



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO.3 OF 2018**

***(CORAM: F.M. GIKONYO J.)***

***(Being an appeal from the Judgment/decree of Hon T. Gesora (S.P.M)***

***delivered on 9<sup>th</sup> January 2018 in Narok CMCC No. 216 of 2014)***

**ABDIMANA ABDULWAHAB.....1<sup>ST</sup> APPELLANT**

**DEPECIC KIMATHI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JANET NJERI WAMBUI & ALEX NJENGA MARIGI**

***(suing as the legal representatives for and on behalf of the Estate***

***JANE WAMBUI KIRAGU Deceased).....RESPONDENTS***

**JUDGMENT**

**Important facts**

[1] The Respondents claim is under Fatal Accident Act and Law Reform Act following the death of **Jane Wambui Kiragu** deceased in a road traffic accident. See the amended plaint filed on 1/06/2015.

[2] Judgment in default was entered against the 1<sup>st</sup> appellant on 4/10/2016.

[3] The 2<sup>nd</sup> appellant and Respondents recorded a consent on liability in the ratio 80; 20 in favour of the Respondents against the appellants.

[4] The respondents called one witness PW1- Janet Njeri Wambui who testified on income of the deceased.

[5] Parties filed submissions on quantum.

[6] Quantum of damages was assessed by the trial court as follows in favour of the respondents;

**i. Loss of expectation of life- Kshs 100,000/=**

**ii. Pain and suffering- Kshs 20,000/=**

**iii. Loss of dependency**

**50,000 x12 x 25 x <sup>2</sup>/<sub>3</sub>- Kshs 10,000,000/=**

**iv. Special damages – Kshs 183,600/=**

**Gross-Total Kshs. 10,303,600/=**

Less 20% contribution Kshs. 2,060,720/=

**Net Total Kshs. 8,242,880/=**

[7] The memorandum of appeal dated 29<sup>th</sup> January 2018 cited Five (5) grounds of appeal on quantum of damages.

#### **APPELLANTS' CASE**

[8] The appellants did not call any witnesses.

[9] The appellants submitted that the trial court erred in awarding Kshs. 20,000/- and did not rely on any authorities or render its reasoning on the said award noting the deceased succumbed to her injuries on the same day of the accident. They urged this court to substitute the award with Kshs. 10,000/= for the pain suffered. They relied in the case of **Kenya Railways Corporation V Samwel Mugwe Gioche [2012] eKLR.**

[10] On loss of expectation of life, the appellants proposed an award of Kshs. 60,000/=. they relied on the case of **Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suing As The Administrators Of The Estate Of The Late Lydia Wanjiku Kahiga And Elizabeth Murugi Kahiga Both Deceased ) V World Vision Kenya & 2 Others [2014] eKLR**

[11] The Appellants submitted that the trial court erred in relying on a book produced before court that was purported to be that of the deceased and it was where she allegedly recorded her earnings. The appellants contest that the said book did not bare the deceased's name and there was no proof that the said book was found in the deceased's store. That there was no proof that the deceased banked the alleged monies at the end of the month. That there was no reliable documentary evidence such as income tax return to support the alleged earnings. In absence of proper evidence this court should adopt the minimum wage of general worker (legal notice no. 197 of 2013) being Kshs. 5,218.00/=

[12] On vicissitudes of life, the appellants submitted that the deceased must have inhaled charcoal dust in one way or another which would have contributed to reducing her life span. That there was no evidence that the deceased was in good health and would have lived a fruitful life prior to her untimely death. The appellants proposed a multiplier of 11 years. They relied in the case of **Monica Njeri Kamau V Peter Monari Onkoba [2019] eKLR.**

[13] On dependency ratio, the appellants submitted that the deceased prior to her death was not married and was alleged had three children though only two birth certificates were produced. They proposed a ratio of ½.

[14] On special damages, the appellants submitted the plaintiff did not plead in the prayers the specific claim for special damages. The allegations of special damages were only captured in the body of the plaint. That the receipts did not bear revenue stamp. That special damages must be pleaded and prayed for specifically and special court fee at 5% of the amount claimed for. They relied in the case of **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited V Janevams Limited [2015] eKLR.**

[15] The appellants submitted that in the current case the damages will devolve to the same alleged beneficiaries. They urged this court to deduct the lesser award from higher award to avoid double benefits to the same claimants under both the law reform act and fatal accident act. They cited the cases of **Nairobi Civil Appeal No. 14 Of 1989 Maina Kanairu Vs Josephat Muriuki, Davies And Another Vs Powell Duffryn Association Colliers Ltd. And Kemfro Africa Ltd T/A Meru Express Service Vs Lubia and Another (No. 2) [1987] KLR 30.**

[16] In conclusion the appellants prayed that the appeal be allowed, the judgment be set aside and either the plaintiff's respondents suit be dismissed with cost or and any other orders this appellate court may deem just.

