



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 55 OF 2013

OMAR SHARRIF HASIM & ANOR.....APPELLANT

-VERSUS-

BONIFACE ASINDU ISUNDU & 2 OTHERS.....RESPONDENT

(Formerly CMC Civil Case 2887/2011 Milimani Commercial Courts, Nairobi)

JUDGMENT

INTRODUCTION

1. The plaintiffs filed suit by plaint dated 28th July, 2011 claiming damages for negligence on the part of the Defendant. The cause of action in this suit arises from an accident that occurred on 27th July, 2008 involving motor vehicle Registration No. KAS 916L (herein after referred to as the motor vehicle) and Morris Kaitoro (deceased) along Valley Road Nairobi.
2. The Plaintiffs bring this suit on their own behalf and on behalf of the estate and Dependants of the deceased.
3. By Consent of parties consent on judgment was entered on 3rd July 2012 in the ratio of 70:30 in favor of the Plaintiff as against the Defendant.
4. It was also agreed that the matter proceeds by way of assessment of damages. Thus this Honourable Court is presented with the issue of determination of quantum herein.
5. The case was heard fully and the Trial Court awarded claimant as follows:-

• Pain and suffering	-	Kshs.20, 000/=	
• Loss of expectation	-	Kshs.80, 000/=	
• Loss of dependency	-	Kshs.10,882/= x $\frac{2}{3}$ x 7 x 12=	- Kshs.609, 398/=
• Total	-	Kshs.716, 667.00/=	
• Less 30%	-	Kshs.215,000.00/=	
• Net	-	<u>Kshs.501, 666.90/=</u>	
• Plus costs and interest.			

6. The Defendants/Appellant were dissatisfied with the decision and thus lodged instant appeal and set out the following grounds:-

- 1) **The Learned Magistrate erred in fact and in law in failing to consider the Defendant's written submissions on record.**
- 2) **The Learned Magistrate erred in fact and in Law in failing to consider the Defendant's submissions on double awards under the Law Reform Act and Fatal accidents Act.**
- 3) **The Learned Trial Magistrate's award of general damages is inordinately high and as a wholly erroneous estimate of the damage caused to the Plaintiffs.**
- 4) **The Learned Magistrate erred in fact and in law in using a multiplicand of Kshs.10, 882/= in computing the award for loss of dependency whereas the deceased's average net income was Kshs.5, 000/=.**

5) The award made by the learned trial Magistrate bears no resemblance to awards for general damages in cases of similar injuries.

7. Parties agreed to canvass appeal via submissions which they filed and exchanged.

APPELLANT'S SUBMISSIONS

8. At the time of his death, both PW1 and PW2 testified that the deceased was working as a G4S security guard earning a gross income of Kshs.10,882/= per month according to his pay slips produced by PW2 PEXH. 8 at pages 18-24 of the Record of Appeal.

9. Further, the Appellants submit that the latest pay slip for June 2008 showed a gross income of Kshs.11,015.50/= and deductions totaling Kshs.7,335.50 leaving a net pay of Kshs.3,360.00/=.

10. The parties having agreed on the issue of liability and recorded a consent in the ratio of 70%:30% in favor of the Respondents, the only issue for determination by the trial court therefore was assessment of damages.

11. Under the Law Reform Act, the Appellants had submitted that the Respondents were not entitled to any award herein as the Letter of administration ad litem did not confer any powers on them to prosecute a suit or receive any proceeds therefrom.

12. Be that as it may, Kshs.10, 000/= was proposed for pain and suffering alongside Kshs.70, 000/= for loss of expectation of life. On the other hand, the Respondents prayed for Kshs.70, 000/= for pain and suffering, Kshs.80, 000/= for loss of expectation of life and Kshs.200, 000/= for loss of consortium.

13. Under the Fatal Accidents Act, the Appellants argued that dependency was a matter of fact that required proof by way of evidence. The Respondents did not produce any marriage certificates and/or birth certificates to prove dependency.

14. The appellants were however fair enough to submit kshs.240, 000/= as sufficient under this head using an average income of Kshs.5, 000/= as a multiplicand, a dependency ratio of 2/3 and a multiplier of 6 years taking into account the age of dependents herein.

15. On the contrary, the Respondents sought Kshs.609, 398/= based on the gross income of Kshs.10, 882/= as a multiplicand, 7 years as a multiplier and a dependency ratio of $\frac{2}{3}$.

16. The award for loss of dependency of Kshs.609,391.00/= forms the gist of the appeal on one hand as the Honourable Trial Court adopted the Respondent's calculation and held:-

“.... On loss of dependency, the deceased earned a gross salary of Kshs.10,882/= and was 59 years at the time of death. It was proposed 7 years as a multiplier and the Defendants proposed 6 years. The court will go by the Plaintiff's proposal as seems reasonable.”

17. On the issue of multiplicand, courts have been consistent in determining the relevant multiplicand for an employed person by adopting the net income and not gross income as in the present case.

18. Notably, the recent decision of the Court of Appeal in **Rosemary Mwasya –Vs- Steve Tito Mwasya And Anor NBI Case No. 100 of 2017 (2018 eKLR)** that set aside the High Court judgment to adopt the gross income of an accountant without factoring the element of deductions and held:-

“...The judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs.118, 546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as $Kshs.118,546/= \times \frac{1}{3}=Kshs.39,512$. When factored into the figure chosen as the multiplicand, it gives a final figure of Kshs.79, 034/=.”

19. Moreover, they urge this appellate court to substitute the award of Kshs.20,000.00/= for pain and suffering with Kshs.10,000.00/= noting that the deceased died few hours after the accident.

20. The Appellants propose an award of Kshs.10,000/= under this head. They rely on the case of **Samwel Kimutai Korir (Suing as the personal and legal representative of Estate of Chelangat Silevia –Vs- Nyanchwa Adventist Secondary School & Anor. (2016) eKLR** whereby Honorable Lady Justice W. Okwany held as follows;

“... Still, even in instantaneous death, the courts have severally held that the deceased must have undergone some pain before finally succumbing to the injuries even if for a brief moment. I will in the circumstances make an award of Kshs.10,000/= under this heading.”

21. The other issue on appeal is the aspect of double award. The Appellants rightly submitted that the award for loss of expectation of life be deducted from the award for loss of dependency noting that the beneficiaries herein (widows and children) were the same under both the Law Reform act and Fatal Accidents Act.

22. However, the trial court failed to address this issue and in the end proceeded to award Kshs.80,000/= to the Respondents leading to an erroneous estimates of damages payable to the Respondents of Kshs.761,667/=.

23. It is the appellants submissions that the same should be deducted from any award made under the Fatal Accidents Act if at all since the beneficiaries under both Acts would ordinarily be the same hence this would amount to double compensation.

24. They are guided by the decision of Nyamweya J. in **Transpares Kenya Ltd & Anor. -Vs- S.M.M (Suing as the legal representative for and on behalf of the Estate of E.M.M (deceased) (2015) eKLR**, quoting the decision of the Court of Appeal In **Kemfro –Vs- A.M. Lubia & Anor (1982–1988) KAR 727** that:-

“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”.

25. In the end, the appellants urge the Appellate Court to deduct Kshs.80,000/= from the final award to the Respondents.

RESPONDENT’S SUBMISSIONS

26. Whether the award of general damages by the Trial Magistrate was excessive, and whether the learned magistrate erred in fact and in law in using a multiplicand of Kshs.10,882/= in computing the award for loss of dependency.

27. The learned Trial Magistrate awarded damages as follows:-

1) Under the Fatal Accidents act (Loss of Dependency) – Kshs.609,391/=.

