REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO 30 OF 2014

NYAMIRA LUXURY EXPRESS CO. LTD.....APPELLANT

VERSUS

JOSEPH KIPKORIR LANGAT & CHRISTOPHER

KIPKORIR (Suing as legal representative of

VINCENT KORIR (Deceased).....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate at Sotik (Hon. P Olengo PM)

in Senior Principal Magistrates Court Civil Case No 117 of 2013 dated 7th August 2014)

JUDGEMENT

1. The respondents in this matter were the plaintiffs in Sotik Senior Principal Magistrates Court Civil Case No 117 of 2013. They had lodged a claim by way of plaint dated 3rd July 2013 against the appellant under the Law Reform Act and the Fatal Accidents Act following an accident on 12th January 2013 along the Sotik- Kericho road. The accident involved the appellant's motor vehicle KBR 953K and a motor cycle KMCS 140N which resulted in the death of Vincent Korir. Pursuant to a consent between the parties recorded in court on 20th February 2014, liability was agreed in the ratio of 80:20 in favour of the plaintiffs/respondents.

2. The 1st plaintiff/respondent, Joseph Kipkorir Langat, testified that the deceased was his son, aged 26 years at the time of his death. He produced documents indicating that he had paid Kshs 20,000 to obtain letters of administration intestate and Kshs 500 for a search of the registration of the motor vehicle involved in the accident. The defendant did not call any witnesses.

3. In the judgment dated 7th August 2014, the trial court noted that the deceased died soon after the accident. He therefore made an award of Kshs 20,000 for pain and suffering as had been proposed by the plaintiffs' advocates. He also made an award of Kshs 80,000 for loss of expectation of life. He noted that the deceased, who was then aged 26, had a contract with Edgeland Blooms Ltd and was earning Kshs 15,000 per month. As there was no evidence that he would have the contract till age 60, the trial court put his monthly earnings at Kshs 10,000 and used a multiplier of 15 years in assessing damages.

4. The trial court noted that the deceased had his two parents and three siblings whom he was paying school fees for. There being no evidence to challenge the plaintiffs' claim that the deceased was supporting his parents and siblings, the trial court applied a dependency ratio of 2/3. He made an award in damages as follows:

(a) Pain and Suffering– Kshs 20,000.00

(b) Loss of Expectation of life– Kshs 80,000.00

(c) Funeral Expenses- Kshs 50,000.00

(d) Special Damages- Kshs 20,000.00

(e) Loss of Dependency

10,000 x 12 x 2/3 x 15- Kshs 1,200,000.00

Grand Total- Kshs 1,370,000.00

Less Double Entitlement- Kshs 90,000.00

Kshs 1,280,000.00

Less 20% contribution- Kshs 256,000.00

NET- **Kshs 1,024,000.00**

5. The appellant was dissatisfied with the judgment of the trial court and has filed the present appeal. Regrettably, the Memorandum of Appeal is a copy that is so faint that it is illegible. From the submissions dated 8th November 2018 however, it is evident that the appellant is dissatisfied with the quantum of damages awarded to the respondents. It submits that the issues for determination are whether the respondents were entitled to the excessive damages under the Law Reform Act and the Fatal Accidents Act, or the special damages; whether the proper dependency ratio was considered; and whether judgment can be entered on a sum that was not proved or the particulars thereof specified. I observe that this appeal relates to the same accident and raises the same issues as **Kericho Criminal Appeal No. 29 of 2014- Nyamira Luxury Express Co. Ltd v Kiptalam Musa Chebaituk & another (Suing as the legal representatives of the estate of Kipsang Talam (Deceased)** in which the appellant raises grounds similar to those raised in this appeal.

6. The appellant asks the court to disturb the award in damages made in favour of the respondents. The law is that in order for an appellate court to disturb an award in damages, it must be satisfied that the award was so inordinately high or law as to amount to an entirely erroneous estimate, or that the trial court proceeded on wrong principles or misapprehended the evidence in some material way- see **Butt vs Khan (1982-88) 1 KAR**.

7. The appellant challenges the award for pain and suffering on the basis that the deceased died minutes after the accident. It submits therefore that in the circumstances, an award of Kshs 10,000 was sufficient. In my view, however, an award of Kshs 20,000 in the circumstances of this case is not so inordinately high as to warrant interference by this court.

