



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO 36 OF 2014

1. MAGUNDANDU COMPANY LTD
2. PATRICK KINYUA KARANIAPPELLANTS

VS

1. MWALUKOMBE MYAKA MWAMLONGO AND
2. MJENI CHIKIPHE (Suing as Legal Representatives of the estate of MWAMLONGO
MNYAKA.....RESPONDENTS

CONSOLIDATED WITH NO 26 &35 OF 2014

PURSUANT TO COURT ORDERS OF 19.9.2017

MAGUNANDU COMPANY LIMITED
PATRICK KINYUA KARANI.....APPELLANTS

VS

MAHENZO KATHENGI AND NDEKA CHAMBEYU(SUING AS LEGAL.REPRESENTATIVES
OF THE ESTATE OFHAMISI CHAMBEYU MUNYAKA.....RESPONDENTS

Vs

MWALUKOMBE MNYAKA MWAMLONGO AND CHAMSUHUNI MWALUKOMBE(Suing as
legal representatives of the estate of NGAZA MWALUKOMBE MNYAKA.....RESPONDENTS

JUDGMENT

Outline and introduction

1. On 7.7.2009 at Mackinon road, along Mombasa Nairobi road, there occurred an accident involving two motor vehicles Reg. No. KAT 979U-ZB 6044, Scania semi-Trailer and an unregistered motor vehicle identified as Chassis No. LH-172-09639, KG No. 4033, Toyota Hiace.
2. As a result of the accident persons said to have been travelling in the Toyota Hiace, three people in this appeal as consolidated, filed three suits at Mombasa being CMCC 3594,3595, & 3596 all of 2009 against the current appellants as the owner and driver ,respectively , of motor vehicle No. KAT 979U-ZB 6044, Scania semi-Trailer.

3. The trial court, on the 4.12. 2012, ordered in suit no. 3596 of 2009, that the determination of the question of liability in these three suits would await and abide the outcome of Voi, SRMCC No. 13 of 2010 which had been selected as a test suit. On 13.8.2013 in Mbs cmcc 3595/2009 parties confirmed to court that the test suit had been determined and liability apportioned at 100% against the two defendants. On the basis of that confirmation, it was ordered by consent that the defendants be held 100% liable and that the trial court would then only take evidence on the question of quantum of damages due and payable.

4. Having taken evidence in the three matters, leading to the judgments subject of this appeal, the trial courts delivered separate judgments on diverse dates during the months of February and March 2014 which have provoked the current appeals. The details of the judgments were as follows:-

i. Mbs cmcc 3595/2009 delivered on 07.03.2014

- Pains and suffering Kshs 15,000/
- Loss of expectation of life Kshs 110,000/
- Loss of dependency Kshs 980,000/

Total Kshs 1,105,000/

- Plus costs and interests

ii. Mbs cmcc 3596/2009 delivered on 04.03.2014

- Pains and suffering Kshs 30,000/
- Loss of expectation of life Kshs 100,000/
- Loss of dependency Kshs 960,000/
- Special damages Kshs 50,000/

Total Kshs 1,140,000/

- Plus costs and interests

iii. Mbs cmcc 3594/2009 delivered on 04.03.2014

- Pains and suffering Kshs 30,000/
- Loss of expectation of life Kshs 100,000/
- Loss of dependency Kshs 960,000/
- Special damages Kshs 50,000/

Total Kshs 1,140,000/

- Plus costs and interests

5. On 19.9.2017, parties in this court recorded consent to the effect that the three appeals be consolidated and a single judgment rendered. I will thus render a single judgment but in it I will consider each appeal separately. This I must do even though the memoranda of appeals are identical in all the grounds of appeal.

6. To enable me determine the matter, I have identified three substantive issues for resolution. They are:-

i. Are damages awarded under law Reform Act due for deduction from those under Fatal Accidents Act?

ii. Are courts bound to consider and refer to written submissions offered by parties?

iii. Should there be interference with the assessment of damages awarded at trial?

7. The first two of the issues apply across board and need not be aligned to any particular file. I propose to deal with those two first and apply my determination to all the three files then proceed to decide on the propriety of the award of damages in each file later.

Analysis and determination Should damages awarded under The Law Reform Act be subtracted from those made under Fatal Accidents Act?

8. There was an omnibus grounds on all the memoranda of appeals that in making awards under both Law Reform Act and Fatal Accidents

Act, there was double compensation and therefore it was necessary to deduct the award under the former Act from that under the latter Act. This argument keeps cropping up and I believe it is out of misinterpretation of the often decision in the case of **KEMFRO –VS- (A. M. LUBIA) and OLIVE LUBIA (1982-1988) KAR 727** where that court inter alia said -

“.. 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.”

