REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 9 OF 2019

CROWN BUS SERVICES LTD.....1ST APPELLANT

PETER KHAKALI.....2ND APPELLANT

AINUS SHAMSI HAULIERS LTD.....3RD APPELLANT

=VERSUS=

JAMILLA NYONGESA AND AMIDA NYONGESA

(LEGAL REPRESENTATIVES OF ALVIN NANJALA (DECEASED).....RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate's Court at Eldama

Ravine PMCC. No. 84 of 2017 delivered on the 26th March 2019 by Hon. J. Nthuku, SRM]

JUDGMENT

Introduction

1. This is an appeal from the judgment of the Principal Magistrate's Court at Eldama Ravine (J. Nthuku, SRM) delivered on 26th March 2019 in a personal injury claim PMCCC No. 84 of 2017 arising from a fatal motor traffic accident on 27/7/2017 in which the plaintiff aged 21 leaving a son age 2 years and a mother and the trial court entered judgment against the appellants in addition to costs and interest as follows:

> · ***"****liability against the 1st and 2nd Defendants jointly and severally at 100%.*
>
> · *special damages awarded Kshs.332.790 ·*
>
> · *general damages under the Law Reform Act, pain and suffering Kshs.20,000/-*
>
> · *loss of expectation of life Ksh.100000/-.*
>
> · *Under the Fatal Accidents Act of Kshs.3.120,000/- I award a lumpsum of Ksh.3,120,000/-*
>
> ***Total award Ksh3,572,790."***

2. The suit was brought by the legal representatives of the deceased Avina Nanjala on behalf of the estate and of behalf the dependants, named as themselves – grandmother and aunt of the deceased, respectively, and the **mother** and **son** of the deceased.

The appeal

3. The Appellants filed a Memorandum of Appeal dated 25th April 2019 setting out the grounds of appeal as follows:

> *1. "The trial Magistrate erred in fact and in law. in awarding the Respondent Kshs. 3.120.000/= a; damages under the Fatal Accident's Act. which award was too excessive in the circumstances.*
>
> *2. The Learned Magistrate erred in law and in fact in relying on the maximum number of productive working years which was 39*

years in the circumstances. and failing to consider vicissitudes of life when awarding damages under the Fatal Accidents Act.

3. *The trial Magistrate erred in law and in fact in failing to accord due regard to the Appellants missions and authorities on quantum on applicable principles for assessment of damages."*

4. The Appellants field the Record of Appeal dated 28th July 2020 and the Respondent filed a Supplementary Record of Appeal dated 3rd August 2020.

Judgment of the trial court

5. In awarding the damages for personal injury in this case, the trial court ruled in relevant part as follows:

"On general damages, the deceased died on the spot.

On quantum. Under Law Reform Act

(1) Pain and suffering, it is in evidence that the deceased died immediately after the accident. I would award a conventional figure of Ksh.20,000.

(2) On the award of expectation of life the deceased was aged 21 years. There is no evidence that she was of ill health. I award Ksh.100,000/=

(3) Under the fatal Accidents Act, it is clear that the deceased was 21 years. There was no evidence that she suffered from any ill health. The witness produced pay slips showing she was earning Ksh.10,000/- for the same month. The deceased was not married and had one child who depended on her so I adopt a multiplicand of 2/3 and a multiplier of 39 years. {10,00O0x 12 X 2/3 X 39 = 3.120,000}

(4) For special damages, the amount proved was Kshs.332,790 and I award the same.

In summary:

· liability against the 1st and 2nd Defendants jointly and severally at 100%.

· special damages awarded Kshs.332.790 ·

· general damages under the Law Reform Act, pain and suffering Kshs.20,000/-

· loss of expectation of life Ksh.100000/-.

· Under the Fatal Accidents Act of Kshs.3.120,000/- I award a lumpsum of Ksh.3,120,000/-

· Total award Ksh3,572,790.

The suit against the 3rd defendant is dismissed with costs to be borne by the 1st and 2nd defendants. The 1st and 2nd defendants will also bear the costs of the suit and interest ant court rate."

Submissions

6. The parties field written submissions on the appeal. As urged by the appellants "*the Memorandum of Appeal contains five grounds of appeal that can be summed up into one issue of quantum*." The court has considered the respective submissions of the parties – for the appellants dated 9th September 2020, filed by M/s Kimondo Gachoka & Co. Advocates and for the respondents dated filed by 25th September 2020, filed by M/S Gekongá & Co. Advocates.