#### **RESPONDENTS' CASE**

[17] According to the Respondents, the death certificate the deceased was aged 39 years. PW1 testified that the deceased sold charcoal where she earned a monthly income of Kshs. 50,000/=. This was proved by production of a book in which she recorded her sales **P Exh 11.** Business permit from municipal council of Limuru for the year 2013 was produced as proof that the deceased operated a charcoal business.

[18] The respondents submitted that the trial court did not err in using a multiplicand of Kshs 50,000/= since the figure was supported and proved by evidence in court. They relied in the case of **Janet Chonge Walumbe & 2 Others V Julius Mwaniki & Another [2019] eKLR** where the court adopted multiplicand for earnings from a posho mill using the daily record book.

[19] The Respondents submitted that the multiplier of 25 years adopted by the court for a deceased aged 39 years was reasonable in the circumstances considering that the deceased was a business lady hence not curtailed by retirement age. That she would have worked up to the age of 70 years. No evidence of any vicissitudes of life which would have shortened the deceased's working life was laid forward. They have relied on the case of **Violet Jeptum Rahedi Vs Albert Kubai Mbogori (2013) eKLR and Samwel Osewe Ochillo V Simion Omwoyo Obare [2013] eKLR.**

[20] The Respondents submitted that the deceased was a single parent survived by three children who solely depended on her for survival hence 2/3 of her income was spent on her family. The chiefs listed the children of the deceased. They cited the cases of **DKM (suing as legal representative to the estate of JMM- Deceased) Vs Mehari K. Towolde [2018] eKLR and Gordon Ouma Sunda & another V Adan Abdikadir Omar & Another (2019) eKLR.**

[21] The respondents submitted that the trial court did not err by awarding the respondents award on loss of earning and loss of dependency since it considered the evidence on record of the same.

[22] The respondents urged this court not to disturb the award of the trial court and relied in the case of *Tridev Construction Vs Charles Wekesa Kasembeli Civil Appel No. 121 of 2002.*

[23] The respondents submitted that the present case does not present a scenario envisaged in *Kemro Africa Ltd* case as there was no misdirection on the part of the learned magistrate on the way he assessed the damages. The damages are reasonable in light of the fatal injuries suffered by the deceased prior to her demise and therefore should not be disturbed.

[24] In conclusion they prayed that the appeal be dismissed with costs to the respondent, and the lower judgment be upheld.

## **ANALYSIS AND DETERMINATION**

### **Duty of court**

[25] The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.*

### **Issues for determination**

[26] The global issue for determination is whether the award of Ksh.10, 120,000/- for general damages was excessive. There is however, another nagging argument on whether the award of Ksh.120, 000/- made under the Law Reform Act should be deducted from the award under the Fatal Accidents Act.

### **The threshold**

[27] As this appeal is on quantum of damages only, the test is as was adumbrated in the case of *Kemfro Africa Ltd v Lubia* (supra) that:

**“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.”**

### **Claim under Law Reform and Fatal Accidents Act**

[28] This claim was founded on Law Reform Act and Fatal Accident Act. These law provides for awards being made for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

[29] Section 4 Fatal Accidents Act provides as follows: -

**“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct.”**

### **The concepts of multiplicand and multiplier**

[30] Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants. The concepts of multiplicand and multiplier; meaning, scope and application in assessment of damages for loss of dependency, was observed by Ringera J (as he then was) in the case of *Beatrice Wangui Thairu V Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 Of 1988.*

[31] The Appellant has fastened a quarrel on the multiplier of 25 years, multiplicand of Kshs. 50,000/= per month and the dependency ratio of 2/3 used by the learned trial magistrate.

### **Multiplicand**

[32] It is not in dispute the deceased was engaged in the business of selling charcoal. She had obtained a permit from the municipal council of Limuru to sell charcoal. PW1 produced a book of recorded transaction of sale of charcoal. The records were kept in a simple unprofessional manner though it appeared to be an honest reflection of the deceased daily records. The amount shown as monthly income from the charcoal business is Kshs.50, 000/-.

[33] From perusal of the judgment it is noted that the trial court used the gross salary of shs.50, 000/-; without taking into account taxes payable, licence fee as well as and other outgoings such as rent.

[34] By using the gross earnings, the trial magistrate failed to take into account relevant factors, thereby, making an inordinately high award for loss of dependency. Therefore, there are good reasons to disturb the trial courts finding on the deceased's income;

[35] Accordingly, the court adopts the sum of Ksh.30, 000/= as the multiplicand for the income from the charcoal business after taking into account statutory payments and other outgoings.

### **Multiplier**

[36] The trial magistrate found that the deceased was of the age of 39 years when she died. He accepted and apportioned the dependency factor going by the testimony of the claimant and documentary material admitted at the trial of the claim. The children are dependants of the deceased and are entitled to be compensated for the loss arising from the premature death of the deceased caused by the negligent acts of the appellants. Dependency was proved and has not been controverted. I so find.