2. Under the Law Reform Act:

a) Pain and Suffering – Kshs.20,000/=

b) Loss of expectation of Life – Kshs.80,000/=

28. In **Joyce Moraa Oyaro –Vs- Hussein Dairy Ltd (2016) eKLR**, Justice Okwany J, highlighted the instances on which the appellate court will interfere with the exercise of discretion by the trial court when assessing damages, that were held by the Court of Appeal in **Kangu –Vs- Manyonka (1961) EA 705, 709 7013** and **Lukenya Ranching And Farming Coop. Society Ltd –Vs- Kavoloto (1979) E.A 414, 418 and 419**. These instances are:-

a) If the trial court took into account an irrelevant fact or;

b) If the trial court left out of account a relevant fact or;

c) The awards is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

29. In Pleasant **View School Limited –Vs- Rose Mutheu Kithoi & Anor (2017) eKLR**, Justice J. Kamau relied on the case of **BUTT VS- KHAN (1977) IKAR** in which it was held as follows:-

“An appellate court will not disturb an award for damages unless it is 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”.

30. The court considered the fact that the deceased died within hours after the accident and granted Kshs.20,000/= for pain and suffering. An amount only Kshs.10,000/= more than the amount submitted by the appellants herein. The amount awarded for loss of expectation of life was also Kshs.10,000/= more than the amount submitted by the appellants herein.

31. The trial court exercised its discretion in awarding the damages thereon. However, as clearly highlighted above, an appellate court such as this cannot interfere with the award unless it is inordinately high or low as to represent an entirely erroneous estimate.

32. In pleasant **View School Limited –Vs- Rose Mutheu Kithoi & Another (2017) eKLR**, Justice J. Kamau, stated as follows:-

“An appellate court cannot review any award downwards merely because it could have awarded a lower figure if it was the trial court. It can only interfere with or disturb such an award if the same is inordinately high or inordinately low so as to come up with a wholly erroneous estimate.”

33. Of the pay slips produced as evidence in the trial court, the average of the gross pay amounted to Kshs.11,202/=.

34. Upon subtracting all the monthly deductions, his average net pay amounted to around Kshs.5,000/=.

35. However, it should be noted that only two of his monthly deductions were mandatory statutory deductions. These two were NHIF and NSSF. His monthly NHIF and NSSF deductions amounted to Kshs.320/=.

36. The other deductions were not mandatory statutory deductions but were SACCO and other saving schemes deductions, which he had enrolled in for his and his family's benefit.

37. His net pay after statutory deductions was Kshs.10,882/=, which was the multiplicand used by the trial court.

38. In **Eastern Produce (K) Limited and Another –Vs- Dominic Lokadogi Lokado (suing as the personal representative of the estate of the late Peter Ekuam Lokado)[2018] eKLR**, Justice Olga Sewe quoted the Court of Appeal in the **Hellen Waruguru Waweru Case**, which explicitly held as follows:-

“...The net income determines the multiplicand and it is only net of statutory deductions. In this case.....the net salary after statutory deductions was Kshs.19,373/=, and indeed counsel for KSSL accepted that figure in his submissions. There is no reason why the High Court should have interfered with that figure.....”

39. Considering the aforesaid, and the fact that the only statutory deductions on the deceased's payslip were N.H.I.F and N.S.S.F deductions which amounted to a total of Kshs. 320/=, it is clear that the Trial Court made no error in using a multiplicand of Kshs. 10,882/=.

40. While using a multiplier of 7 years, a dependency ratio of $\frac{2}{3}$, and a multiplicand of Kshs. 10,882/=, the court awarded a sum of Kshs.609,391/= for loss of dependency.

41. In view of the aforesaid, there is therefore no merit in the Appellants' ground of appeal No. 4 and the same should be dismissed.

42. On the issue as to whether estate should benefit from awards both under Law Reform Act and Fatal Accident Act; the Respondent submits in **Pleasant View School Limited –Vs- Rose Mutheu Kithoi & Another [2017] eKLR**, Justice J. Kamau, stated as follows:-

*“This court was fully aware that there seems to be two (2) schools of thought on this issue. However, this court therefore associated itself fully with the holdings of Emukule J, Karanja J and Mativo J in the cases of **Benedeta Wanjiku Kimani –Vs- Changwon Cheboi & Another [2013] eKLR**, **Richard Omeyo Omino –Vs- Christine A. Onyango [2009] eKLR** and **David Kahuruka Gitau & Another –Vs- Nancy Ann Wathithi Gitau & Another [2016] eKLR** respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal Accidents Act but merely need to be taken into account.”*

43. Justice J. Kamau further went on to quote Justice M.J. Anyara Emukule as he then was in the case of **Benedeta Wanjiku Kimani -Vs- Changwon Cheboi & Another (2013) eKLR**, where he rendered himself as follows:-

“.....These awards are therefore capped to a minimum, so that the estate does not benefit twice 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.....”

44. In making his decision on the issue of deducting the award under the Law Reform Act from the damages awarded under the Law Reform Act, Justice Kamau in **Pleasant View School Limited –Vs- Rose Mutheu Kithoi & Another [2017] eKLR** further stated as follows:-

*“This court was thus not persuaded by the Appellant's submissions that a trial court must engage in mathematical deductions of the award under the Law Reform Act from the damages awarded under the Fatal Accidents Act and the Court of Appeal in the case of **KENFRO AFRICA LTD –VS- AZIRI KAMU LUBIA & ANOTHER (Supra)** stated as such. It was therefore misleading for the Appellant to have relied on few lines to argue about the deductions and fail to read the said decision in full.*

As this court found favor with the Respondents' submissions, it was not persuaded to interfere with and/or disturb the decision of the Learned Trial Magistrate by deducting the damages the Respondents were awarded under the Law Reform Act from the damages under the Fatal Accidents Act as the law was clear that they were distinct awards under two (2) separate statutes.”

DUTY OF THE FIRST APPELLATE COURT

45. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand.

See the case of **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123**.

EVIDENCE

46. PW1 Boniface Ashihundu was a resident of Kawangware, he was a son to the deceased. They received a call from their mother that his father had been hit by a motor vehicle.

47. PW1 went to the Highway Avenue and found that the deceased had been moved to KNH. On reaching, PW1 found that his father had

passed on. They took him to the mortuary. PW1 reported to the chief and prepared for his burial.

48. They paid for the mortuary – PEXH 1 and Kshs.80,000/= for transport and Kshs.10,000/= for coffin. The documents were misplaced. They reported to the police station at Kilimani, they were given an abstract – PEXH.2 (a), and he paid Kshs.500/= - PEXH. 2 (b). They obtained death certificate – PEXH. 3. A search was done for the motor vehicle – PEXH 4.

49. The certificate and we paid Kshs.500/= - PEXH 5. About Kshs.8,000/=Kshs.10,000/=. The deceased left behind 11 children.

50. A demand letter was send to the Defendants and insurance – PEXH.7. Some children are still school going. They seek to be paid for the loss suffered. They were supposed to pay for the others.

51. Mary Atambi (PW2) was not employed and resided in Kawangware and had sued on behalf of the deceased. Her husband was to report in the morning for work.

52. The deceased delayed when PW 2 called his phone. A person answered the phone and told PW 2 to go to KNH. She did so and called her son. On reaching found he had passed on.

53. He was a guard with G4S, earning a salary of Kshs.10,000/=, PW2 then shows the deceased's pay slips – PEXH.8. The deceased had another wife apart from PW2.

54. Five of the children depended on him and were still school going. They got a letter from the area chief showing the relation – PEXH 9. The dependent children are:-

1) **Macimila.**

2) **Alex.**

3) **Erako.**

55. PW2 Mary Atambi produced baptismal cards as – PEXH 10. Also produced was report for Maximila, which showed school fees schedule – PEXH. 11.

