REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO 29 OF 2014

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

VERSUS

KIPTALAM MUSA CHEBAITUK

ANNETH CHEPKEMOI KETER (Suing as legal representatives of

The estate of KIPSANG TALAM (DECEASED).....RESPONDENTS

(Being an appeal form the judgment of the Principal Magistrate's Court at Sotik (Hon. P. Olengo) in Civil Suit No 159 of 2013 dated 7th August 2014)

JUDGMENT

1. The appellant was the defendant in Sotik CMCC No 159 of 2013, while the respondents were the plaintiffs suing as the legal representatives of Festus Kipsang Talam, deceased. The deceased was 21 years old at the time of his death in a road traffic accident involving motor vehicle registration number KBR 953K and the deceased. In the plaint dated 13th September 2013, the respondents allege that on 12th January 2013, the appellant's driver, servant or agent so recklessly and carelessly drove the said motor vehicle that he caused an accident to occur, thereby knocking down the motor cycle on which the deceased was riding, as a result of which the deceased sustained fatal injuries.

2. By a consent entered in court on 20th February 2014, judgment was entered for the plaintiffs/respondents as against the defendant/appellant in the ratio 80:20.

3. The evidence before the trial court was presented by the 1st plaintiff/1st respondent. He testified that at the time of his death, the deceased, who was not married, was 21 years old, a commercial motor cyclist who made between Kshs 250-500 (per day); that he was assisting his parents to pay school fees for his siblings; and that they had used Kshs 50,000 for his funeral. The defendant/appellant did not call any witnesses.

4. In the judgment dated 7th August 2014, after considering the parties' written submissions, the trial court entered judgment in favour of the plaintiffs as follows:

(a) Pain and Suffering- Kshs 15,000.00

(b) Loss of expectation of life- Kshs 80,000.00

(c) Special damages- Kshs 20,000.00

(d) Funeral expense- Kshs 50,000.00

(e) Loss of dependency-

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

TOTAL Kshs 1,365,000.00

Less double entitlement Kshs 95,000.00

Kshs 1,270,000.00

Less 20% contribution Kshs 254,000.00

TOTAL **Kshs 1,016,000.00**

5. The appellant was dissatisfied with the judgment of the court and has filed the present appeal in which he raises six grounds of appeal. The record of appeal is not legible in places. What the court can make out is that the appellant challenges the decision of the lower court, first, on the ground that the court erred in law and fact in finding that the plaintiffs were entitled to damages under the Fatal Accidents Act and in awarding special damages that were excessive and not commensurate with the laid down principles. The second ground relates to the dependency ratio applied by the trial court, which the appellant alleges was not proper. The third ground is to the effect that the trial court did not consider the appellant's submissions with respect to the quantum of damages. It is also alleged that the court erred in its calculation of the damages under the Fatal Accidents Act and failing to consider conventional awards for such damages.

6. In its submissions dated 8th November 2018, the appellant argues that the appeal raises three issues for determination. The first is whether the respondents were entitled to the excessive damages under the Fatal Accidents Act, as well as special damages. The second is whether the trial court applied the proper dependency ratio, and thirdly, whether judgment can be entered on a sum which was not proved or particulars thereof specified. It submits that an award of Kshs 10,000 is adequate for pain and suffering. This is on the basis that the deceased passed away soon after the accident. It relies on **James Gakinya Karienye (Legal representative of the estate of David Kelvin Gakinya) & Another v Perminus Karuki Githinji (2015) eKLR** where such an award was made in respect of a deceased person aged 28 years.

7. With respect to the claim under the Fatal Accidents Act, the appellant cites section 4(1) thereof to submit that the trial court erred in finding that the deceased had two parents, was a last born and was not married, which was not tendered in evidence. Nor was the amount earned proved with documentary evidence. It relied on **New Kenya Co-operative Creameries Ltd (Formerly Kenya Co- operative Creameries) & Another v Cheusit arap Langat (2013) eKLR** and **Gladys Wanjiku Njaramba v Globe Pharmacy & Another (2014) eKLR** in which the dependency ratio was reduced from 2/3 to 1/3.

8. It was also its submission that the trial court erred in making an award on quantum of damages not supported by law or facts. It relied on section 8 of the Fatal Accidents Act to submit that there was no evidence to suggest that the deceased would continue to earn Kshs 15,000 per month. In its view, as the deceased had only reached form 4, he should be treated as an unskilled employee under the then prevailing 2009 minimum wage of Kshs 3,043.

9. The appellant also challenged the receipts produced in respect of special damages on the basis that they did not comply with section 19 of the Stamp Duty Act. It therefore proposed that the quantum of damages should be reduced as follows:

(1) Under Fatal Accident Act Loss

of dependency -3043 x 128 1/3 x 15 Kshs 182,580/-

(2) Under Law Reforms Act

Loss of expectation of life- Kshs 80,000/-

Pain and suffering- Kshs 10,000/-

Sub total under Law Reform Act- Kshs 90,000/-

Subtotal under Fatal Accident Act- Kshs 182,580/-

Less the award under the Law Reform Act 92,580/-

Add proved special damages 20,300/-

TOTAL **202,880**/-

Less 20% liability conceded 40,576/-

TOTAL AWARD less liability **243,456/-**

10. In submissions in reply, the respondents note that liability having been agreed by consent, the appeal hangs on the quantum of damages made by the trial court. They submitted that as damages are a matter of judicial discretion, the appellant has to show that the award made was so inordinately high or low as to represent an entirely erroneous estimate, or that the trial court proceeded on wrong principles or misapprehended the evidence in some material way. The respondents cited the decision in **Peters vs Sunday Post Ltd (1958) EA 424** and **Butt vs Khan (1982-88) 1 KAR** in this regard. It was also their submission, on the authority of **Checkers Trading Ltd & Anor vs Fatuma Kimanthi CA 317** of **2003** that dependency is a question of fact and in the absence of the appellant's evidence to controvert or rebut their evidence, the trial court must rely on the evidence on record.

11. The respondents submit that the trial court had noted the appellant's submissions on the multiplier and had considered that he was a businessman, not a labourer. They observe that the 1st plaintiff's evidence in the witness statement was adopted, and that it showed that the deceased was making Kshs 15,000 per month and had his parents as his dependants so there was no basis to reduce the multiplicand to 1/3. They further submit that even if the Regulation of Wages 2015, which was in force at the time of judgment, was adopted, there would be no basis for adopting Kshs 3,043 as the multiplicand. They therefore urge the court to dismiss the appeal with costs.

12. I have considered the judgment of the trial court and the submissions on record. I believe that the appeal revolves around the quantum of damages made to the respondents, and the dependency ratio relied on by the trial court. The principles on which an appellate court will disturb an award in damages are well settled. In **Butt v Khan [1978] eKLR**, the Court of Appeal stated as follows:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

13. Similarly, in **Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2) [1985] eKLR**, the Court of Appeal stated that:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."***

14. In this case, the trial court made an award of Kshs 1,016,000. This award comprised, first, an award of Kshs 15,000 for pain and suffering. The appellant challenges this on the basis that it is too high, and it proposes an award of Kshs 10,000, contending that the deceased died instantly. On the principles in **Butt v Khan**, (supra) however, I find no basis for interfering with this award. It is not, in my view, so inordinately high as to amount to an erroneous estimate of the damages, or to demonstrate an application of wrong principles.