7. By submissions dated 9th September, 2020 the Appellant urged the court to assess the damages on dependency using a multiplicand of Ksh.8,000/- and a multiplier of 20 with a dependency ratio of ½ for the deceased who had one child as follows:

"i. Damages under the Fatal Accident's Act

13.The bone of contention in this appeal is on the award of Kshs. 3,120,000.00 under Fatal Accident's Act where the trial court completely misapplied the law and the principles applicable. In arriving at the said award, the trial court erroneously and incorrectly employed/ adopted the now renowned multiplier approach/ formulae which is usually used when determining loss of dependency. The trial court adopted a multiplier of 39 years using a multiplicand of Kshs. 10,000.00 being the alleged basic salary of the deceased and worked out the loss of expectation of life as follows:-

"Kshs. 10,000.00x 12 x 39 x 2/3 = Kshs. 3,120,000.00"

14. The deceased was 21 years old at the time of the accident. She was not married but had a son. She also provided a letter from employer as proof that she earned Kshs.10,000.00 per month. The multiplier of 39 years in our view is extremely high and urge your Lordship to review the same. ***We propose a sum of Kshs. 8,000.00 to factor in the minimum wage at the time of death and in any event the applicable statutory deductions if this court is inclined to adopt the sum of Kshs.10,000.00.***

15. Secondly Your Lordship the dependency ratio of 2/3 was not justified taking into account that the deceased was not married and had one child only. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1/3 which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was unmarried with 1 child and a dependency ratio of 1/2 would suffice. 16.Courts have developed guidelines on multiplier and multiplicand. The multiplier is the number of years the deceased would have been in gainful employment. In the case of Kenya Wildlife Services vs. Geoffrey Gichuru Mwaura [2018] eKLR the court relied on the Ezekiel Barngetuny case where Ringera J had stated:

"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 purchase. 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."

17. In arriving at the multiplier, the court takes into the consideration the vagrancies of life. However, there is no clear-cut approach. This was reiterated by Waweru J in West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR. However, case law gives guidance on the court approach.

18. In West Kenya Sugar Co. Ltd v Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) (supra) the court substituted the trial court's multiplier of 35 years with 33 years. The deceased was 21 years.

19. In Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] eKLR the court held that a multiplier of 30 years was reasonable for a 21-year-old fatal claim. 20.Similarly, in Kenya Power & Lighting Co. Ltd v Benard Kilonzo (suing as the administrator of the Estate of the late Maurice Mutinda Kilonzo [2012]eKLR the court adopted a multiplier of 25 years for a deceased of 21 years.

21. It is our humble submission that a multiplier of 20 years as submitted in the trial court would be reasonable consideration of vicissitudes & vagrancies of life. *The computation for loss of expectation of life would therefore be as follows:-*

"Kshs. 8,000.00x 12 x 20 x 1/2 = Kshs. 960,000.00"

22. We therefore urge your Lordship to find that the trial magistrate erred in fact and in law in awarding the Respondent Kshs. 3,120,000.00 as damages under the Fatal Accident's Act and substitute the same with Kshs. 960,000.00.

ii. Damages under the Law Reform Act - Double Award

23. Under the Law Reform Act, Chapter 26 Laws of Kenya, the trial court awarded KShs.100,000.00 for loss of expectation of life and KShs. 20,000.00for Pain and Suffering. The Appellant considers the aforesaid awards to be fair and shall not contest the same.

24. However, it is the Appellants submissions 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. We are guided by 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 that:

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

25. My Lord we submit that since the Respondent herein is a dependant of the estate of the deceased, she ought not to benefit under both the Law Reform Act as well as under the Fatal Accident Act. It means that the amount awarded to the Respondent under Law Reform Act for pain and suffering as well as loss of expectancy should be deducted from the award made under the Fatal Accident Act based on the court of Appeal in Maina Kamau and Another -vs- Josephat Muriuki Wangondu and Another cited with approval in Josephat Wachira Maina and Another -vs- Mohammed Hassan, Civil Appeal Number 43 of 2003."

8. By submissions dated 22nd September 2020, the Respondent replied urging the court to uphold the assessment by the trial court as follows:

1. That the trial Magistrate erred in fact and in law in awarding the Respondent Ksh.3,120,000/= as damages under the Fatal Accident's Act which award was too excessive in the circumstances.

Your Lordship, the Respondent in the trial court testified as recorded in the proceedings at page 59 of the record of appeal that the

deceased was 21 years at the time of her death and the deceased's death certificate was produced as Plaintiff's exhibit 3. The said death certificate is on page 3 of the supplementary record of appeal. The Respondent further testified that the deceased was working at Transit Petroleum and she was earning Kshs.10,000/= per month. A payslip and letter from the employer was produced as Plaintiff's exhibit 4. The trial court in its judgment notes at page 69 of the record of appeal noted that a payslip showing the deceased was earning Kshs.10,000/= was produced. It was the respondent's testimony at the trial court as recorded at page 60 of the record of appeal that the deceased had one child who was then 2 years and produced a birth certificate to that effect as Plaintiff's exhibit 5. The trial court in its judgment notes at page 69 of the record of appeal equally noted as follows:-

"It is clear that the deceased 21 years. There was no evidence that she suffered from any ill health. The witness produced the payslip showing she was earning Kshs.10,000/= for the same month. The deceased was not married and had one child who depended on her so I adopt a multiplicand 2/3 and a multiplier of 39 years. (10,000 x 12 x 2/3 x 39=3,120,000)"

Your Lordship, what the court should take into account to reach an award under this ground was well said in the case of Richard Matheka Musyoka & another v Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR (Number 1 in the Respondent's list of authorities) where reference was made to the case of BEATRICE WANGUI THAIRU -VS- HON. EZEKIEL BARNGETUNY & ANOTHER NAIROBI HCCC NO. 1638 OF 1988 (UR) where J. Ringera stated as follows:-

"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 purchase. 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."

Your Lordship, it is clear that the trial court took into consideration the factors it ought to consider in arriving at the award of Kshs.3,120,000/=. It is therefore our submission that the amount awarded by the trial court was not excessive in the circumstances and we pray that this Appeal fails on this ground.

2. THAT the learned trial Magistrate erred in law and in fact in relying on the maximum number of productive working years which was 39 years in the circumstances and failing to consider vicissitudes of life when awarding damages under the Fatal Accidents Act.

Your Lordship, the Respondent testified at the trial court that the deceased was 21 years at the time of her death. The Respondent in her submissions at pages 9 and 10 of the supplementary record of appeal submitted that the deceased was aged 21 years old and in extremely good health prior to her death. It was the Respondent's submissions at the trial court that the deceased was working in a private company and would have worked past 60 years. The Respondent in her submissions proposed a multiplier of 44 years. We submit that the award of a multiplier of 39 years by the trial court was reasonable. your lordship, we rely on the case of DAVID KIMATHI KABURU V GERALD MWABOBIA MURUNGI (SUING AS LEGAL REPRESENTATIVEOF THE ESTATE OF JAMES MWENDA MWOBOBIA (DECEACED)(2014)EKLR (Number 2 in the Respondent's list of authorities) where the court noted as follows:- "... the trial court correctly observed that the deceased was in private business, was aged 28 years and that the maximum retirement age in Kenya is now 60 years. The court in applying a multiplier of 30 years took 60 years retirement age of civil servants but failed to note that the deceased was in private sector where the retirement age of 60 years does not apply as one can continue working even beyond 60 years ... " The trial court in its judgment notes at page 69 of the record of appeal noted as follows:-

"It is clear that the deceased 21 years. There was no evidence that she suffered from any ill health. The witness produced the payslip showing she was earning Kshs.10,000/= for the same month. The deceased was not married and had one child who depended on her so I adopt a multiplicand 2/3 and a multiplier of 39 years.

Your Lordship, no evidence of ill health of the deceased was produced to indicate or suggest that she would not have worked beyond the retirement age of 60years. This therefore makes the multiplier of 39 years relied upon by the trial magistrate proper. Your Lordship, we rely on the case of Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma - Deceased) [2019] eKLR (Number 3 in the Respondent's list of authorities) where reference was made to the case of CHUNIBHAI J PATEL AND ANOTHER VS. PF HAYES AND OTHERS (1957) EA 748, 749 where the Court of Appeal stated

*"... It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.' In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life ... In **Benedita Wanjiku Kimani** (supra) Emukule J awarded a multiplier of 16 years to+ a deceased aged 44 years at the time of his death ... "*

3.THAT the trial Magistrate erred in law and in fact in failing to accord due regard to the Appellants submissions and authorities on quantum on applicable principles for assessment of damages.

Your Lordship, the trial court had all the evidence, submissions and authorities presented to it and it must have considered all these

when making its decision. It is not proper for the Appellant to allege that the trial court did not accord due regard to their submissions and authorities in the absence of cogent evidence to support such allegations. There is enough proof that the trial court considered the evidence, submissions and authorities before it when making its decision as seen in its judgment notes at page 69 of the record of appeal. The court Indicated that no evidence was presented to show "the deceased was of ill health to affect the award of damages made."

Issue for determination

9. The twin issue for determination is whether the awards of Ksh.3,120,000/- for general damages under the Fatal Accidents Act were excessive and whether the award of Ksh.120,000/- made under the Law Reform Act should be deducted from the award under the Fatal Accidents Act.

Determination

Principles for appellate interference with award of damages

10. The well-known principles for interference with an award of damages by a trial court are laid down by the Privy Council in ***Nance v. British Columbia Electric Railway Co. Ltd.*** (1951) A.C. 601, 613 as discussed in related KBT HCCA NO. 11 OF 2019.

11. On the facts of the case, the victim was a 21 year old woman with a son whom she supported as testified by the mother PW1 as follows:–

"PW1 Female Adult Duly Sworn States in Kiswahili as follows: I am Jamilla Nyongesa. I stay in Kakamega am Counselor. I testified in CC. 98/2017. Emmanuel Nyongesa was my grandchild his mother Avin Nanjala died on 27.07.2017.

7.2017 through a road traffic accident. I produce the Limited Grant Ad Litem as an exhibit PEx1.

I paid Ksh.35,000/- for the Grant. EXH.2.

The deceased was 21 years old. She lived in Mombasa. Death Certificate Exh.3. She worked at Transit Petroleum and she was earning Ksh.10,000/- per month. I produce the payslips for January to June 2017 as exhibits and letter from the employer. PEXh. 4.

Gross Ksh.10,000/- House allowance 3000/-.

She had one child. Emmanuel Bahati Nyongesa. He is aged 2 years now. I produce the birth certificate as an Exhibit. PExh5.

She was buried in Kakamega after one week and half. We spent Ksh.348,540 for burial expenses. I produce the bundle of receipts as exhibit. Exh.6.

I produce the police abstract as exhibit PExh.7.

Demand Notice exhibit PExh.8.

We haven't been compensated. I stay with the child. I pray for compensation and costs of the case.

Cross-examination by Chesire for 3rd defendant

No questions."

12. When recalled for further cross-examination pw1 said:

"Cross examination by Ms. Baraza for 1st and 2nd Defendants

My ID is 14655476. I live in Kakamega. Alvin Nanjala is my daughter's child who I live with. Her mother is Amina Nafula. The Chief confirmed that I am the guardian. Amina is also known as Claudieta. Morgan is child to my other sister, (shown statement filed 05.12.2017. The Verifying Affidavit is signed by my sister Amida. Alvin is not in court today. Alvin Nanjala was my nephew. I was not present during the accident so I don't know how it occurred. Alvin was 21 years old. (Plaint shows 27 years old). Emmanuel was Alvin's child. ***Alvin was hotel attendant. I produced the pay-slips and evidence of when he was employed.***

Re-examination by Gekongá

I and Amidah are the administrators. I produced Letters of Administration as exhibits. Alvin had a child Emmanuel Nyongesa. The deceased was aged 21 years."

Damages under the Law Reform Act

13. No challenge was made to the award of the Ksh.100,000/- for loss of expectation of life and pain and suffering at Ksh.20,000/- for the death which it was conceded occurred shortly after the accident. The concern on the matter was only that the award of Ksh.120,000/- under the Law Reform Act 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.

14. 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, as follows:

> "*6. 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.*
>
> *7. The Law Reform Act (cap 26) section 2(5) provides that the rights conferred by or for the benefit of 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. 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.*
>
> *8. The words "to be taken into account" and "to be deducted" are two different things. The words used in section 4(2) of the Fatal Accidents Act are "taken into account". The 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."***

15. From the judgment of the trial court the two awards under the Law Reform Act and the Fatal Accidents were considered in close proximity as to indicate that the court did have in mind and take into account its award for non-pecuniary damages for loss of expectation of life and pain and suffering when considering the damages under the Fatal Accidents Act.

16. **I do not 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.**

Damages under the Fatal Accidents Act

Formula for calculation of dependency

17. Both parties agree as to the formula for computation of dependency as observed by Ringera, J. as he then was in ***Beatrice Wangui Thairu*** case, supra. Indeed, Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of ***Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another*** cited by the Court of Appeal for Eastern Africa in ***Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar*** (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:

> ***"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:***
>
> *"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."*
>
> *Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):*
>
> *"That the method of assessment of damages adopted by the learned chief justice was correct.""*

18. 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.

Multiplicand

19. The Court could properly take judicial notice of the statutory regulations on Basic Minimum Wages for the relevant year under section 60 (1) (a) of the Evidence Act. ***THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2017***, which is applicable for the present case where the accident occurred on 27/7/2017 and judgment given on 26th March 2019, provides for a basic minimum wage of **Ksh.13,960.80** for a cook in Nairobi, Mombasa and Kisumu cities. The deceased worked as a hotel attendant in Mombasa.

20. **However,** in disallowing the objection seeking the striking out of the letter PEX.4, the court exercised discretion reasoning that the respondents were at liberty to cross-examine the plaintiff on the letter which was produced without having been served on the defendants in accordance with the rules. There is no evidence that, in allowing the production of the letter, on which the defendant's had opportunity to cross-examine the witness, the trial court erred in accordance with the principles of ***Mbogo v. Shah*** (1968) EA 93 which would entitle this court to interfere as follows:

> "***A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice***"."

21. In any event, in the absence of a letter confirming employment and wages, the court would still be entitled to adopt, without proof pursuant to section 60 of Evidence Act, under the statutory minimum wage guidelines, the minimum wage for the year, which at Ksh.13,960.80 was well above the sum of Ksh.10,000/- adopted by the court as to take care of any statutory deductions as urged by the appellants' counsel.

Multiplier

22. The deceased aged 21 years could have worked under Government Regulations upto 60 years, a difference of 39 years. The respondent urged the court to find that being employed in private sector the deceased may have worked beyond the 60-year retirement age under Government labour regulations. The appellant emphasizes vicissitudes of life to potentially curtail such working period.

23. The court does not accept the argument by the trial court and the respondent that as there was no evidence of ill health on the part of the deceased she must be taken to have been able to work upto the applicable retirement age and that therefore the multiplier is the function of a subtraction of the retirement age of the age for the deceased. Apart from ill health there are many vicissitudes that afflict the daily lives of humans as may well shorten the working life prescribed under private contract or statute regulations.

24. Nor do I accept however, that the court is entitled to mechanically adopt a mathematical. That would be plastic and unreflective of the reality of life where the pilgrim's journey is fraught with many uncertainties, unknown unforeseen occurrences which may well shorten the expected working life of the employee in private or public service so that the contractual or statutory age of retirement is an unrealistic quotient. A court determination ought to be realistic and the court is better placed in justice to adopt a figure of the multiplier which is reasonable and in tune with realities of life.

25. In this case in the absence of any debilitating health concerns the court shall make only a small reduction of four (4) years on the public sector retirement age of 60 so that the multiplier of 35 years is used in the computation. The court notes that in one decision relied on by the appellant herself, namely *West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR*, a multiplier of 33 were used for a deceased aged 21 years as in the present case. The deceased herein working in the private sector may well have worked beyond the retirement age of 60.

Dependency ratio

26. As regards the fraction income which is spent on the dependants in the case of an unmarried woman who supports a child (and in this case her mother) I consider that 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, the single female parent's dependency ratio should be equal to that of a married man who maintains his family household at 2/3 of his income. Both occupy the same position of family breadwinner and provider, and I do not see why an unmarried woman's support of her family should be at a lower fraction of her income than that of her male counterpart. The court, therefore, approves the use of the dependency ratio of 2/3 in the computation of the applicable damages for dependency under the Fatal accidents Act.

Whether damages under Law Reform Act should be deducted from the award under the Fatal Accidents Act

27. For the reasons that the trial court clearly took into account the award of Ksh.120,000/- in making the award under the Fatal Accidents Act, as shown in the court's summing up of the aggregate of the two awards in making its total damages, there was no lawful call for the deduction of the award under the Law Reform Act from the award under the Fatal Accidents Act**.**

28. In any event, as this court discussed in KBT HCCA No. 1 of 2018, (Formerly NAKURU HCCA No. 147 of 2015) ***David Kenei Julius Cheretei v. Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii - Deceased)***, there is no requirement for deduction of the one award under Law Reform Act from the other under the Fatal Accidents Act as follows:

> "***6.*** *In* ***Hellen Wanguru Waweru (Suing as the legal representative of Peter Waweru Mwenga (deceased) v. Kiarie Shoes Stores Limited*** *(2015) eKLR, the Court of Appeal (Waki, Nambuye & Kiage JJA.) explained the principle of double compensation under the Law Reform Act and the Fatal Accidents Act as follows:*
>
> "***18.*** *Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.*
>
> ***19.*** *Finally on the third issue, learned counsel for KSSL,* ***Mr. C. K. Kiplagat*** *was of the view that Hellen could not claim damages*

under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.

20. *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 under the* ***Law Reform Act*** *and dependants under the* ***Fatal Accidents Act*** *are the same, and consequently the claim for lost years and dependency will go to the same persons. It 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.*

21. *The confusion appears to have arisen because of different reporting of the Kemfro* ***case*** *(supra) which was heavily relied on by Mr. Kiplagat. 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* ***Kemfro 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:-*

> ***"6. 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.***
>
> ***7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for 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. 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.***
>
> ***8. 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'. The 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."***

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

23. *The consequence of our intervention in the various awards boils down to the following final assessment of damages:-*

Pain and suffering	*10,000/-*
Loss of life expectation	*100,000/-*
Loss of dependency (19,373 x 12 x 1 x 2/3)	*154,984/-*
Farming (20,000 x 12 x 5 x 2/3)	*800,000/-*
Total	*1,064,984/-*
Less 30% contribution	*319,495/-*
Balance	*745,489/-*

In our view, the low amounts awarded under the LRA sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate.

24. *The appeal is thus allowed in the manner stated above and an order shall issue accordingly. The appellant shall have the costs of the appeal."*

7. It is therefore clarified by the Court of Appeal in ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited*** *(supra), which binding on this Court, that that there is no requirement for the trial court to discount or reduce the damages in Fatal accidents Act with the awarded recovered under the Law Reform Act. The submission by the appellant that the trial court "the trail magistrate erred by failing to deduct the award [under the Law reform Act of Ksh.100,000 for loss of expectation of life and Ksh.50000/- for pain and suffering] and thus made a double award is therefore erroneous."*

Conclusion

29. The court's adoption of a multiplicand of 39 years for the deceased who was aged 21 years, although not shown to have been of ill health, was wrong for failing to take into account life's other vicissitudes not restricted to ill health that could cut short the working life of the deceased. For such vicissitudes despite the deceased being of good health, the court awards a multiplier of 35 years. The trial court's use of the sum of Ksh.10,000/- to find the multiplicand cannot be challenged in view of the letter of employment and payslip produced by the deceased's mother (PW1) and, in any event in view of the applicable basic minimum wage of Ksh.13,960.80 applicable to the deceased who worked as a hotel attendant in Mombasa at the time of her death. The trial court properly took into account the award of Ksh.120,000/- made under Law Reform Act when making the award under the Fatal Accidents Act. This court accepts the dependency ratio of 2/3 for the unmarried woman with a child and mother to support. The computation of the damages for dependency under the Fatal Accidents Act, therefore, becomes 10,000/-x12x35x2/3 =2,800,000/-.

Added to the amount of Ksh.120,000/- under the Law Reform Act, the total award in general damages become **Ksh.2,920,000/=.**

The plaintiff's award of Ksh.332,790/- special damages was not challenged, and the same is affirmed.

Orders

30. Accordingly, for the reasons set out above, the appellant's appeal herein is allowed in terms as follows:

> *1. The award of Ksh.3,120,000/- for dependency under the Fatal Accidents Act is set aside and substituted with an award of Ksh.2,800,000/-, therefor.*
>
> *2. The award of Ksh.120,000/- as damages under the Law Reform Act is affirmed.*
>
> *3. The award of Special Damages in the sum of Ksh.332,790 is affirmed.*

31. Consequently, an award of damages for personal injury and, therefore, Judgment is entered in the sum of **Ksh.3,252,790/-** for the plaintiff/respondent against the 1st and 2nd defendants/appellants.

32. The order on interest and costs made by the trial court shall remain in force. There shall, however, be no order as to the costs of the appeal in this court as both parties have partially succeeded in their respective contentions.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF NOVEMBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for the Appellants.

M/S Gekongá & Co. Advocates for the 1st Respondent.