



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 14 OF 2016

CORAM: HON. R.E. ABURILI, J

PETRONILLA ANYANGO OWINO

AND JAMES OMONDI (suing as Legal Representative of the Estate

JARED OWINO ODUOL - Deceased.....APPELLANTS

VERSUS

COUNTY GOVERNMENT OF SIAYA.....RESPONDENT

(Being an appeal against Judgment and Decree dated 21.6.2016 in Civil Case No. 87 of 2015 in Siaya Principal Magistrate’s Court before Hon. C.A. Okore, Senior Resident Magistrate)

RULING

1. On application by way of a letter dated 12/5/2021 by the appellant’s counsel, Geoffrey O. Okoth and upon perusal of the judgment delivered on 31/8/2018, I am in agreement that there is an error apparent on the heading the citation of the judgment, which error is clerical.
2. The Respondent who is a County Government of Siaya is not named therein and instead, the second appellant is erroneously named as the Respondent. That error which is clerical is amenable for amendment by this court pursuant to Section 99 of the Civil Procedure Act which stipulates that:

“Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

3. As the error or mistake in the judgment was occasioned by the court in typing, the same is hereby corrected by this court and the correct parties are hereby named in a freshly signed judgment which is also paragraph-numbered and to be supplied to the parties and send to Kenya Law for uploading.
4. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JUNE, 2021

R.E. ABURILI

JUDGE

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(FATAL ACCIDENT)

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(Being an appeal against the judgment and Decree dated 21.6.2016 in Civil Case No.87 of 2015 in Siaya Principal Magistrate's Court before Hon. C.A. Okore – S.R.M.)

JUDGMENT

1. The appeal herein arises from judgment and decree of the subordinate Court at Siaya vide **Siaya P.M's Court Civil Suit No. 87 of 2015** made on 21.6.2016, by Hon. C.A. Okore, Senior Resident Magistrate.

2. The claim before the subordinate Court as initiated by the Plaintiff/Appellant herein **Petronilla Anyango Owino** and **James Omondi (Suing as legal representatives of the estate of Jared Owino Oduol)** arose from a fatal road accident on 13.12.2014 involving the deceased **Jared Owino Oduol**, a Pillion Passenger then being carried by PW1 **James Omondi Owino** who was the deceased's son on a motor cycle Registration No. Boxer KMDC 283 F and the Respondent's Motor Vehicle Registration No. KBY 770C. The accident is said to have occurred while the deceased was trying to cross the road, at 6.20 p.m.

3. The Plaintiff's claimed that as a result of the collision between PW1 and the defendant's/Respondent's motor vehicle, the deceased sustained serious injuries as a result of which he died while being attended to at Jaramogi Oginga Odinga Hospital, Kisumu, after one week.

4. The Parties agreed on liability between the Appellants and the Respondents which was apportioned in the ratio of 30:10 in favour of the plaintiff in **C.C. 86/2015**.

5. The matter proceeded to hearing on the question of quantum of damages payable to the plaintiffs as far as the deceased person was concerned. In her judgment dated 21.6.2016 Hon. Okore assessed damages under the Fatal Accidents Act and under the Law Reform Act and deducted from the total damages, the award under the Fatal Accidents Act and contributory negligence of 30% and awarded the plaintiff KShs.84,000/= general damages and KShs.15,300 special damages all totaling Shs.99,300 together with costs of the suit and interest at Court rates. The judgment was later corrected to rectify arithmetical errors being dissatisfied with the said judgment and decree of the subordinate Court, the Plaintiffs/Appellants filed this appeal dated 3rd October, 2016, on 4.10.2015 citing the following three principal grounds of Appeal.

1. The Learned trial Magistrate erred in law and in fact in writing a judgment which is at variance with the pleadings and against the weight of the evidence.

2. The Learned trial Magistrate erred in law and in fact in awarding the Appellant damages which were inordinately low and disregarding the set out principle in calculating damages.

3. The learned trial Magistrate erred in law and fact by making an award under the fatal Accidents Act then deducting it from the award under the law Reform Act. Making it to appear as if the award under the Fatal Accidents Acts is a negative award yet, it is a positive award.

6. The Appellants prayed that this Court sets aside the judgment on quantum in **Siaya CMCC No.**

87/2015, makes its own findings on quantum based on the pleadings, Evidence on record and the submissions of the parties, and provide costs of the appeal.

7. The Appeal herein which was filed out of time was validated on 4.4.2018 when Hon. Makau – J., granted leave extending the period within which the appeal ought to have been filed and the appeal as filed being deemed to be duly filed out of the stipulated statutory period of 30 days.