[37] I have considered the cases cited by both counsel as well as the principles applicable to multiplier. I draw upon the significant evidentiary material on record: (i) The death certificate indicates shows that the deceased was aged 39 years when she died; and (ii) the deceased was business lady.

[38] It is the respondents' argument that the deceased may have worked up to the age of 70 years. Also, it is their submission that retirement age of 60 years is only applicable to civil servants. Nothing guarantees employment up to 70 years of age. Frailty of human body or ill health or other eventualities may curtail a person's employment. I wish to state also that private companies are known to retire employees at an early age or the statutory age provided for civil servants. Therefore, ascertainment of the appropriate multiplier remains at the discretion of the court. Did the trial court, therefore, commit an error in the assessment of the appropriate multiplier as to justify interference by this court?

[39] In so far as the multiplier is concerned, there are chances that the deceased would not work up to the official retirement age of sixty due to uncertainties of life. Unskilled workers tend to engage in heavy work which may contribute in reducing their life span. In respect of the deceased herein, a multiplier of 21 years is reasonable.

### **Dependency ratio**

[40] Argument by the appellant seems to suggest that a lower ratio of dependency should be adopted because the deceased was a woman. Truth be told. Women are now empowered. And, single mothers or unmarried women with full parental responsibility, support their children- single-handedly- to the full extent a pair of married couple would. The dependency ratio or the fraction of income which is spent on the dependants by unmarried or single mother, in the absence of evidence that the child or children are also supported by their father pursuant to parental responsibility, or by any other person in filial or other guardian relationship to the child or children, should be equal to that of a married man who is taken to maintain his family household at the ratio of 2/3 of his income. Gender does not matter or justify any differentiation between a female, and male breadwinner and provider. Both occupy the same eminent position and traction of family breadwinner and provider, and there is no lawful or any justification that an unmarried woman's support of her family should be at a lower ratio of her income compared to that of the male counterpart. The evidence herein supports, and I do adopt dependency ratio of 2/3 in the computation of the applicable damages for dependency under the Fatal Accidents Act.

[41] Accordingly, loss of dependency is calculated thus: -

$$\text{a. Kshs. } 30,000 \times 12 \times 21 \times 2/3 = 5,040,000.$$

### **Special damages**

[42] This ground was not raised in the memorandum of appeal but was raised in the written submissions. I will address it nonetheless.

[43] On special damages, the record shows that the appellant produced receipts for Kshs 140,000 +8,600/+35,000/= totaling 183,600/=. Special damages pleaded in the amended plaint are 184,800. The trial court awarded special damages pleaded and proved. I find no reason to interfere.

### **Deduction of damages: Law Reform Act and Fatal Accidents Act**

[44] The concern by the appellant is that the award of Ksh.120, 000/- under the Law Reform Act should be deducted from the award under the Fatal Accidents Act as the persons entitled to the estate are the same persons for whose benefit the action under Fatal Accidents Act was brought. The Court of Appeal in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2) [1987] KLR 30* has guided that what the court is required to do is to take into account the award under Law Reform Act and not necessarily to deduct the same from the award under the Fatal Accidents Act. See also the explanations on whether there was double award under **Law Reform Act** and **Fatal Accidents Act** in the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs Kiarie Shoe Stores Limited [2015] eKLR* by the Court of Appeal.

[45] In making the award under the Fatal Accidents Act, as shown in summing up of the aggregate of the two awards and in making its total damages, the trial court acted in accordance with law and was aware that there is no lawful call for the deduction of the award under the Law Reform Act from the award under the Fatal Accidents Act.

[46] I do not therefore, find merit in the objection as to non-deduction of the sum of Ksh.120, 000/- for loss of expectation of life and pain and suffering from the award under the Fatal Accidents Act. The argument by the advocates for the appellant on double compensation therefore fails.

**Judgment and orders**

[47] Accordingly, for the reasons set out above, the appellant’s appeal herein is allowed in the following terms:

- i. Liability is in the ratio of 100:20% in favour of the respondent.**
- ii. The award of Kshs. 10,000,000/- for dependency under the Fatal Accidents Act is set aside. I make an award of Kshs. 5,040,000 for loss of dependency.**
- iii. The award of Kshs.120, 000/- as damages under the Law Reform Act is affirmed.**
- iv. The award of Special Damages in the sum of Kshs. 183,600/= . Is affirmed.**

[48] All the foregoing awards are subject to 20% contributory negligence. Consequently, Judgment is entered in the sum of Ksh.4, 274,880/- in favour of the respondent and against the appellants. I also award costs and interest on the award.

[49] Given the results of the appeal, I order that each party shall bear own costs of the appeal.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 25<sup>TH</sup> DAY OF OCTOBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Kendi holding brief for Kinyanjui for Appellant
2. M/s Oganga for Respondent
3. Mr. Kasaso – CA

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**F. GIKONYO M.**

**JUDGE**