings as most of the things were provided by the deceased.

6. PW1 further stated that they incurred funeral expenses but due to shock she could not get receipts for the expenses. She blamed the 1st Appellant for being careless and prayed for compensation for the deceased's death and expenses incurred.

7. In cross-examination, PW1 stated that she was not with the deceased at the time of the accident and does not know what happened. She testified that the deceased had been a passenger. According to PW1, the 1st Appellant was to blame for the accident despite the case pending investigation. She testified that she saw the registration number of the suit motor vehicle at the scene and found the owner of the motor vehicle. She stated that she does not have a copy of records for the motor vehicle. Again she stated that the 1st Appellant was charged with a traffic offence but she didn't have evidence in court.

8. Further, she stated that the deceased had a Metro Trans badge which had his picture. She stated that she did not have proof of deceased's earnings. She reiterated that she did not follow up on the receipts for funeral expenses but they incurred the expenses. She stated that she bought food from the market where she was not issued with receipts.

9. In re-examination, she stated that she was on board another motor vehicle and she found the accident had already happened. She pointed to the court that the police abstract shows that the motor vehicle belonged to the 2nd Appellant and that the driver was the 1st Appellant. According to her, the deceased was a passenger who should not be blamed. She informed the court that she got married to the deceased in 2001 but she did not know when the deceased was employed neither did she have proof of deceased's earnings.

10. ***PW2, Julius Masendu Maseve*** testified that he works at City Trans Shuttle as a Fleet Manager of buses and adopted his witness statement filed in court. He testified that the deceased had been an employee in City Shuttle. According to him, the deceased was an operator and in charge of the stages from Umoja to Nairobi town. He stated that the deceased supervised all drivers and conductors and reported any arrest of all motor vehicles that plied on the route daily and also in charge of collection of management fees.

11. PW2 testified that the deceased earned a daily allowance of Kshs.500 which was paid at the end of the month after deduction of taxes and other dues. He informed the court that he knew the deceased while in Utimo Sacco in 2011 and that the deceased worked with Metro Trans before his death.

12. In cross-examination, PW2 stated that he was the deceased's immediate boss working as the operations manager. He stated that he had a job identity card although he did not carry it and given time he would bring the card. He restated that he knew the deceased while at Utimo in 2011 since they worked together and that he was in charge of the Sacco. He added that he was not in charge of payments but he knew each employee's salary since he checked the payroll before salaries were paid but however did not bring any pay slip.

13. In re-examination PW2 stated that he was the Chief Executive Officer at Utimo although he had not carried the job card. PW2 restated that the deceased earned Kshs.500 per day. The Respondents case was closed.

14. Vide an application dated 21st August 2017, the Respondents sought leave to re-open the Respondents case for purposes of summoning the investigation officer Sergeant Mburu Mbuke from Makueni Traffic Base. The application was unopposed and it was allowed.

15. ***PW3, No.64524 Sergeant Mburu Mbuke*** testified that he was the deputy base commander at Makueni Traffic Base and the investigating officer in this accident. According to him, on 12th October 2013 at around 6.30 pm while at the base he received a report from OCPD Mbooni East of a fatal traffic accident along Tawa-Masii Road at Ngwani bridge. He stated that he proceeded to the scene with Tom Meme and found police officers and OCS from Tawa station. According to him, the accident was self-involving by motor vehicle registration KBU 928N of Movina Sacco which was lying at the road side on the grilles of the bridge.

16. Pw3 further added that at the scene he found the two deceased persons Robert Masika and Jeremiah Nyaga. He stated that he marked the scene since it was dark and could not measure the distance but he ensured that motor vehicle KBU 928N was towed to Machakos police station and the bodies taken to Tawa Funeral Home while other injured persons were treated in various hospitals. According to him, Leon Ojiambo the 1st Appellant herein was the driver. He added that two other passengers namely Noor Mohamed and Jacob Odhiambo are said to have succumbed to the injuries suffered.

17. It was his testimony that 1st Appellant was to blame for the accident as he had negotiated a corner at high speed causing the motor vehicle to lose control. He added that the 1st Appellant is at large and would be charged for causing death by dangerous driving once he is apprehended. He informed the court that he was paid Kshs. 7,000/- to attend court and that on 19th December 2017 Kshs. 5,000/- was paid to

him.