9. This court has in the past made an observation on what it understands the court of appeal to have said in this often cited decision and what it believes to be the law. In **Hussein Ahmed Hanshi & another v Peter Gichuru Njoroge & 2 others [2016]eKLR** this court said:-

“ 5. The Law on whether or not the damages due under the two statutes are due to the same persons is well legislated under the two statutes. The law can be summarized as being in addition to and not in derogation from each other.

Section 2(6) of the Law Reform Act provides:-

“the rights conferred by this Act for the benefit of the estate of the deceased persons shall be in addition to and not in derogation of any rights conferred on dependants of the deceased persons by the fatal accidents Act”

6. The suit against the Appellant was expressed to have been brought by the Respondent in his capacity as the Personal Representative and dependants of the deceased under both statutes. It is not in doubt that the Court of Appeal in KEMFRO vs C.A.M LUBIA and ALIVE LUBIA (1982-1988) KAR 727 laid the law that where damage under both Acts vest in the same person(s) the court takes into account awards made under Law Reform Act while making an award under the Fatal Accidents Act.

7. However the court was succinct when it said :-

.....To be taken into account and to be deducted are two different things. The words in section 4(2) of the fatal accidents are ‘taken into account’. The section says which should be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower court shows that in reaching the figure awarded under Fatal Accidents Act, the 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 mathematical deduction as suggested.

10. In all the three appeals and the suits from which they arise, the plaintiff were personal representatives pursuing the interests of the estate as well as those of the disclosed dependants. In those circumstances it cannot be validly said that the benefits would vest in the same category of persons.

11. But, even if the entire decretal sums were to be demonstrated to vest upon the same persons, there is no requirement in law to engage in mathematical deductions. It is enough that a court says I have taken account or had regard to the other awards made under the other statute. This is because the awards are in addition to and not in derogation from each another.

12. The last point I must consider is the grounds of appeal challenging the manner in which the trial courts dealt with the submissions. That is a complaint that cannot be overlooked when one read the judgments in appeals nos. 26 & 35 of 2014. Granted that submissions are not pleadings nor evidence^[1], when parties take their time and the time of the court to file, serve and at time highlight submissions, the court is expected, even if only at the level of courtesy, to make reference to and take same into account, without necessarily being bound by such submission and the authorities cited. Of course, in taking them into account the court is at liberty to disagree with such submission and even to distinguish the authorities cited. Like in this matter I am entitled to reject the respondents submission quoting PW1 as having said that the deceased would give her 3000 per month because that is not on the record. I however do not agree that the court is wholly entitled to just ignore papers filed before it as if the same never existed. Submissions filed ought to be considered for the parties before court to get the satisfaction that their efforts and resources were never in vain.

13. There is yet another complaint by the appellant, not in the memoranda of appeals but in the submissions regarding the courts duty under Order 21 Rule 4, Civil Procedure Rules. That is also indeed a genuine complaint as far as appeals nos. 26 &35 both of 2014 are concerned. The trial court totally failed to observe the rule and that could be the reason it is difficult to understand the rational and reasons for the decision reached. However, this being a first appeal, proceeding by way of retrial, the decision I have arrived at takes on the grounds of appeal will take care of that complaint because I do not have a reason to believe that that the departure has occasioned any prejudice to the appellant after the determination of this appeal.

Were the awards for damages justifiable?

14. The task of the court in this appeal as far as assessment of damages is concerned is largely and solely to determine if there exist genuine grounds and justification to interfere with the assessment of damages undertaken by the trial court. Being an appellate court, this court can only interfere where and when it is demonstrated that **the assessment is so inordinately high or low as to represent an entirely and wholly 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**^[2].

15. In all the three matters the trial courts awarded damages under both fatal Accidents Act as well as under the Law Reform Act

and awarded to all the Respondents damages under the established heads; pains and suffering, loss of expectation of life and lost dependency. The only major variation of the three judgments is the fact that the respondent in HCCA No.36 of 2014 was never awarded special damages in the sum of Kshs 50,000/ like the other two. However, there is no challenge on the award of special damages just like there is no challenge on the sums awarded for pains and suffering and loss of expectation of life. I will thus consider and seek to determine the three appeals on the basis and understanding that they challenge the assessment of damages for lost dependency and secondly that there ought to have been effected a mathematical deduction of the awards made under the Law Reform Act from those made under fatal Accidents Act

16. I have pointed out the fact that the memoranda of appeal are all identical on all the grounds, save for appeal No. 26/2014 in which ground 5 complain about the choice of multiplicand of kshs 6,000/ without proof. It may however be necessary to reproduce those grounds here as they relate to each appeal. The grounds are crafted as follows:-

- i. The Learned Trial Magistrate greatly misdirected herself in treating the submissions of the Appellants on quantum very superficially thereby erroneously arriving at a wrong conclusion on quantum.
- ii. The Learned Trial Magistrate erred in misdirecting herself to consider only a part of and not all the evidence and submissions presented to her particularly the evidence and submissions presented to her by the Appellant consequently arriving at damages which were inordinately high that it represented an entirely erroneous award vis-a vis the injuries of the Respondent.
- iii. The Learned Trial Magistrate erred in law in making an award under both the Fatal Accidents Act and the Law Reform Act resulting into double compensation thereby arriving at an erroneous award.
- iv. The Learned Trial Magistrate erred in law in failing to deduct the amount awarded under the Law Reforms Act from that awarded under the Fatal Accidents Act.
- v. The Learned Trial Magistrate erred in law and fact in not making an award which was within the limits of already decided cases of similar nature.

17. As drafted ground 1 &2 in each memorandum faults the trial courts for having casually treated the submissions filed by the appellant, ground 3 & 4 attack the judgments for making awards under both statutes thereby making double compensation and failing to deduct one from the other. Those ground I have dealt with and rendered my determination earlier in this decision. For now I must determine grounds five which accuse the awards for not being within the limits of decided cases.

18. One other common feature in all the appeals is that the respondents brought the suits as personal representatives of the deceased persons and behalf of the dependants of such deceased persons. Consequently the only difference to have informed the variation in the sums awarded should be the choice of the factors of calculating lost dependency since all the deceased persons were earning different incomes and died at different ages. For that reason each appeal must be considered separately

HCCA NO. 26 OF 2014

MAGUNDANDU COMPANY LTD

PATRICK KINYUA KARANIAPPELLANTS

VS

MAHENZO KATHENGI and NDEKA CHAMBEYU (Suing as legal representatives of the estate of

HAMISI CHAMBEYU MUNYAKA.....RESPONDENTS

19. It was pleaded that the deceased was prior to his death aged 25 years old and was gainfully employed at a monthly income of kshs 10,000. The documentary evidence led to support the oral evidence of PW1 included a death certificate EXH P-1 which clearly showed the deceased died aged 25 years. On employment the witness said in cross examination that the deceased was a quarry worker. The evidence of dependency was not consistent in that the witness said the deceased would give her Kshs 200-300 per day and on the same vein Kshs 1,000 per month. However the witness was consistent that the deceased earned Kshs 10, 000 without any document in support.

20. This court proceeds from the position of the law that documents are not the only way to prove income^[3] and that dependency is a matter of fact to be proved by evidence^[4] but such facts need not only be proved by documents^[5].

21. Even though counsel should have led the witness better to be more clearer, that failure should not by itself be a basis to deny the respondent damages when there was indeed evidence that she was married to the deceased and was expecting his child as at the date of death.

22. Accordingly I find an error in the decision by the trial court to settle on a multiplicand of 6,000. That finding to me was never discerning of the court even if the duty of assessment of damages is a matter for discretion and known to be a difficult one^[6]. Exercise of discretion must be based on some reason and evidence. Even though there was no documentary evidence of employment and income, it is now trite that

in such circumstances a court should adopt the minimum wage^[7]. Minimum wages are set by statute and are therefore provision of the law the court is expected to take note of and apply at all times even if parties don't refer the court to same. In this case however, the plaintiff did draw the court's attention to the Regulation of Wages (General) Order, 2013, by the submissions dated 23.11.2013. It showed the minimum wage for a quarry or mine worker outside, Nairobi, Mombasa and Kisumu was Kshs 9,372.15. That was the sum the trial court ought to have adopted rather picking the sum of Kshs 6,000 from the air. In resorting the Order, the court was perfectly within its rights but in applying the 2013 edition, there was an error. This is because the death was on 7/7/2009 hence the relevant Order ought to have been that published in legal Notice No. 68, dated 15/4/2009. It set the minimum wage for miners outside municipalities at Kshs.3,778/=. That is the multiplicand the trial court ought to have adopted but which it did not adopt. Having adopted the wrong order the decision must be interfered with and corrected by application of the correct order.

23. I however have no reason to disturb the choice of 20 years as the multiplier noting that the deceased was aged 25 years at death. I also uphold the choice of dependency ratio of 2/3 because I am prepared to believe the respondent that the deceased would give her kshs 200-300 per day.

24. In coming to that conclusion and finding I have taken note of the fact that the assertion that the respondent was dependent upon the deceased, who gave to her some money daily, was not meaningfully contested by the appellant in cross-examination.

Accordingly the workings of damages under this heading would be:- $3778 \times 20 \times 12 \times = 604,480$

25. I therefore, on my mandate as a first appellate court, set aside the judgment by the trial court on assessment of damages under the heading lost dependency in the sum of Kshs 960,000 and in its place a substitute a judgment in the sum of Kshs 604,480.