8. The appeal was admitted to hearing on 11.1.2017 by Hon. Justice James Makau. On 4.4.2018, directions were given for parties to canvass the appeal by way of written submissions.

9. This being the first appeal, this Court is alive to the mandate of this Court under **Sec.78 of the CPA** to analyze and reassess the evidence on record and reach its own independent conclusions bearing in mind that it neither saw nor heard the witnesses as they testified. This is the principle espoused in **Selle Vs. Associated Motor Boat Co. [1968] E.A. 123 and Kiruga V Kiruga & Another [1988] KLR 348**, among other cases.

10. In determining the merits of this appeal set out above, the Court is also alive to the fact the Appellant at page 3 of their written submission filed in Court on 9.5.2018 had this to state:

“We are not contesting the individual awards under the separate heads pursuant to the provisions of the Law Reform Act and the Fatal Accident Act. However, we are contesting the Idea of deducting the award under Fatal Accidents Act from the award under the Law Reforms Act and vice versa as happened in this case.”

11. The above submission by the Appellant accordingly settles the sole issue in this appeal which I consider to be whether the learned trial Magistrate erred in law and fact in deducting the award under the Fatal Accident Act from the award made under the Law Reform Act. This is so since I have considered the judgment of the Learned trial Magistrate and have not seen any deduction of the award made under the Law Reform Act from the Fatal Accidents Act.

12. On the part of the Respondent, written submissions dated 30.5.2018 on 31.5.2018 supporting the judgment and decree of the learned trial Magistrate and contending that the trial Court considered the principle of double compensation as a factor in the matter before her and hence, the deduction of the amount awarded for the loss of expectation of life. Reliance was placed on **Sections 4 (1) & (8) of the Fatal Accidents Act** which stipulate that only the deceased’s wives, children and parents are the ones to Benefit from claims brought under the Act.

13. It was submitted that it was the same beneficiaries under the law hence, to award them under the Law Reform Act and Fatal Accident Act is tantamount to double compensation. On the part of the Appellants, they relied on **Section 2 (5) of the Law Reform Act** which stipulates that rights conferred by or for the benefit of the estates of the deceased person shall be in addition to and not derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act.

14. Further reliance was placed on **Kemfro Africa Ltd T/A Meru Express Service Vs. A.M. Lubia & Another (1982 – 88) 1 KLR, 727** where the Court of Appeal upheld the High Court’s awards under the two statutes, Fatal Accidents Act and Law Reform Act account that the two awards did not overlap nor did they result in the plaintiff being compensated twice. Further reliance was placed on **Hellen Waruguru (Administrator) Vs. Kiarie Shoes Ltd [2015] eKLR**.

15. The Appellant maintained that in view of the decision in the above cases, awards under the law Reform Act should not be deducted from the Fatal Accidents Act and vice versa as happened in this case.

DETERMINATION

16. In my determination, I have considered all the foregoing. The Principle applicable is that the assessment of damages is within the discretion of the trial Court and the Appellate Court will only

interfere where the trial Court and in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence. The above principle was espoused in **Kemfro Africa Ltd t/a Meru Express & Another Vs. A.N. Lubia & Another [Supra] Peter M. Kariuki V A.G. C.A. Appeal No. 79/2012 [2014] eKLR and Bashir Ahmed Butt Vs. Wwais Ahmed Khan [1982 – 88] KAR 5.**

17. On whether an award under Fatal Accidents Act must be deducted from the award under the Law Reform Act, the case of **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs. Kiare Shoe Stores Ltd Nyeri C.A. C.A. 22/2014 [2015] eKLR** is relevant. In that case, the Court of Appeal stated:

“(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 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.

18. Further, in the **Aphia Plus Western Kenya & Another V. Mary Anyango Kadenge [2015] eKLR** case, Majanja – J., set aside the sum awarded for loss of dependency and substituted it with an award of Kshs.100,000/= under the Law Reform Act. **P.S. Atiya on Accidents compensation and the Law, 2nd Edition at P.88** states:

“.....hard reality enters this extraordinary legal stage, the law will not allow double recovery. In Practice, this means the amount inherited by a person as a beneficiary of the deceased’s estate may be deducted from an award under the Fatal Accidents Act as the legal justification that the inheritance is a “gain” from the death which must be set off against the loss.”

19. I have carefully perused the **KEMFRO Africa Ltd Vs. A.M. Lubia & Another (Supra)** case. Part of that decision states:

“..... 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 and so it appears the legislative intended that it should be considered.

