



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 128 OF 2016

DAVID MWANIKI WAITHERA.....1ST APPELLANT

WAIHAKA JORAM.....2ND APPELLANT

VERSUS

JEMIMAH MWIKALI MOTO

(Suing on behalf of the Estate of late SHARON MUENI).....RESPONDENT

(Being an Appeal from the Judgment of the Honourable M.A.O Opanga,

Senior Resident Magistrate delivered on the 13th day of October 2016

at Kithimani in Civil Suit No. 303 OF 2015)

BETWEEN

JEMIMAH MWIKALI MOTO

(Suing on behalf of the Estate of late SHARON MUENI).....PLAINTIFF

VERSUS

DAVID MWANIKI WAITHERA.....1ST DEFENDANT

WAIHAKA JORAM.....2ND DEFENDANT

JUDGEMENT

1. The Respondents herein, **Jemimah Mwikali Moto**, in her capacity as the administrator of the estate of the late **Sharon Mueni** -Deceased, instituted civil proceedings against the Appellants seeking general damages, special damages and costs. The suit was premised on a road traffic accident which occurred on 5th May, 2015 along Matuu-Thika Road at Kwa Makaa. It was pleaded that on that day the deceased was travelling as a lawful passenger in motor vehicle reg. no. KBU 940A which was in the actual possession and control of the Appellants who were the registered owners thereof. According to the Respondent, due to the negligence and carelessness of the driver and/or servant of the Defendants, the of the said vehicle overtook motor vehicle registration no. KBZ 973P and the same lost control, veered off the main road and collided with an oncoming lorry registration number KBP 702Q resulting into the deceased sustaining fatal injuries. It was pleaded that as a result the estate of the deceased suffered loss and damage.

2. The particulars of negligence, injuries, statutory particulars and particulars of special damages were pleaded and the Respondent claimed special damages in the sum of Kshs 30,650/-, General Damages and Costs of the suit.

3. PW1, **Jemima Mwikali Moto**, the Plaintiff, adopted her evidence in CMCC No. 282 of 2015 and testified that the deceased who was her daughter, was 8 years old when she died. She testified that the deceased attended AIC Kithyoko Academy and was a bright girl who had wanted to become a pilot or doctor when she grew up. According to PW1, the deceased used to be position 3 in her class upwards. She exhibited her death certificate and Report book. It was PW1's case that by the deceased's death she lost her as she hoped that the deceased, who was her first born daughter. She produced the police abstract, letter from the chief, copy of the records and receipt, demand letter and receipts in support of special damages in the sum of Kshs 28,000/=.

4. The defence opted not to call any evidence.

5. In her judgement, the learned trial magistrate noted that the matter appealed from arose from a series of others where liability had been determined against the defendants at 100%. According to her though there was no evidence to show at what time the deceased died, from the evidence she deduced that the deceased must have died instantly hence awarded Kshs 30,000.00 for pain and suffering. As regards the award for loss of expectation of life, she awarded Kshs 150,000/-. According to the learned trial magistrate, it is not wrong to procrastinate (sic) the amount a deceased minor would have earned in future based on her ability at the time of death. In the case before her, the deceased was 8 years and the first born in a family of two. She was of good health when she died and very bright student judging from her performance in school assessment report. The court found that the deceased would have succeeded in her education proceeding to university level and would have entered the job market at the age of 24 and worked up to the normal retirement age of 55. She therefore adopted the minimum age as at 2015 with dependency ratio of 1/3rd giving her a working life of 31 years. She accordingly arrived at a figure of Kshs 1,302,00/- for loss of dependency while awarding Kshs 28,000/- being proved special damages. In the end she awarded a total sum of Kshs 1,510,000/= with cost and interests.

6. Aggrieved by the said decision the Appellant has appealed against the same. However, the Appellant submitted that award made by the trial court in the sum of Kshs. 150,000.00 for loss of expectation of life and Kshs. 30,000.00 for Pain and Suffering were fair and did not contest the same.

7. It was however submitted that the same should be deducted from any award made under the **Fatal Accidents Act** if at all since the beneficiaries under both Acts would ordinarily be the same hence this would amount to double compensation. This submission was based on the decision of **Nyamweya J in Transpares Kenya Ltd & Ano. vs. S M M (Suing as the Legal Reresentative for and on behalf of the Estate of E M M (Deceased) [2015] eKLR**, quoting the decision of the Court of Appeal in **Kemfro vs. A.M. Lubia & Another [1982-1988] KAR 727**.

8. The Appellants took issue with the award made under the **Fatal Accidents Act** on two (2) fronts namely that the multiplier of 31 years and a multiplicand of Kshs. 10,500.80 with a ratio of 1/3 is extremely high and unreasonable for a minor who was aged 8 years at the time of death. According to them, the learned magistrate did not explain the basis for employing the multiplier approach.

9. It was submitted since the deceased was a minor aged 8 years, her mother could not have depended on her. According to the Appellant, there is no testimony that purported to establish dependency, and since the deceased was in school, the hope in her does not warrant using the multiplier approach and awarding a sum of Kshs. 1,510,000.00 awarded by the learned magistrate under this head. To the Appellant, the applicable method of assessment of damages under this heading was expressed by **Nyamweya J in Palm Oil Transporters & Anor. vs. W W N [2015] eKLR** citing **Ringera J** (as he then was) in **Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny 7 Anor., Nairobi HCCC No. 1638 of 1988**.

10. According to the Appellant, the court was of the view that the deceased child aged 13 years had not earned any income that would have guided the court in determining the multiplicand and a resultant multiplier, and the best the court could do in the circumstances was to award a global amount. As a result, the appellate court upheld the lower court award of Kshs. 400,000.00 that was appealed against as being exorbitant and termed it reasonable in line with awards given in similar cases. Moreover, your Lordship, the appellate court deducted the award for loss of expectation of life of Kshs. 100,000.00 from the grand total. The Appellants, based on the said authority urged the court to make a global award.

11. They also relied on the decision of the Court of Appeal in **Kenya Breweries Ltd vs. Saro [1991] KLR 408**.

12. Further the Honourable Judge in the **Transpares case** above, upon finding that the Respondent was a dependent of the deceased, was of the view that the estate of the deceased is entitled to damages for lost years, for the income that would have been earned by the deceased, less the living expenses, assuming he had lived and worked for the period he would have been expected to be in employment. The court relied on the decision of **Hassan vs. Nalian Mwangi Kamau Transporters & 4 others [1986] KLR 457** where it was held that in the assessment of general damages for lost years, the court has to make the best estimate it can, based on the known facts and the prospects of the deceased at the time of his death.

13. In the Appellant's view, since it was not possible to ascertain the actual income of the deceased to enable the trial adopt the multiplier approach, that approach was speculative, unjustified and a misdirection on the part of the Magistrate and the Learned Magistrate erred in principle in this regard. In this regard the Appellants relied on the case of **Mwanzia vs. Ngali Mutua and Kenya Bus Services (Msa) Ltd & Another**.

14. It was the Appellants' submissions that the trial court could have abandoned the multiplier approach and adopted the global sum method in the computation of the award for Loss of Dependency, a method that was readily proposed to the trial court by the defendants in their submissions which the trial court ignored/failed to consider. It was reiterated that evidently, the amount of annual or monthly dependency in the present case was not known and could not be ascertained and as such the trial court should abandoned the multiplier approach and awarded a global sum. In view of the foregoing, the Appellants opined that the court had no proper basis in adopting the multiplier approach and the trial court should have abandoned the multiplier approach and awarded a global sum. In support of this position the Appellants relied **Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR, Nashon Gitau vs. F W H [2016] eKLR and PI vs. Zeina Roses Ltd & Anor [2015] eKLR**.

15. This Court was therefore invited to interfere with the award of Kshs. 1,510,000.00 as extremely high and erroneous considering the comparable awards for similar claims.

16. It was also submitted that this Court ought to take into account the vicissitudes and imponderables of life that may shorten a life over and above accidents based on the views of **Mulwa J** in **Simon Kibet Langat & Anor. vs. Miriam Wairimu Ngugi (Suing as the Administrator of the estate of Daniel Mwiruti Ngugi [2016] eKLR.**

17. In that case, it was submitted that the sum of Kshs. 870,000.00 as general damages under the **Law Reform Act** and **Fatal Accidents Act** awarded by the trial court for a deceased minor aged 14 years was challenged on appeal as too high. The trial court's global award of Kshs. 720,000.00 for loss of dependency was upheld by the appellate court as fairly reasonable. However, Kshs. 150,000.00 that was awarded by the trial court for lost years under the **Law Reform Act** was deducted from the total sum of Kshs. 870,000.00. The appeal succeeded partially with the upshot being that the award of Kshs. 870,000.00 was set aside and substituted with an award of Kshs. 720,000.00.