26. As the other awards have not been disturbed the total sum due for payment to the respondent by the appellant shall be:-

- a. Pains and suffering - Kshs 30,000/
- b. Loss of expectation of life - Kshs 100,000/
- c. Loss of dependency - Kshs 604,480/
- d. Special damages - Kshs 50,000/

Total Kshs 784,480/-

27. That sum shall attract interest at court rates from the date of judgment of the trial court till payment in full.

APPEAL NO 35/2014

1. MAGUNANDU COMPANY LTD

2. PATRICK KINYUA KARANI.....APPELLANTS

VS

1. MWALUKOMBE MNYAKA MWAMLONGO and

2. CHAMSUHUNI MWALUKOMBE(Suing as legal representatives of the estate of NGAZA MWALUKOMBE MNYAKA.....RESPONDENTS

28. The judgment in this appeal and that in the appeal in the foregoing decision were by one court and exhibit extreme identity save for the sums the two deceased persons were said to have been earning. It gives the impression that there could have been some confusion of the facts between the two. That is but just an unfortunate observation. The important facts were however not far apart. The deceased in both cases were stone miners. For that reason the choice on the multiplicand for both must be the same. I won't depart from my reasoning in the related appeal but adopt same multiplier, multiplicand and the dependency ratio. Using such determinants to calculate the lost dependency I can only come to the same figure. Even though the deceased had a five year age difference, the choice of a multiplier is also an exercise in discretion which in the circumstances obtaining in this appeal interference is not merited. Having so found, and executing my mandate as a first appellate court, I do set aside the judgment by the trial court on assessment of damages under the heading lost dependency in the sum of Kshs 960,000 and in its place a substitute a judgment in the sum of Kshs 604,480/=.

29. Since the other awards have not been disturbed, just like in appeal No 25 of 2014, the decision of the trial court is set aside and judgment is entered for the respondent against the appellant as follows:-

- a. Pains and suffering Kshs 30,000/=

b. Loss of expectation of life	Kshs	100,000/=
c. Loss of dependency	Kshs	604,480/=
d. Special damages	Kshs	<u>50,000/=</u>

Total Kshs 784,480/=

30. That sum shall attract interest at court rates from the date of judgment of the trial court till payment in full.

APPEAL NO 36/2014

MAGUNDANDU COMPANY LTD

PATRICK KINYUA KARANIAPPELLANTS

VS

MWALUKOMBE MYAKA MWAMLONGO and

MJENI CHIKIPHE (Suing as Legal Representatives of the estate of

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31. Unlike the other two appeals, the decision in this appeal was made by a different court. The decisive factors on assessment of damages for lost dependency were different but not so materially. Here the deceased was pleaded and proved to have been a mason. However there was no evidence of his daily or monthly earnings hence the minimum wage rule was applicable. That position of the law the trial court correctly found and applied. It cannot be said that in adopting the minimum wage as the multiplicand the trial court erred. The court applied the law as it ought to have been applied. The only error the trial court committed is to treat the deceased to have been working with a municipality of Mombasa, Nairobi and Kisumu. The facts pleaded and proved was that the deceased worked in Mackinon area outside any established municipality. He was certainly outside Mombasa or any other Municipality identified under the order. The minimum wage therefore applicable to him under the Order was Kshs.3,270. Based on that figure general damages for loss dependency work out thus; **3270 x 20 x 12 x 2/3 = 523,200/=**.

32. Even on his choice of a multiplier and dependency ratio the trial court cannot be faulted least of all on the grounds advance by the Appellant that proof of marriage can only by marriage certificate.

33. Based on the record before court there is neither justification nor any reason for interfering with those aspects of the decision. For clarity the appeal succeed to the extent of damages for lost dependency only.

34. Having so found, the judgment of the trial court is set aside and varied to the extent aforesaid and now works out as follows;-

• Pains and suffering	Kshs	15,000/
• Loss of expectation of life	Kshs	110,000/
• Loss of dependency	Kshs	<u>523,200/</u>

Total Kshs 648,200

35. That sum shall equally attract interest at court rates from the date of judgment of the trial court till payment in full.

36. Overallly, I consider that there has not been an outright successful party but rather both have succeeded and lost in equal measures. The appellant has damages to pay while the respondents have damages previously awarded reduced. In those circumstances the order on costs that recommends itself to me is that each party shall bear own costs

Dated and delivered at **Mombasa** this **23rd** day of **July 2018**

P J O OTIENO

JUDGE

[2] **Butt v Khan [1981] KLR 349**, per Law JA

[3] Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR

[4] **Bor –vs- Onduu [1982- 1992] 2 K.A.R. 288”**

[5] 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. Each case has to depend on its own circumstances. Per Dulu J in Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR

[6] *Ugenya bus Service V Gachiki (1976-1985) Ea 575, At Page 579:*

[7] **Authur Nyamwate Omutondi & Others V United Millers Limited & 2 Others [2009] eKLR,**