15. The awards of loss of expectation of life of Kshs 80,000 and special damages of Kshs 20,000 are unchallenged, but the appellant questions the award of Kshs 50,000.00 made in respect of funeral expenses on the basis that the expenses in respect thereof were not proved. However, as was held in the case of **Premier Dairy Ltd v Amarjit Singh Sagoo & Another (2013) eKLR** it would be wrong and unfair to expect a bereaved family to keep records of funeral expenses when their primary concern was that a family member had died, and there is no requirement that a claimant must produce receipts in respect of funeral expenses. The court stated as follows:

> ***"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. In **Jacob Ayiga Maruja & Another v Simeon Obayo (2005) eKLR** an award of Kshs. 60,000 was made in respect of funeral expenses, the court observing that:

> ***"We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses."***

17. See also **Abdalla Rubeya Hemed vs Kajumwa Mvurya & another [2017] eKLR**. In the result, I find that there is no basis to disturb the award in respect of funeral expenses.

18. The appellant questions the award in respect of loss of dependency of Kshs 1,200,000/ It submits that the deceased was not married, and so the multiplier of 2/3 was not correct, and that a multiplier of 1/3 should have been applied. It is also its argument that the earnings of Kshs 15,000 should not have been used. Rather, a multiplier based on the minimum wage in 2009 of Kshs 3043 should have been applied, resulting in an award under the Fatal Accidents Act of Kshs 182,580.

19. The response from the respondents is that the witness statement, which was admitted into evidence, indicated that the deceased was earning Kshs 15,000. The trial court used a multiplicand of Kshs 10,000. I am not satisfied that there is a basis for utilising Kshs 3043 when there was an indication of the deceased's monthly earnings, which the trial court reduced to an amount which, in its discretion which I do not find to have been unreasonable, to Kshs 10,000.

20. The issue, however, is whether the trial court erred in using a 2/3 multiplier when the deceased was unmarried, the argument being that he was likely to spend more on himself as he was unmarried. The evidence before the trial court was that though the deceased was unmarried, he used to assist his parents and his younger siblings. Our courts have often expressed the view that the social context in which we live has to be taken into account in considering matters such as is presently before me. While there is no documentary evidence with respect to the manner in which the deceased was assisting his parents, it is not only through such evidence that such proof is to be found. In **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR** the Court observed as follows:

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and***

that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

21. I also bear in mind the words of the court in **Leonard O. Ekisa & Another vs Major K. Birgen (2005) eKLR** in which it was observed that:

"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."

22. In the circumstances, I am unable to find a basis for disturbing the award of the trial court on the basis that it used a ratio of 2/3. I find support in adopting this view in the decision 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** in which the court adopted a ratio of 2/3 in respect of the deceased on the basis that they were supporting their parents.

23. The trial court in this case reduced the award made to the respondents by the amount of Kshs 95,000. This is the amount of the award in respect of pain and suffering and loss of expectation of life made under the Law Reform Act. The basis of the reduction, as I understand it, is that there would be double compensation under the Law Reform Act and the Fatal Accidents Act.

24. There was a time when this deduction, or at times not making an award under both Acts, was accepted as the proper practice- see **Joseph Wachira and Another vs Mohammed Hassan 2006 eKLR**. However, in its decision in **Agnes Bosibori Ogega vs Tea Research Foundation & Another Nakuru Court of Appeal Civil Appeal No. 226 of 2007**, the Court of Appeal cited 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. It then 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 conclude 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."

25. 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."

26. 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 observed as follows with regard to the practice of courts to deduct awards made in circumstances such as are presently before me:

"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."

27. In the result, I find that the present appeal is without merit. I also find that the trial court erred in deducting the sum of Kshs 95,000 from the award in damages made to the respondents. I therefore dismiss the appeal and direct that the award to the respondents shall be as follows:

Pain and Suffering-	Kshs 15,000.00
Loss of expectation of life-	Kshs 80,000.00
Special damages-	Kshs 20,000.00
Funeral expense	Kshs 50,000.00
Loss of dependency- 10,000 x 2/3 x 15 x 12 = Kshs 1,200,000.00	
TOTAL	Kshs 1,365,000.00
Less 20% contribution	Kshs 273,000.00
TOTAL	Kshs 1,092,000.00

28. The respondents shall also have the costs of this appeal.

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