18. In view of the foregoing, the Appellants submitted that the learned magistrate erred by relying on wrong principles to arrive at such a high award of Kshs. Kshs. 1,510,000.00 for loss of dependency and it was urged that the same should be set aside by awarding a global sum of between Kshs. 400,000.00 – Kshs. 600,000.00 in light of the circumstances of the instant appeal.

19. On behalf of the Respondent, the appeal was opposed. It was submitted that that the deceased minor was an 8 year old standard 3 pupil at **AIC Kithoko Academy**, who was hard working and diligent as well as in robust health and good physical shape. Counsel pointed out to court that a report book for the minor was produced and Pw1's evidence was that the minor was aspiring to be a medical doctor and a pilot in life. Counsel submitted that in African Culture children are expected to support their parents hence are entitled to damages for loss of dependency from the estates of their children and in support of that view placed reliance on the case of **Sheikh Mushaq vs. Nathan Mwangi Kamau Transporters & Five Others [1985 – 1986] 4KCA 217.**

20. Counsel submitted that the issue is whether to adopt the multiplier approach or the global award approach when the Deceased is a minor who had not yet started working for gain. Counsel invited the court to consider the case of **Bobmil Industries Ltd & Another v Kennedy Indakwa Eshiteni (2010) eKLR** where the deceased was a minor and the court adopted a global sum of Kshs 1,200,000/=. Counsel with regard to the multiplier approach submitted that courts have considered how much the deceased would have earned upon completion of education, how many years he/she would have supported the parents and the siblings and for how many years. Reliance was placed on the case of **Kenya Power & Lighting Company Ltd vs. E K O & Another [2018] eKLR**, where **Justice Joel Ngugi** found no fault in the lower court adopting the multiplier of Kshs 10,000/= as a minimum wage for the deceased. Counsel's argument was that the deceased would probably become gainfully employed at 24 years till the retirement age of 60 years as was the reasoning in the case of **Abdi Kadir Mohammed & Another v John Wakaba Mwangi (2009) eKLR**, where the court considered a multiplier approach in awarding loss of dependency in the case of a 12 year old minor.

21. Counsel urged the court to exercise its discretion to decide on the approach on which to apply in each case hence the trial court did not err in adopting a multiplier approach in awarding Kshs 1,302,000/=. That the dependency ratio of 1/3 was reasonable, that the deceased would have secured employment at the age of about 24 years and she would have worked to retirement age which is 60 years hence a multiplier of 36 years would be reasonable however the multiplier of 31 years adopted by the court was reasonable. In addition, the multiplicand of Kshs 10,500/= adopted by the court being the minimum wage was reasonable and fair as at 2015.

22. On the 2nd issue, counsel opposed the intimation that the award of Kshs 150,000/= for loss of expectation of life and Kshs 30,000/= for pain and suffering made under **Law Reform Act** should be deducted from the award made under the **Fatal Accidents Act**. Reliance was placed on the case of **Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR.**

23. The Respondent relied on section 2(5) of the **Law Reform Act** which 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 dependants of the deceased persons by the **Fatal Accidents Act** and submitted that this 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.

24. In view of all the foregoing, the Respondent prayed that this Appeal be dismissed with costs.

Determinations

25. In this appeal, the Appellant is challenging quantum of damages.

26. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

27. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

28. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

29. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

30. The same Judge in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), in which Ringera J. as he then was, held at page 248 that:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

31. In this case, the appellants have taken issue with the dependency ratio. In this case, PW1’s evidence was that the deceased was aged 29 years was married with a wife and two children. In Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another (supra) the court:

“...constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track.”

32. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, it was the opinion of the Court of Appeal that:

“There is no two-thirds rule as dependency is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss...“Dependency” or “dependency” is the relation of a person to that by which he is supported...The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation...But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person...In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half.”