8. The appellant challenges the application of the 2/3 dependency ratio. It cites section 4(1) of the Fatal Accidents Act to submit that while the trial court stated that the deceased had two parents and three siblings and that the deceased was paying school fees for them, it erred in using the ratio as they were also getting assistance from other quarters. It relies on **Kenya Power Limited v James Matata & 2 Others (2016) eKLR** to submit, on the basis of **Multiple Hauliers Co Ltd v David Lusa (2012) eKLR** that the only persons who can benefit from a claim under section 4(1) of the Fatal Accidents Act can only be the wife, husband, parent or child, but not siblings. It urges the court to disturb the award and apply a ratio of 1/3 and a multiplier of 15 years as the deceased was 26 years old. The appellant also cites **New Kenya Co-operative Creameries Ltd & Another v Chebusit Arap Langat [2013] eKLR** in which the court set aside the dependency ratio of 2/3rd and applied a ratio of 1/3 as the deceased was not married and did not have children.

9. In their submissions in response, the respondents relied on the case of **Checkers Trading Limited and Anor vs Fatuma Kimanthi C.A. 317 of 2003** to submit that the Court of Appeal had held that dependency is a question of fact and in the absence of evidence from the appellant to controvert their evidence, the trial court must rely on the evidence it has on record as representing the truth in the matter.

10. I have considered the award of the trial court against the submissions of the parties. I have also considered various judicial precedents on this point. It has been recognised in a number of judicial precedents that the social context in which we live must be taken into consideration when determining questions related to what awards in damages to make in a matter such as this. The evidence before the trial court was that the deceased used to assist his parents and siblings. There is no documentary evidence to show that he did support his parents, but it has been held that it is not just through such evidence that this issue can be addressed-see **Jacob Ayiga Maruja & Another v Simeone Obayo [2005] eKLR**.

11. In its decision in **Leonard O. Ekisa & Another vs Major K. Birgen (2005) eKLR**, the court stated as follows:

> ***"Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures."***

12. The evidence in this case is that the deceased had two parents and three siblings. While it is correct that section 4(1) of the Fatal Accidents Act applies to the wife, husband, parent or child of a deceased person and not the siblings, I am satisfied that the trial court did not err in finding that the deceased, who was unmarried, would have been supporting his parents and therefore applied the 2/3 ratio. This ratio was also applied in **Gachoki Gathuri (Suing as the Legal Representative of the Estate of James Kinyua Gachoki (Deceased) vs. John Ndiga Njagi Timothy & 2 Others [2015] eKLR** and **Eastern Produce (K) Limited & another v Dominic Lokadogi Lokado (suing as the personal representative of the estate of the late Peter Ekuam Lokado) [2018] eKLR** on the basis that the deceased in those cases were supporting their parents.

13. The appellant was further dissatisfied with the multiplicand used by the trial court in assessing damages. It submits that the deceased was a casual labourer who would work at times and not others, so he could not earn Kshs 15,000 till the age of 60. The appellant therefore proposes a multiplicand of Kshs 7,000. The evidence before the trial court was that the deceased had a contract with Edgeland Blooms Ltd. He was earning Kshs 15,000 per month. The trial court took the view that he may not earn that amount till he reached the retirement age of 60, and accordingly used a sum of Kshs 10,000 for a period of 15 years. Having considered the judgment of the trial court, I am not satisfied

that there is a basis for disturbing the award of the trial court in this regard.

14. The appellant has also challenged the award of special damages in this matter. It submits that the special damages were not proved as required as the documents produced did not comply with section 19 of the Stamp Duty Act. I note that the issue of compliance with the Stamp Duty Act was not raised before the trial court, and the documents were admitted by consent. In my view, it is rather late in the day to raise this argument. Had it been raised before the trial court, the respondents could have had recourse to section 19 (3) of the Stamp Duty Act which allows a party to apply to the Collector of Stamp Duties for leave to have the documents stamped.