18. On cross-examination, PW3 stated that passengers indicated that the driver negotiated the corner at a high speed and that there were skid marks at the scene but did not produce any documents as proof. According to PW3, the driver has not been charged since he is still at large and that they are waiting to arrest and charge him. He stated that the driver is within Umoja Estate in Nairobi and they are tracking him through his phone. He stated that the road accident occurred on 13th October 2015. He testified that the file is complete which has a Notice of Intended Prosecution, sketch plans, P3, Postmortem recorded in the OB but admitted that he didn't have them in court. He stated that the details of the accident were in the Investigation diary which he had in court but did not produce it in court.

19. PW3 testified that he can confirm the person who died since he had a copy of the postmortem. He agreed that he did not witness the accident since he reached the scene after the accident had occurred. He stated that investigations revealed that the driver was to blame for the accident and that the matter is pending arrest of a known person. In re-examination, he stated that the information he gave in court came from the police file and that the case was pending arrest of the 1st Appellant and that they have been trying to trace him.

20. The Appellants and Respondents filed written submissions before the trial court. On 14th March, 2018 the trial magistrate delivered judgement in favour of the Respondents, inter alia as follows:-

a) The Defendants are jointly and severally held 100% liable.

b) (i) Pain and suffering Kshs. 10,000/-

(ii) Loss of expectation of life Kshs. 100,000/-

(iii) Loss of dependency Kshs. 2,399,999/-

(iv) Special damages <u>*Kshs. 50,000/-*</u>

Total <u>*Kshs. 2,559,999/-*</u>

21. Aggrieved by the said decision, the Appellants lodged a Memorandum of Appeal dated 6th December 2018 citing the following grounds of appeal:-

1. The learned magistrate erred in law and misdirected himself when he failed to consider the Appellants submissions on point of law and facts on liability.

2. The learned magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice

3. The learned magistrate erred in law and in fact when she used a multiplier of Kshs. 15,000/- as minimum wage without any basis whatsoever.

4. The learned magistrate erred in law and in fact in awarding liability to a tune of 100% to the Applicants which was excessive and unjust in the circumstances considering the evidence brought before court and principles of law.

5. The learned Senior Principal magistrate erred in fact and in unduly disregarding the judicial authorities cited by the Appellants and instead relying on the authorities cited by the Respondent which were excessive in the circumstances.

22. The Appellant has urged the court to allow the appeal by setting aside the whole judgement of the trial magistrate and award costs of the appeal and suit to the Appellants.

<u>Submissions</u>

23. In support of the Appellants case, it was submitted that PW1 did not witness the accident and hence the Respondents did not prove claims of negligence. According to the appellants, it is trite law that the burden of proof solely lies on the respondents. Reliance is placed on the cases of ***Lucy Muthoni Munene vs Kenneth Muchange & Another Nairobi HCC 858 of 1988***, ***Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR.*** On the functions of pleadings reliance is placed on the case of ***Dare vs Pulham (1982)148, C.L.R 658.*** According to the Appellants, the 1st Appellant was not charged with a traffic offence of over speeding and hence the finding of 100% liability simply because the deceased was a passenger was erroneous. According to the Appellants, there is no liability without fault. Reliance is placed on the case of ***East Produce (K) Ltd vs Christopher Astiado Osiro Civil Appeal No.43 of 2001***. I note before the trial, the Appellant proposed 50% liability to be apportioned on the deceased as an alternative. Reliance was placed on the case of ***Peter Okello Omedi vs Clement Ochieng (2006) eKLR*** where Warsame ***J*** held that the failure by both parties to observe their obligations to each other might have caused the accident and in the absence of clear and uncontroverted evidence the learned Judge set aside the trial magistrate's apportionment of 80:20 to 50:50 liability.

24. On quantum, the Appellants do not contest on the award of Kshs. 10,000/- for Pain and Suffering and Kshs. 100,000/- for loss of expectation of life awarded by the trial court but that the award ought to be deducted from the award under loss of dependency in Fatal

Accident Act. Reliance is placed on the case of ***Transpares Kenya Limited & Another vs SMM(Suing as the legal representative for and on behalf of the Estate of EMM(Deceased) [2015]eKLR*** quoting the decision of the Court of Appeal in ***Kemfro vs AM Lubia & Another [1982-88]KAR 727.***

25. On loss of dependency, it is submitted that the court ought to have adopted a minimum wage of Kshs. 9,780 instead of Kshs. 15,000/- since no income was proved. Reliance is placed on the case of ***Beatrice W. Murage vs Consumer Transport Ltd & Another [2014] eKLR.*** In the Appellants written submissions before the trial court, they had proposed a multiplier of 10 years by submitting that the deceased was not married and did not have any children but in the appeal submissions, the Appellants enhanced the years to 20. Before the trial court, the Appellant submitted that dependency ratio of 1/3 was reasonable but in the appeal the Appellants have proposed 2/3 as the dependency ratio. According to the Appellants, this was a case where multiplier approach should have been abandoned to determine loss of dependency.

26. In support of the Respondents case, it was submitted that PW1 stated that the accident was self -involving and since the deceased was only a passenger, the 1st Appellant was to blame for the accident. That a police abstract produced bear the name of the 1st Appellant as the driver and 2nd Appellant as owner. According to PW3, the 1st Appellant ran from the scene of the accident and can't be traced. It is submitted that ownership of the suit motor vehicle has not been denied or the abstract challenged. According to the Respondent, the Appellants case was closed without their testimony or an account of how the accident occurred and hence the Respondents testimony remains uncontroverted.

27. Respondents placed reliance on the cases of ***Kenya Bus Services Ltd vs Dina Kawira Humphrey CA 295/2000*** where it was observed by the court that buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation. Further reliance is placed on the case of ***Nairobi CA 179 of 2003 Rahab Micere Murage Estate of Esther Wakiini Murage vs AG & 2 Others [2015] eKLR*** where the court stated that well driven vehicles do not just get involved in an accident.

28. On quantum, the Respondents contend that the trial magistrate did not err to adopt a multiplicand of Kshs. 15,000/-, multiplier of 20 years and dependency ratio of 2/3. It is submitted that in the event the court is inclined to apply the minimum wage then it's should be as per the Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No.197) where minimum wage is Kshs. 15,064.65 and not Kshs. 9,780.95 since the deceased's work was supervisory in nature and hence classified as a *general clerk* and not as a *General laborer.*

29. Despite the challenge on the whole judgement by the Appellants, the Appellants seem not challenge the award of Kshs. 50,000/- for funeral expenses. The Respondents have submitted by supporting the award and not submitted on the costs of Kshs. 1,160/- for obtaining the letters of administration and Kshs.500 for motor vehicle search which were not awarded by the trial court. Based on the foregoing the Respondents have urged the court to dismiss the appeal with costs.

Determination

30. I have considered the submissions filed. This being a first appellate court, the role of this court is provided for under section 78 of the Civil Procedure Act and espoused in the case of ***Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA, 212*** wherein the Court of Appeal stated; inter alia: -

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion through it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

31. In the case of ***Mbogo vs Shah [1968] EA*** page 93 in which ***De Lestang VP*** (as he then was) observed at page 94:-

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

32. However in ***Peters vs Sunday Post Ltd [1958] EA 424***, the Court held that:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"***

33. The appeal is against the whole judgement which encompasses a finding on liability, assessment on quantum of damages and costs of the suit. The question that arises is whether the Respondents proved their case on a balance of probabilities. The Appellants contend that the Respondents failed to discharge that burden of proof and since the trial magistrate is *functus officio* and hence the reason they filed the appeal.

34. As regards the question of liability, the trial magistrate relied on PW3's testimony that the 1st Appellant drove 2nd Appellant's motor vehicle KBU 928N at a high speed while negotiating at a corner causing the motor vehicle to lose control and the deceased persons who were passengers on board the motor vehicle suffered yet they were not in control of the same. The trial magistrate noted that the evidence was not controverted by the Appellants since their cases were closed without their testimonies. According to the trial magistrate, it was incumbent upon the Appellants to call evidence to prove that the 1st Appellant was not negligent and explain how the accident occurred but they failed to do so hence the basis for the trial magistrate to find the Appellants 100% liable.

35. It is urged by the Appellants that the 1st Appellant was never charged with a traffic offence despite there being a complete file with testimonies of witnesses. However, I note that PW3 stated that the matter is pending arrest and thereafter charging the 1st Appellant. PW3 stated that they are tracing the 1st Appellant who is at large.

36. Indeed the burden of proof lies on the Respondents as submitted by the Appellant. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

37. But again once the burden under section 107(1) (supra) is discharged, the burden then shifts to the opposite party in a suit. This is what is called the evidential burden of proof which is captured under sections 109 and 112 of the Evidence Act. The Court of Appeal in ***Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*** held that:-

> ***"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is called upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

38. The Appellants did not testify to support their case despite filing statement of defence. The court is well guided by the case ***Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J.*** citing the decision in ***Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*** held that:

> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."***

39. Again in ***Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR*** the court stated as follows:-

> ***"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."***

40. It is submitted by the Appellants that the 1st Appellant was not charged with any traffic offence. In my view this is a mere statement that has found itself in the written submissions. The Appellants failed to attend court to substantiate them. As stated by the Court of Appeal in ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:-***

> ***"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."***

41. In my view the learned trial magistrate did not err to find the Appellants who did not attend court to testify and give their version of events. As the accident was confirmed to be self- involving with no other vehicle, then it behoves upon the driver to come forward and explain the circumstances which made him to lose control of his vehicle. The deceased and other passengers were not in control of the vehicle and hence no amount of negligence could be attributed to them. As noted in the authorities cited by the respondent's counsel, a properly managed and controlled vehicle does not just veer off the road and crash onto bridge rails or even plunge into a river below a bridge without an explanation. It was incumbent upon the appellants to offer that explanation and since they opted not to rebut the respondents evidence, then I find the same to be uncontroverted. Even though the appellant is yet to be charged, there is evidence that the police are on his trail and will be charged once he is arrested. In any event, the burden of proof in civil cases is always on a balance of probabilities. The accident and death of the deceased is not disputed as well as the fact that the deceased was a lawful fare paying passenger in the appellants' motor vehicle on the material. The finding on liability by the trial magistrate was sound and must be upheld.

42. On quantum of damages, I note that the Appellants have not contested the award assessed under pain and suffering and loss of expectation of life. The contention is in regard to the multiplicand of Kshs.15,0000/- applied by the court. The dependency ration and multiplier used by the court is not contended by the Appellants. However, the Appellants contend that the loss of expectation, pain and suffering were not deducted from the award under loss of dependency.

43. In ***Butt vs Khan [1981] KLR 349***, where the Court (***Law. J.A***), held that:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

44. Similarly, in ***Kemfro Africa limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] eKLR, Kneller. J.A***, stated:-

> ***"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 by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the 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"***

45. The trial magistrate took into consideration the vicissitudes and vagaries of life that make future uncertain and adopted a multiplier of 20 years. The trial magistrate was convinced that the minimum wage of Kshs. 15,000/- was appropriate as the deceased's earning were not proved. According to the trial magistrate, a dependency ration of 2/3 was reasonable since the deceased supported the mother, wife and children hence the computation was as follows: - Kshs. 15,000 x 12 x 20 x2/3= *Kshs. 2,399,999.00/-*.

46. It is urged by the Appellants that the trial magistrate went against its own finding to adopt a minimum wage of Kshs. 15,000/- despite finding that there was no proof of deceased's income. Reliance is placed on the case of ***Beatrice W.Murage vs Consumer Transport Ltd & Another [2014] eKLR*** where the court stated that the court should base the earnings on the minimum wage where there is no proof of income. In the lower court submissions, it was submitted that the trial court was to be guided by the Regulations of Wages Order, 2009where the minimum wage was Kshs. 9,780/-.

47. The Respondents submitted that there was proof of employment at Metro Trans marked as MF1 7, work sheet marked as MF1 8 as per PW1 and PW2's evidence. PW2 stated that the deceased was an operator who supervised drivers and conductors. According to PW2, the deceased earned an allowance of Kshs.500 per day which was paid at the end of the month after deduction of taxes and other dues.

48. In the alternative, the Respondents submitted that in the event the minimum wage is applied, then *Regulation of Wages (General) (Amendment) Order, 2013(Legal Notice No.197)* where the minimum wage is Kshs. 15,064.65 should apply. According to the Respondents, the deceased would be categorized as general clerk since his work was supervisory in nature. The Respondents were of the view that in any event Kshs.500 per day would translate to Kshs. 15,000/- similar to the minimum wage under the 2013, Regulation of Wages Order 2013.

49. The Appellants contend that employment contracts or letter were not produced by the Respondents. The Court of Appeal in ***Jacob Ayiga Maruja & Another vs. Simeone Obayo [2005] eKLR*** observed that –

> ***'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very 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.'***

50. It is imperative therefore to interrogate whether the material placed before court was sufficient to prove the earnings of the deceased. The accident occurred on 12th October 2013 hence the applicable Wage Order is the 2013 Order and not 2009 which had been proposed by the Appellants before the trial court. The Appellants submitted that the minimum wage is Kshs.9,780.00/- which upon perusal of the 2013 Order is the wage prescribed for '*general labourer'*. The Respondents submitted that the deceased was a '*general clerk*'.

51. However the court observed in ***Oyugi Judith & Another vs. Fredrick Odhiambo Ongong & 3 Others [2014] eKLR*** that *"Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time."*

52. PW2 stated that the deceased:-

> ***"The deceased was an operator and was in charge of the stages from Umoja to Nairobi Town. He supervised drivers and conductors, reported any arrest all motor vehicles that plied on the route on daily basis, he was in charge of collection of management fees. He was earning a daily allowance of Kshs.500. The money was paid at the end of the month after deduction of taxes and other dues."***

53. A reading of PW2's testimony in my view connotes that the deceased earned kshs.500 daily after deduction of taxes and other dues had been taken into account. This daily allowance will translate into Kshs. 15,000/- per month.

54. Nevertheless, the Respondents have placed reliance on the 2013 Regulation of Wages Order. It is provided under Column 1 (a) *General labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, and messenger.* In my view the categories seem not have supervisory roles. At (g) it provides *Pattern designer (draughtsman), garment and dress cutter, single hand, oven man, charge hand baker, general clerk, telephone operator, receptionist.*

55. Under the *Merriam Webster Dictionary* a *clerk* has been defined to be *a person employed to keep records or accounts or to perform general office work'*. Based on the definition the deceased would be categorized as a general clerk since his role was to supervise the drivers and conductors and report all arrests. The deceased was also in charge of collection of the management fee. Moreover the Appellants have not disputed that the deceased was a general clerk whose prescribed wage is Kshs. 15,064.65.

56. I therefore find no reason to disturb the reliance of minimum wage of Kshs. 15,000/- as the multiplicand as it tallied with what is provided for under the Regulation of Wages (Amendment) Order 21013. Hence, the appeal against the multiplicand used by the trial court fails.

57. On whether the award under the Law Reform Act should be deducted to avoid double compensation, the Appellants place reliance on the case of ***Transpares Kenya Limited & Another vs SMM(Suing as the legal representative for and on behalf of the Estate of EMM(Deceased) [2015]eKLR*** where ***Nyamweya J*** quoted the decision of the Court of Appeal in ***Kemfro Africa Limited vs A.M Lubia &***

Another[1982-1988]KAR 727 where court stated:-

> ***"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 Accident Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act"***

58. I note that the Respondents have not opposed the submissions by the Appellants that the award should be deducted. However it should be noted that damages must be awarded within the confines of the laid down principles of law. I will associate myself with the decision in ***Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja(Deceased) vs Kiarie Shoe Stores Ltd [2015] eKLR*** where the Court of Appeal noted the confusion in regard to the concept of double compensation put across by *Kemfro Africa Limited* case(supra). The learned Judges expressed themselves as follows:-

> ***"…..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 Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:***
>
> ***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."***

59. The interpretation find support from ***Majanja J.*** in ***Richard Matheka Musyoka & another vs Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR*** where then learned Judge restated the principle by Court of Appeal in ***Kemfro vs A. M. Lubia & Another [1982-1988] KAR 727*** where it was held that the court cannot make an award for lost years and loss of dependency to beneficiaries as it would amount to double compensation. At paragraph 10 ***Majanja J***. guided by the Court of Appeal decision 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*** held that:-

> ***"The principal 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 regarding that aspect of the award."***

60. In the case of ***Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR*** counsel for the Appellant submitted an award under the Law Reform Act must be deducted in full from the award made under the Fatal Accident Act as the deceased's estate cannot benefit twice but ***Meoli J.*** disagreed with counsel by stating at paragraph 23;

> ***"With respect, that is not the dictum of the Kemfro case. The brief passage in Hellen Waruguru quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein"***

61. I will associate myself with the learned judges in the above decisions to find that the trial magistrate did not err in not deducting the award under the Fatal Accident Act as submitted by the Appellant.

62. In the premises, I find the appeal lacks merit and is dismissed with costs. The trial court judgement delivered on 14th March 2018 is hereby upheld.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **June, 2021**.

D. K. Kemei

Judge