Section 2(5) of the Law Reform Act provides:

“(5) the rights conferred by this part are for the benefit of the estate of the deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased person by the Fatal Accidents Act To be taken into account and to be deducted are two different things [Emphasis added]. 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. For me it is enough 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 law or otherwise for him to engage in mathematical deduction as suggested by Mr. Barasa.”

20. On the basis of the above decision which is predicted on the statutory provisions namely, the Fatal Accidents Act and the Law Reform Act, I am persuaded that the deduction of the awards made under the Law Reform Act from damages awarded under the Fatal Accidents Act is a mere practice by some Courts borrowing from the English Courts and not backed by any statutory provisions in Kenya.

21. This is so because any damages under the Law Reform Act in respect of loss of expectation of life and pain and suffering are benefits to the deceased's estate.

22. **Section 2(5) of the Law Reform Act** is clear that *the rights conferred 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 deceased persons by the Fatal Accidents Act.*

23. The provision is clear and not ambiguous. It therefore follows that the school of thought that propagates for deduction of the award of damages under Law Reform Act from damages under the Fatal Accidents Act is erroneous.

24. What the trial Court ought to do in such circumstances is to take into account and not to deduct therefrom. It is for that reason that I fully associate myself with the holding by **Emukule–J. In Benedeta Wanjiku Kimani V. Chargwon Cheboi & Another [2013] eKLR.**

“These awards are therefore capped to a minimum, so that the estate does not benefit from the same death Under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above”

25. Furthermore, the **Court of Appeal in the Kemfro Africa Ltd VS. A.M. Lubia & Another** observed that:-

“The Law Commission in England proposed that:

(a) Damages for loss of expectation of life should be abolished and

(b) There should be no deduction from the damages under the Fatal Accidents Act in respect of benefits received from the deceased's estate. The Courts there wait any consequent changes that Parliament may make in Law. We have a Law Reform Commission in Kenya and it has not made such a recommendation and nor has our Parliament changed the Law so, in my view, it would not be right for this Court to do so.”

26. It is for the above reasons that I find and hold that this Court would not engaged into mathematical deductions of the award under the Law Reform Act from the damages awarded under the Fatal Accidents Act especially where there is no argument that the trial Court in making the award under two statutes did not take into account the principles applicable in awarding damages.

27. For those reasons, I find and hold that the trial Magistrate erred in Law and fact in deducting the Appellant's awards made under the Law Reform Act from the damages made under the Fatal Accidents Act as the Law is clear that they are distinct awards under the two separate statutes and as the case of **Kemfro Africa Ltd VS. A.M. Lubia & Another [Supra]** is so clear on this issue and therefore it was misleading for the Respondent to rely on a few paragraphs and lines of that decision and to persuade the trial Court to make deduction and fail to fully read and consider the said decision as a whole.

28. The above position is further supported by the Court of Appeal decision in the **Hellen Waruguru [supra]** case where the Appeals Court stated:-

“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 they are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

29. The above decision is one of the most recent decisions on the issue at hand and made by the Court of Appeal. It is therefore binding on this Court. There is no reason why this Court should depart from it. It follows, therefore that indeed, the trial Magistrate erred in law and fact when she made deduction in the awards made vide her judgment of 21.6.2016 vide **Siaya PMCC No. 87 of 2015**.

30. Accordingly, the appeal herein is found to be meritorious. It is hereby allowed. The decision of the trial Magistrate deducting the award under the Fatal Accident Act from the award made under the Law Reform Act is hereby set aside and substituted with judgment for the plaintiffs/Appellants in the sums awarded under the two statutes without any deduction, less 30% contribution which is made up as follows:

a. Pain and Suffering	Kshs. 20,000
b. Loss of expectation of life	Kshs. 200,000
c. Loss of dependency	KShs.100,000
Total	KShs.320,000
d. Less 30% Contribution	Kshs. 96,000
Balance General /damages	KShs.224,000
e. Add Special damages	<u>Kshs. 15,000</u>
Total Damages	<u>Kshs.239,300</u>

31. The above sums of money shall attract interest at Court rates from date of filing suit in the lower Court on special damages until payment in full and on general damages, interest shall accrue at Court rates from date of judgment in the trial Court until payment in full.

32. The Appellant shall also have costs of the suit in the Lower Court as awarded and costs of this appeal.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF AUGUST, 2018

DATED, SIGNED AND CORRECTED AT SIAYA THIS 30TH DAY OF JUNE, 2021

R. E. ABURILI

JUDGE