15. The appellant also asks the court to set aside the award in respect of funeral expenses on the basis that they were not proved. I need only mention two cases with respect to awards for funeral expenses. In **Premier Dairy Limited vs Amarjit Singh Sagoo & another [2013] eKLR** the court stated:

> ***"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved."***

16. Further, in upholding an award of Kshs 45,000 in **Abdalla Rubeya Hemed vs Kajumwa Mvurya & another [2017] eKLR**, they observed as follows:

> ***"On funeral expenses, the law allows a court under Section 60 of the Evidence Act to take judicial notice of matters of local or general notoriety. I do not hesitate to take notice that most Kenyans of African origin do honour their kin in death by feeding the mourners who attend to witness the last rites. Besides this practice there was evidence that the deceased's remains were preserved at a mortuary and was later transported for burial at Kinango. I take it that Kimango is some 100 kilometres from Mombasa and that the body was not carried there on the shoulders of his relatives. There must have been hired a motor vehicle, a coffin must have been brought just like death certificate was produces but the cost thereof not claimed. These to me are inevitable expenses associated with the disposal of the deceased remains which I think every court has a right to appreciate the social context Kenyans of different cultural backgrounds operate in. While the principle keep resonating in my mind that special damages must be pleaded and specifically proved, I take note that the pleading was indeed made but no receipts were produced. However, that should not be the only reason to deny a litigant an expenses reasonably spent unless it be demonstrated as utterly unnecessary. In this case I consider it necessary and imperative that the plaintiff had to spend money to have the remains of the deceased interred and that the sum of Kshs. 45,000 was not unreasonable in the circumstances. Using the reasoning by the court of appeal in Jacob Ayiga Waruja vs Simeon Obayo [2005] eKLR, I hold that to insist that special damage must and can only be proved by way of receipts is to give the requirement of special proof to stringent determination. The totality of the foregoing is that I find no merit in this ground of appeal as well and I dismiss it."***

17. The respondents have noted that the trial court deducted the award made under the Law Reform Act, an amount of Kshs 90,000, on the basis that the dependants under the Fatal Accidents Act and the Law Reform Act were the same. The trial court, in my view, erred in making this deduction. I reiterate the holding in **Agnes Bosibori Ogega vs Tea Research Foundation & Another (2015) eKLR** in which the Court of Appeal, after citing the provisions of section 2 (5) of the Law Reform Act and section 4 (1) and (2) of the Fatal Accidents Act with respect to the award of damages for loss of expectation of life, relied on the decision of the Court of Appeal (Chesoni, Lakha and Omolo, JJA) in **Nyanza Sugar Co. Limited vs James Martin Matoke Kisumu CA No. 91 of 1997** (U.R) to observe that:

> ***"The trial court should assess and make an award of damages under both sets of law as each is intended for a distinct head: under the Law Reform Act for the benefit of the estate of the deceased as compensation for loss of expectation of life and under the Fatal Accident Act for benefit of the dependants of the deceased for loss of support from the deceased. We agree that in most cases the beneficiaries of both may be the same and that is why there is a requirement that awards under one Act take into account the award under the other to avoid over compensation or unjust enrichment. But such taking into account does not mean not making the award at all."***

18. The court went on to conclude, in allowing the appeal, that:

> ***"..we are in agreement with the appellant that the learned trial judge erred firstly when he failed to make a determination of an award under the Law Reform Act for the benefit of the deceased's estate; and secondly for holding that had he made such a determination then the resulting figure awarded would have been reduced mathematically from the sum awarded under the Fatal Accidents Act."***

19. In its decision in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** the Court of Appeal chided lower courts for making deductions in circumstances such as are now before me and observed as follows:

> ***"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 Kenfro 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 Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi 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."

20. The upshot of my findings above is that the appeal before me fails and is accordingly dismissed with costs to the respondents.

21. Further, in light of my findings with respect to the deduction of the award of damages under the Law Reform Act for pain and suffering and loss of expectation of life, the same shall be added back to the award and the respondents are entitled to an award in damages as follows:

(a) Pain and Suffering – Kshs 20,000.00

(b) Loss of Expectation of life– Kshs 80,000.00

(c) Funeral Expenses – Kshs 50,000/.00

(d) Special Damages– Kshs 20,000.00

(e) Loss of Dependency

10,000 x 12 x 2/3 x 15– Kshs 1,200,000.00

Total **Kshs 1,370,000.00**

Less 20% contribution- Kshs 274,000/.00

NET- **Kshs 1,096,000.00**

Dated and Signed this 31st day of May 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 19th day of June, 2019

GEORGE DULU

JUDGE