33. As regards the multiplicand, Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 held that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical

payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

34. In this case the deceased was aged 8 years. The principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others Civil Appeal No. 123 of 1983 [1986] KLR 457; [1982-1988] 1 KAR 946; [1986-1989] EA 137** as:

- (1). Parents cannot insure the life of their children;
- (2). The death of a victim of negligence does not increase or reduce the award for lost years;
- (3). The sum to be awarded is never a conventional one but compensation for pecuniary loss;
- (4). It must be assessed justly with moderation;
- (5). Complaints of insurance companies at the awards should be ignored;
- (6). Disregard remote inscrutable speculative claims;
- (7). Deduct the victim’s living expenses during the “lost years” for that would not be part of the estate;
- (8). A young child’s present or future earning would be nil;
- (9). An adolescent’s would real, assessable and small;
- (10). The amount would vary from case to case as it depends on the facts of each case including the victim’s station in life;
- (11). Calculate the annual gross loss;
- (12). Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case;
- (13). Deduct the victim’s probable living expenses of reasonably satisfying enjoyable life for him or her; and
- (14). Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.

35. That is my understanding of the holding of the Court of Appeal in **Kenya Breweries Ltd vs. Saro [1991] KLR 408** that;

“...in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those in awardable in the case of a four year old one who has not been to school and whose abilities are not yet ascertained. That, we think, is a question of common sense rather than the law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and invariably take care of their aged parents.”

36. Githinji, J (as he then was) in **William Juma vs. Kenya Breweries Ltd. Nairobi HCCC NO. 3514 of 1985** however appreciated that:

“In this country, the courts have taken into account the nature of our society and have correctly held that parents expect financial help from their children when they grow up. It is recognised that in our society children render useful services in the house or in the shamba, which relieves parents from financial expenditure on, say an employed worker. Those free services can be converted into money. The courts therefore have been awarding a lumpsum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer.”

37. In **DMM (Suing as the Administrator and Legal Representative of The Estate of LKM vs. Stephen Johana Njue & Another [2016] eKLR** the court expressed itself as hereunder:

“In the circumstances, the sum of Kshs. 700,000/= was a product of, and was an erroneous estimate of damages. Taking all factors into account, a 16 year old in school and doing well would receive a compensation of between Kshs. 1,000,000/= to Kshs. 1,500,000/=. In my discretion, I find the sum of Kshs. 1,200,000/= to be adequate compensation for loss of

dependency. Accordingly, I set aside the award of Kshs. 700,000/= awarded by the trial court for loss of dependency and in its place I award the sum of Kshs. 1,200,000/= for loss of dependency.”

38. I agree with Ringera, J in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplier to the multiplicand is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

39. It is therefore clear that in adopting the principles applicable to loss of dependency for the deceased who was aged 8 years old, the learned trial magistrate committed an error of principle. What she ought to have done was to award a lumpsum based on comparable awards. I associate myself with the decision of Mulwa J in Simon Kibet Langat & Anor. vs. Miriam Wairimu Ngugi (Suing as the Administrator of the estate of Daniel Mwiruti Ngugi [2016] eKLR where she stated that:

“For young minors, it is not clear how a child may turn out to be when they mature despite good grades in school and high expectations of parents. Further, minors cannot be said to strictly have dependants. All children from all walks of life, given equal opportunities could become anything in future. It is not predictable.”

40. In my view, the trial court ought to have been guided by the decision in Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and Administrators of the estate of CRK (deceased) (2017) eKLR where the court awarded Kshs 600,000.00 as lost years.

41. As regards the double award, as stated in Marko Mwenda vs. Bernard Mugambi & Another (supra) the capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. Similarly, the Court of Appeal in Eliphaz Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004 held that:

“As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards...Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-.”

42. The Court of Appeal (Waki, Nambuye and Kiage JJA) in the case of Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR similarly stated that:

“...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... 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.”

43. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award leaving a balance of Kshs 1,818,882.20.

44. Accordingly, I allow the appeal, set aside the award made by the trial court and substitute therefor the following:

(a) Pain and Suffering – Kshs 30,000.00

(b) Loss of Expectation of Life – Kshs 150,000.00

(c) Lost years – Kshs 600,000.00

(d) Special Damages – Kshs 28,000.00

Sub Total - Kshs 808,000.00

Less - Kshs 100,000.00

Net - Kshs 708,000.00

45. The Respondent will have the costs of the lower court but there will be no order as to the cost of this appeal. The general damages will accrue interest at court rates from the date of the judgement in the court below till payment in full while the special damages will accrue interest from the date of filing suit at the same rate till payment in full.

46. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of April, 2020

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey