



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 30 OF 2020**

**BETWEEN**

**JOHN KIGUTA KIUGU.....APPLICANT**

**AND**

**ESTHER KARWIRA MURITHI**

**(suing as Legal Representative of**

**the Estate of Paul Muriithi-deceased).....RESPONDENT**

**(Being an Appeal from the Judgment and Decree in MERU**

**CMCC No. 137 of 2018 by Hon. L.N.Juma (SRM) on 05<sup>th</sup> March, 2020)**

**JUDGMENT**

1. On 30th July, 2017 **Paul Muriithi (Deceased)** was lawfully walking along Meru-Nanyuki Road when he was knocked down by motor vehicle **KAR 123 TOYOTA WAGON (accident motor vehicle)** that was negligently driven by **JOHN KIGUTA KIUGU (Appellant)** as a result of which the deceased suffered fatal injuries.

2. **CATHERINE KARWITHA (Respondent)** in her capacity as Legal Representative of the deceased filed suit against the Respondent seeking damages.

3. The Defendant/Appellant in his statement of Defence denied the claim and blamed the deceased for causing the accident.

4. At the conclusion of the trial, the learned trial magistrate found the Appellant liable at 100% and proceeded to award damages as follows:

- 1) **Pain and suffering Kshs. 50,000/-**
- 2) **Loss of expectation of life Kshs. 100,000/-**
- 3) **Loss of dependency Kshs. 3,000,000/-**
- 4) **Special damages Kshs. 270,455/-**

**The Appeal**

5. The Appellant dissatisfied with the lower court's decision on quantum preferred this appeal mainly disputing the award for loss of dependency, special damages and the award under both the Law Reform Act and the Fatal Accidents Act.

**Analysis and Determination**

6. In regard to the assessment of damages, the principle stated by **Kneller JA** in **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30** at page 35 is instructive th:

*“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.”*

7. I have considered the evidence at the trial and the submission on behalf of the parties and I will address each of the issues raised on appeal as hereunder.

#### **Lump sum award for loss of dependency**

8. Concerning the issue of loss of dependency, the evidence that was adduced by the Respondent that the deceased was a farmer was not disputed. What the Appellant takes issue with the lump sum of Kshs. 3,000,000/-

9. The Appellant proposed a sum of Kshs. 1,200,000/- and placed reliance on three decisions. In **Amazon Energy Limited v Josephine Martha Musyoka & another [2019] eKLR**, the court on appeal set aside a lump sum of Kshs. 2,500,000/- and substituted it with Kshs. 1,200,000/-. I am persuaded that **Amazon Energy Limited** is more relevant and comparable to the case at hand for the reason that the deceased in both cases were 56 years old. An award of Kshs. 3,000,000 was in the circumstances inordinately high and the same is set aside and substituted with an award of Kshs. 1,200,000/-.

#### **Award under the Fatal Accidents Act and Law Reform Act**

10. In the case of **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited [2015] eKLR)**, the Court of Appeal (Waki, Nambuye and Kiage JJA) stated as follows concerning damages under the foregoing two Acts:

*“...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.*

11. In a persuasive decision in **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**, Mativo J analysed Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act and stated as follows:

*“I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.”*

12. In **David Kahuruka Gitau** case (above), the judge also cited **Richard Omeyo Omino vs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007** with approval, where **Karanja J** in discussing the provisions of Section 2 (5) of the Law Reform Act stated: -

**“The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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.**

**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”. This 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.”**

13. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages under both the Fatal Accidents Act and Law Reform Act.

#### **Special damages**

14. Special damages must not only be specifically pleaded but also proved with a degree of certainty and particularity. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR** and **Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR**.

15. As clearly submitted by the Appellant, the respondent was only able to prove Kshs. 265,455/- and not Kshs. 270,455/- awarded as special damages.

16. In the final analysis, this appeal has merit and it is allowed in the following terms:

1) The award of Kshs. 3,000,000 awarded for loss of dependency is set aside and substituted with an award of Kshs. 1,200,000/-.

2) The sum 270,455/- awarded as special damages is set aside and substituted with Kshs. 265,455/-

3) Appellant having partially succeeded shall have half costs of the Appeal

DATED AT MERU THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - Mr. Macharia for Patricks Law Associates

For the Respondent - Mr. Ngunjiri for Ngunjiri Michael & Co Advocates