



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 76 OF 2013**

**CONSOLIDATED WITH CIVIL APPEAL NO.65 OF 2013**

**MARTIN MUTHYA.....APPELLANT**

**JOSEPH KIMOTHU.....APPELLANT**

VERSUS

**LYDIA MOSWETA KWAMESA**

**(Suing as the legal representative Estate of DANCUN OGOGA ATURA (deceased))**

*(Being an appeal from the judgment/Decree of Honourable Komingoi –Senior Principal Magistrate in Nakuru CMCC no 483 of 2011 delivered on the 2<sup>nd</sup> Day of May 2013)*

**JUDGMENT**

1. Lydia Mosweta Kwamesa and Atura Nyanchoka (suing as the legal representatives of the Estate of the late Dancun Ogoga Atura) were the plaintiffs in the primary suit, **Nakuru CMCC No. 483 of 2001**).

Judgment thereof was delivered on the 2<sup>nd</sup> May 2013. The plaintiffs were awarded general damages in the sum of Kshs.840,000/= plus costs of the suit upon a finding of 100% liability against the defendants, Martin Muithya and Joseph Kimotho.

2. The said awards were compensation for the death of the deceased in an accident that happened on the 23<sup>rd</sup> November 2010 involving the deceased who was a pedal cyclist and the defendants **motor vehicle KAX 049N** along Oginga/Odinga road within Nakuru town.

3. Both parties were dissatisfied with the trial magistrate's judgment and lodged separate appeals.

In **HCCA NO.65/2013** the then plaintiffs appealed against the *quantum* of damages as being too low whereas in **HCCA NO. 76/13** the then defendants by way of cross appeal were dissatisfied with what they called "Double duplicate awards" in the assessment of damages.

The two appeals are interrelated. They are thus consolidated for hearing, and **HCCA No. 76/13 chosen as the lead file**.

4. The appellant in **HCCA No.76/13** does not challenge the *quantum* of damages save that they urge that the trial court erred in awarding damages under both the Fatal Accidents Act as well as under the Law Reform Act thus (double compensation) to same beneficiaries.

**5. Issues for Determination**

*1. Whether the quantum of damages under the Fatal Accidents Act Cap 32 Laws of Kenya is too low as to invite this court's interference and re-assessment upwards.*

*2. Whether the trial magistrate erred by awarding damages under both the Fatal Accidents Act and the Law Reform Act to the same beneficiaries/dependants.*

6. I have considered the parties rival written submissions.

**7. The Appeal**

The trial court awarded to the deceased's estate Kshs.120,000/= under the Law Reform Act.

Under the Fatal Accidents Act, a sum of Kshs. 720,000/= was awarded to the dependants of the deceased stated as the wife, two children and father.

The deceased died at the age of 26 years. He was a *bodaboda* operator with an income from the business.

8. In assessing damages under the Fatal Accidents Act, the trial court applied an income of Kshs.4,500/= against a multiplier of 20 years and dependency ratio of 2/3, hence  $Kshs.4,500 \times 20 \times \frac{2}{3} \times 12 = Kshs.720,000/=$ .

The Respondent has urged that the said award is too low, to be a proper estimate of damages.

9. To support that contention, it is submitted by M/S Gekonga & Co. Advocates that the multiplier of 20 years was inordinately low as the deceased was not bound to retire at the official Government retirement age of 60 years.

Citing the case **Violet Jeptum Rahedi V. Albert Kubai Mbogori (2013) e KLR where Waweru J** rendered that

*“A private business --- cannot be limited by any formal retirement age --- and everything being equal he should have been able to carry on the business probably into his late 60's and early 70's.”*

It is suggested that the multiplier be enhanced to 34 years.

10. The principles to be used in the termination of a multiplier are stated in **Leonard Ekisa & Another –vs- Major Birgen (2005) @ KLR** that

*“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lumpsum.”*

11. There is no doubt that the deceased would have lived to work for longer than 20 years given his age of 26, and health status. He had a very young family of a wife and two young children hence a longer dependency period save for vicissitudes of life. He was not bound to retire at 60, further he would probably have moved onto less risky business than motor bike operator. The future always remains uncertain.

12. Considering the above principles and precedent, I am persuaded that the multiplier of 20 years applied by the trial court was inordinately low. It is trite that Courts should not be overly concerned about mathematical correctness but what is reasonable upon circumstances and character of each individual case.

13. As pronounced in the case **Mombasa C.A No. 59 of 2004 Roger Dainty –vs- Mwinyi[LOI] & Others,**

*“---there is no guarantee of life for any period these days as expectations of life is reduced by many risks to be encountered within modern living.”*

and in the **Board of Governors of Kangubiri Girls High School –vs- Jane Wanjiku & Another Nyeri C.A NO. 35 of 2014 (2014) e KLR,** the court rendered that

*“the choice of a Multiplier is a matter of the court's discretion which has to be exercised judiciously with reason.”*

I am therefore of the opinion that a **multiplier of 30 years** would be more appropriate in the circumstances.

The multiplier applied by the trial court is thus set aside and substituted with **one of 30 years.**

14. As to the income - earnings, in the absence of proof of income by documentary evidence, the Regulations of Wages (General Amendment) Order of 2010 in ought to have been applied.

I have looked at the said Basic Minimum wages.

In comparison, the monthly wages for a car van driver was Kshs.8,400/=.

It is to be noted that the deceased was a motorbike operator, meaning he could have been making much more. I am persuaded that a reasonable and average monthly earnings are in the Region of Kshs.10,000/= per month. I accordingly set aside the amount applied by the trial magistrate of Kshs.4,500/= and substitute it with **Kshs.8,500/= per month.**

15. A dependency ration of 2/3 shall remain uninterrupted. Thus loss of dependency will be enhanced to  $Kshs.10,000/= \times 12 \times \frac{2}{3} \times 30 = Kshs.2,400,000/=$ .

The **Appeal** is therefore allowed to the above extent.

16. **The Cross-Appeal**

The matter of double compensation under the Law Reform Act and the Fatal Accidents Act being the only ground raised has been discussed in numerous decisions.

There is no dispute that in a case like the present one, the net benefit of awards under the two Acts will go to the deceased's dependants – wife, children and father – See **Kemfro –vs- A.M Lubia & Another (1982-1988) KAR 727**.

17. The Court of Appeal in recent decisions, and specifically in the cases **Hellen Waruguru Waweru** (Suing as the legal **Representative of Peter Waweru Mwenja) –vs- Kiarie Shoe Stores Limited (2015)** rendered and explained that

*“----The principle is logical enough, duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and under the Fatal Accidents Act are the same, 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 of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise...”*

18. The court continued that

*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.*

*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.....”*

19. I urge parties to read the whole decision of the Judges of Appeal, to understand fully why the awards under the Law Reform Act need not be deducted from awards under the Fatal Accidents Act.

This court is bound by the Court of Appeal decision, until such time that it is reviewed and/or set aside by a higher court, the Supreme Court of Kenya.

20. As a result, I decline to hold that the trial Magistrate erred in awarding to the Respondents what it calls double compensation and find that both awards under the Law Reform Act and Fatal Accidents Act are awardable to the dependants of the deceased.

That settles the second issue.

21. The final conclusion is that the Appeal succeeds and is allowed to the extent stated above, that the awards on damages under the Fatal Accidents Act is enhanced to Kshs.2,400,000/= while the cross-appeal fails, and is dismissed.

22. In view of the above, I order no costs in both the Appeal and the Cross-Appeal.

**Delivered, Signed and Dated at Nakuru this 26<sup>th</sup> Day of September 2019.**

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**J.N. MULWA**

**JUDGE**

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