ISSUES, ANALYSIS AND DETERMINATION

56. After going through evidence on record and parties submissions, I find issues arising are;

1) *Whether the award of general damages by the Trial Magistrate was excessive;*

2) *Whether the learned magistrate erred in fact and in law in using a multiplicand of Kshs.10,882/= in computing the award for loss of dependency.*

3) *Whether amount awarded under the Law Reform Act ought to have been deducted from the damages under the Fatal Accidents Act?*

57. In **Joyce Moraa Oyaro –Vs- Hussein Dairy Ltd (2016) eKLR**, Justice Okwany J, highlighted the instances on which the Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages, that were held by the Court of Appeal in **Kangu –Vs- Manyonka (1961) EA 705, 709 7013** and **LUKENYA Ranching And Farming Coop. Society Ltd –Vs- Kavoloto (1979) E.A 414, 418 and 419.**

58. These instances are:-

If the trial court took into account an irrelevant factor; If the trial court left out of account a relevant fact; the awards is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

59. On the issue of multiplicand, courts have been consistent in determining the relevant multiplicand for an employed person by adopting the net income and not gross income as in the present case.

60. Notably, the recent decision of the Court of Appeal in **Rosemary Mwasya –Vs- Steve Tito Mwasya And Anor NBI Case NO. 100 OF 2017 (2018 eKLR).**

61. The court ought to have adopted net income not gross income thus court substitute multiplicand to Kshs. 5,000/=. This is the disclosed average net income after the deductions noted on pay slips. As for pain and suffering award, the court awarded Kshs. 20,000/= but Appellant proposes Kshs. 10,000/=.

62. In the case of **Samwel Kimutai Korir (Suing as the personal and legal representative of Estate of Chelangat Silevia –Vs- Nyanchnwa Adventist Secondary School & Anor. (2016) eKLR** whereby Honorable Lady Justice W. Okwany held as follows;

“... Still, even in instaneous death, the courts have severally held that the deceased must have undergone some pain before finally succumbing to the injuries even if for a brief moment. I will in the circumstances make an award of Kshs.10,000/= under this heading.”

63. I don't find the reason to depart from the above decision as it's a conventional award unless proved the deceased had prolonged period of pain before passing on. The amount is adjusted to Kshs. 10,000/=.

64. As for loss of expectation of life award Kshs. 80,000/=, the Appellant proposal was Kshs. 70,000/=. I find Kshs. 80,000/= not inordinately high and thus retain the same.

65. As for complaint that there was double award under Law reform and Fatal accident act, I rely on the case of **Pleasant View School Limited –Vs- Rose Mutheu Kithoi & Another [2017] eKLR**, Justice J. Kamau, stated as follows:-

“This court was fully aware that there seems to be two (2) schools of thought on this issue. However, this court therefore associated itself fully with the holdings of Emukule J, Karanja J and Mativo J in the cases of Benedeta Wanjiku Kimani –Vs- Changwon Cheboi & Another [2013] eKLR, Richard Omeyo Omino –Vs- Christine A. Onyango [2009] eKLR and David Kahuruka Gitau & Another –Vs- Nancy Ann Wathithi Gitau & Another [2016] eKLR respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal Accidents Act but merely need to be taken into account.”

66. Thus the award is adjusted as follows;

- i. Pain and suffering - Kshs.10, 000/=.**
- ii. Loss of expectation - Kshs.80, 000/=.**
- iii. Loss of dependency - Kshs.5000/= x $\frac{2}{3}$ x 7 x 12= - Kshs.280 000/=.**
- iv. Total - Kshs.370,000/=.**
- v. Less 30% - Kshs.111,000.00/=.**
- vi. Net - Kshs.259, 000/=.**
- vii. Plus interest from the date of the lower court judgement.**
- viii. The appellant will get $\frac{1}{2}$ costs of the appeal.**

DATED, DELIVERED, SIGNED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE