REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 7 OF 2014

PLEASANT VIEW SCHOOL LIMITED…….....…..APPELLANT

AND

ROSE MUTHEU KITHOI & JOSEPH KIMILO KANUNGANI (SUING ON

BEHALF OF THE ESTATE OF MUTUA KINYINGINI (DECEASED).....RESPONDENT

(Being an appeal from the whole Judgment of Hon S.M. Wahome, Senior Principal Magistrate delivered on 23rd September 2013)

IN

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT VOI

CIVIL SUIT NO 82 OF 2012

ROSE MUTHEU KITHOI & JOSEPH KIMILO KANUNGANI (Suing on behalf of

the estate of MUTUA KINYINGINI (Deceased)….....….PLAINTIFF

VERSUS

PLEASANT VIEW SCHOOL LIMITED.....…….…..DEFENDANT

JUDGMENT

INTRODUCTION

1. On 15th July 2013, the parties herein recorded a consent where liability was apportioned at 60%-40% in favour of the Respondent herein. In his judgment delivered on 23rd September 2013, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 1,032,000/= made up as follows:-

i. Pain and suffering Kshs 20,000/=

ii. Loss of expectation of life Kshs 100,000/=

iii. Loss of dependency **Kshs 1,600,000/=**

Kshs 1,720,000/=

Less 40% **Kshs 688,000/=**

Kshs 1,032,000/=

together with costs and interest thereon until payment in full.

2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 17th October 2013 on the same date in **HCCA No 139 of 2013Pleasant View School LimitedvsRose Mutheu Kithoi & Joseph Kimilo Kanungani (suing on behalf of the estate of Mutua Kinyingini (Deceased)**at the High Court of Kenya, Mombasa.

3. The Grounds of Appeal were as follows:-

1. THAT the Learned Magistrate erred in fact and in law by making an award under both the Law Reform Act and the Fatal Accidents Act without deducting the former from the other.

2. THAT the Learned Magistrate erred in fact and in law for not using a minimum income at the time of the accident and assuming the income of the deceased to be Kshs 10,000/= when there was no proof of earnings.

3. THAT the Learned Magistrate erred in law and fact for using a multiplier of 20 years without taking into account comparable authorities and totally disregarding the defendant's submissions on record.

4. THAT the Learned Magistrate erred in law and fact by awarding excessive amount of Kshs 100,000/= for loss of expectation of life, Kshs 1,600,000/= for loss of dependency and Kshs 20,000/= for pain and suffering disregarding the Defendant's submissions on the issue.

5. THAT the Learned Magistrate (sic) **decision was unjust, against the weight of evidence was based on wrong principles of law and occasioned miscarriage of justice.**

2. On 25th August 2014, Kasango J made an order transferring the said file to the High Court of Kenya, Voi and directed the Appellant to file her Record of Appeal. On 17th November 2014, M/S Mwinzi & Co Advocates for the Respondents filed a Notice of Motion application of even date in which they had sought the dismissal of the Appellant's Appeal for want of prosecution and/or in the alternative, that the monies deposited in the Voi Law Court be released to the Respondents. The Appellant opposed the said application.

3. In his Ruling dated 15th April 2016, Muya J who heard and determined the said application held that the said application had been filed prematurely as the proceedings from the lower court had not been typed to enable the Appellant file its Record of Appeal as had been ordered by Kasango J. He directed that the said proceedings be typed within the shortest time possible and not more than fourteen (14) days of the time of delivery of his said Ruling, which in essence was fourteen (14) days from 9th May 2016, when this court read the said Ruling on his behalf.

4. In view if the fact that Muya J may not have been aware of the challenges of typing of proceedings at the High Court of Kenya, Voi, this court gave the Appellant additional time to file its Record of Appeal. Its undated Record of Appeal was filed on 22nd July 2016. Its Supplementary Record of Appeal dated 4th October 2016 was filed on the same date. Whereas the court receipt was clear that payment of filing fees was made on 4th October 2016, the court stamp erroneously showed the date of filing as 4th September

2016.

5. As the Learned Trial Magistrate did not award the Respondents special damages as he found that they had not proven the same, the Respondents filed a Cross-Appeal dated 5th October 2016 on even date in which they urged this court to dismiss the Appellant's Appeal and award them special damages as they had proven the same.

6. Although the Appellant's Record of Appeal was undated, this court nonetheless determined this matter on its merits as Article 159(2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities.

7. The Appellant's Written Submissions and List of Authorities were dated and filed on 28th November 2016. The Respondents' Written Submissions were dated and filed on 18th January 2017. Their List of Authorities was also dated 18th January 2017 but was filed on 23rd January 2017.

8. When this matter came up on 13th February 2017, both parties requested this court to deliver its Judgment based on their respective Written Submissions which they did not highlight but relied on, in their entirety. The Judgment herein was therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidenceand make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

10. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

11. Having looked at the Appellant's grounds of appeal and in particular to its Written Submissions, it was clear that the said grounds all related to the question of whether or not the Learned Trial Magistrate was justified in awarding the Respondents the sum of Kshs 895,450/= plus costs and interest thereon. The issues the Appellant raised in its Written Submissions for determination by this court which issues the Respondents also adopted in their Written Submissions were as follows:-

> **a. Whether the trial court took into account the award under the Law Reform Act in awarding damages under the Fatal Accidents Act; and**
>
> **b. Whether the award by the Trial Magistrate was excessive.**

12. The court therefore addressed the said issues under the following distinct heads.

I. DEDUCTION OF DAMAGES AWARDED UNDER THE LAW REFORM ACT FROM THE FATAL ACCIDENTS ACT

13. Ground of Appeal No (1) was dealt with under this head.

14. It was the Appellant's submission that the Learned Magistrate erred when he awarded the Respondents damages both under the Fatal Accident's Act and the Law Reform Act as the beneficiaries

of both awards were the same. It referred this court to the case of **Kenfro Africa Ltd vs Aziri Kamu Lubia & Another (No 2) [1985] eKLR**where the court held as follows:-

> **"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account 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."**

15. It also relied on the cases of **Marwanga Jeffern vs Jecken Ochieng Ochieng&Another[2015] eKLR** and **Edner Gesare Ogega vs Aiko Kebiba (suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased [2015] eKLR** where the courts deducted the damages awarded under the Law Reform Act in line with the holding in the case of **Kenfro Africa Ltd vs Aziri Kamu Lubia & Another**(Supra).

16. It also pointed out that the 2nd Respondent was not a dependant of the deceased as Section 4 of the Fatal Accidents Acts did not include brothers and sisters of a deceased as dependants.

17. On their part, the Respondents submitted that there was no express provision of the law that provides that the awards under the Law Reform Act should be deducted from the Fatal Accidents Act whenever damages are awarded under both statutes.

18. They argued that the deduction of the award made under the Law Reform Act from damages awarded under the Fatal Act was a mere practise imported from English courts. They also placed reliance on the case of **Kenfro Africa Ltd vs Aziri Kamu Lubia & Another**(Supra) where the court stated as follows:-

> **"…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 Legislature intended that it should be considered. Section 2(5) of the Law Reform Act says this:**
>
> **"(5) the rights conferred by this part are for the benefit of the estate of 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. The words used in s.4(2) of the Fatal 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 law or otherwise for him to engage in mathematical deduction as suggested by Mr Barasa."**

19. This court carefully considered the submissions by both the Appellant and the Respondents on the issue of how awards under both the Fatal Accidents Act and the Law Reform Act were to be treated and found itself in agreement with the latter's submissions.

20. 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. Section 2(5) of the Law Reform Act Cap 26 (Laws of Kenya) 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. This court could not see any other interpretation of that provision as the same was not ambiguous.

21. 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.

22. This court thus wholly concurred with the holding of Emukule J (as he then was) in the case of **Benedeta *Wanjiku Kimani v Changwon Cheboi &Another*** *(Supra)* ***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…"***

23. This court was also persuaded that the interpretation given by Emukule, Mativo and Karanja JJJ was the correct one as in the case**Kenfro Africa Ltd vs Aziri Kamu Lubia & Another**(Supra), the Court of Appeal had observed as follows:-

> **"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 the law. We have a Law Reform Commission in Kenya and it has not made such a recommendation and nor has out Parliament changed the law so, in my view, it would not be right for this court to do so."**

24. 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 Actand the Court of Appeal in the case of **Kenfro Africa Ltd vs Aziri Kamu Lubia & Another**(Supra) stated as much. 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.

25. As this court found favour 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.

26. In this respect, Ground of Appeal No (1) was not successful and the same is hereby dismissed.

II. FATAL ACCIDENT'S ACT CAP 32 (LAWS OF KENYA)

27. In assessing the damages under this head, the court had to consider the multiplicand, the multiplier and dependency ratio. Grounds of Appeal No (2), (3), (4) and (5) were dealt with as shown hereunder.

AA. MULTIPLICAND

28. Ground of Appeal No (2) was dealt with under this head.

29. The Appellant referred this court to the definition of **"earnings"** in Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 which was "revenue gained from labour or services and includes the income or money received from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007, or the determination of income whichever is higher."

30. It was its argument that although the 1st Respondent testified that Mutua Kinyingini(hereinafter referred to a**s "**the deceased") used to give her a monthly sum of Kshs 5,000/= for her upkeep while he sent his 2nd wife, a sum of Kshs 3,000/= for her upkeep, she did notadduce any evidence to prove the deceased's earnings.

31. On their part, the Respondents argued that the sum of Kshs 10,000/= the Learned Trial Magistrate

adopted was reasonable in the absence of any documentary evidence considering that the deceased was a driver of lorries and earned a monthly income of Kshs 40,000/=.

32. It was correct as the Appellant stated that the Respondent did not adduce any documentary evidence to support the fact that the deceased used to earn a monthly income of Kshs 40,000/=. The only documents they adduced as evidence before the Trial Court were the Limited Grant, Certificate of Death, Police Abstract Report, Notice to the Insurance Company, Demand Notice and Receipts in support of the funeral expenses.

33. In his Judgment, the Learned Trial Magistrate noted that the Respondent had proposed a sum of Kshs 20,000/= to be adopted while the Appellant had argued that as there was no proof of earnings, the minimum wage of Kshs 5,500/= for lorry drivers be adopted.

34. However, he rejected the two (2) propositions and adopted the sum of Kshs 10,000/= as a conventional figure as the deceased's earnings after noting that that the deceased had two (2) wives and several children. The court noted that he arrived at that figure as he had argued that the Appellant had suggested the least minimum income which he opined no person in Kenya could accept.

35. Notably, the Appellant did not adduce any evidence to rebut and/or controvert the Respondent's evidence relating to the deceased's evidence. While arguing this appeal, it did not suggest what figure it opined was reasonable in the circumstances of the case herein.

36. However, as there was no proof of income, this court was of the view that a monthly income in the sum of Kshs 10,000/= was modest for a thirty six (56) year old African male with two (2) families.

37. In arriving at the said conclusion, this court had due regard to the case of **Jacob Ayiga Maruja & Another V Simeon Obayo CA167/200 [2005] eKLR** where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated as follows:-

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."**

38. In the case of **Authur Nyamwate Omutondi & Others V United Millers Limited & 2 Others [2009] eKLR**, Mwera J (as he then was) also stated as follows:-

> **"… It is clear that the claim that the deceased was a businesswoman at the time of her death was not established. She had a trading licence up to 31st December 2002.She did not renew it in 2003 when she died. Thus Sarah cannot be presumed to have been a fish monger in 2003 as the plaintiff set out to prove. Further, it was not proved by accounts or other means that Sarah earned shs.100,000/=. A transfer bank slip for shs.60,000/=, could not be proof of income. Proof of income is basic to a claim of loss of dependency under the Fatal Accidents Act because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved then no award of dependency can issue.However, in our present case this court is prepared to take a minimum sum of shs.4,000/= as what Sarah could earn in rural Migori to support herself and the nephew (PW1). With a multiplier of eight (8) the court awards him shs.256,000/=…"**

39. Whilst this court was of the view that the Respondents could have done better by adducing some sort of documentary evidence of the deceased's income , it could not begrudge them for not adducing the same in evidence due to the informal nature of the business the deceased was engaged in. However, she

could have at least attempted to provide some sort of proof that the deceased would send her a sum of Kshs 5,000/= and her Co-wife a sum of Kshs 3,000/= for their monthly sustenance to demonstrate their dependency on the deceased.

40. Be that as it may, this court was prepared to accept her evidence that the deceased who was aged thirty six (36) years was engaged in some sort of economic activity to support the Respondents, his Co-wife and mother.

41. Accordingly, bearing in mind the aforesaid case law on the question of income that is not proven by documentary evidence and the inflationary trends over the years, this court was not persuaded to interfere with the Learned Trial Magistrate's finding regarding the deceased's income and retained the same at Kshs 10,000/= as it was a modest figure by all standards.

42. This court therefore found Ground of Appeal No (2) not to have been merited and the same is hereby dismissed.

BB. MULITIPLIER

43. Ground of Appeal No (3) was dealt with under this head.

44. As can be seen hereinabove, the deceased was aged thirty six (36) years at the time he met his death through a fatal accident on 22nd April 2011 at Ndara along Nairobi-Mombasa Road. The Appellant had proposed a multiplier of fourteen (14) while the Respondent had suggested a multiplier of twenty five (25) years.

45. The Learned Trial Magistrate rejected both proposals and adopted a multiplier of twenty (20) years. He observed that under the Kenya labour laws, the retirement age is sixty (60) years and that it was possible that the deceased could have worked for another twenty (20) years.

46. Notably, the Appellant had argued that a multiplier of twenty (20) was erroneous as the Learned Trial Magistrate did not consider the comparable authorities relating to multipliers. As has been stated hereinabove, it did not rebut the Respondent's evidence that the deceased was a businessman who could have worked beyond sixty (60) years. Barring the vagaries and uncertainties of life, an average Kenyan man engage in economic activity upto about seventy (70) years or beyond especially where he is a businessman.

47. In the circumstances foregoing, this court was persuaded that the Learned Trial Magistrate did not err when he adopted a multiplier of twenty (20) where the deceased was aged thirty six (36) years of age.

48. In arriving at the said multiplier, this court had due regard to the **Elizabeth Chelagat Tanui & another v Arthur Mwangi Kanyua [2013] eKLR**where H.P.G. Waweru J adopted a multiplier of eighteen (18) where the deceased was aged thirty six (36) years.

49. This court therefore found no basis of interfering with and/or disturbingthe said Learned Trial Magistrate's findingon the multiplier as the same was not unreasonable. In that respect, Ground of Appel No (3) was therefore not merited and the same is hereby dismissed.

CC. DEPENDENCY RATIO

50. Ground of Appeal No (4) was dealt with under this head and in Part III hereinbelow.

51. The Appellant submitted that the Respondent admitted in the Trial Court that she had a two (2) acre farm where she grew subsistence food and reared cows for milk. It pointed out that the dependants were adult children who were even married and had their own families and that it was never demonstrated how they were the deceased's dependants. It contended that since all the children were adults as at the time of the deceased's death, the Respondent's assertions that the

deceased paid their school fees was a misrepresentation.

52. It was emphatic that although it was not disputing that the said children were the deceased's dependants, the dependence ratio of 2/3 that was adopted by the Learned Trial Magistrate was not applicable herein in view of the circumstances of the case herein. It submitted that in the circumstances of the case herein, a dependency ratio of 1/3 was what was reasonable.

53. In this regard, it referred this court to the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR** where the court therein relying on the case of **HCCC No 1438 of 1998Beatrice Wangui Thairu vs Hon Ezekiel Bargetuny** (unreported) that:-

> **"…there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case."**

54. It also referred this court to the definition of **"dependency"** given in Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act as that part of the deceased's earnings that he/she spent on the maintenance or financial support of his/her dependants.

55. On the other hand, the 1st Respondent argued that she was the deceased's wife having been married to him under customary law which alone established "interdependency" hence the application of 2/3 as the dependency ratio. The Respondents placed reliance on the case of **United Millers Ltd vs Yano Omoro Oindo [2007] eKLR** where the court stated as follows:-

> **"Regarding the claim under fatal accident** (sic) **Act, I am of the view that the deceased being unmarried and the applicant, being a surviving parent having provided his particulars of dependency as required under Section 8 of the Act, was entitled to the award under this heading."**

56. Paragraph (5) of the Respondents' Plaint that was dated 20th June 2012 and filed on 31st July 2012 showed that the deceased's dependants were:-

i. Rose Mutheu Kithoi 1st wife

ii. Joseph Kimilo Kanunguni Brother

iii. Faith Mwandoe 2nd wife

iv. Ch M K Minor son

v. M M Minor son

vi. W M K Minor daughter

vii. T M K Minor daughter

viii. C M K Minor son

ix. M M K Minor daughter

x. V M K Minor daughter

xi. Grace Kanyingini Mother

xii. Mutua Kanyingini Brother

xiii. Katumbi Kanyangini Sister

57. Under Section (4) (1) of the Fatal Accidents Act, it is clear who a dependant of for whose benefit a claim under the said Act can be brought. It provides as follows:-

> **"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child**(emphasis court) **of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:**
>
> **Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."**

58. It was therefore evident that proceedings under the Fatal Accident's Act could therefore be brought on behalf of the Respondent and her children. However, as was rightly pointed out by the Appellant, it does not automatically follow that the deceased's wife and children will be entitled to damages under the Fatal Accidents Act.

59. Indeed, it is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependant on a deceased prior to his death.

60. Appreciably, it is reasonable to expect that as an African man, the deceased financially supported the 1st Respondent, his Co-Wife, their seven (7) children and mother. His brothers and sisters ought to have demonstrated how hesupported them. In the absence of any evidence, this court agreed with the Appellant's submissions that the 2nd Respondent, the deceased's brothers and sister were not entitled to his deceased's estate and that in any event, the Section 4(2) of the Fatal Accident's Act was clear that the action under the said Act could not have been brought for their benefit.

61. Turning to the issue of the deceased's support, this court found and held that it was also reasonable to have expected that he would have to spend a large chunk of his income on his many dependants. It was irrespective that the 1st Respondent stated that she was a peasant farmer. Clearly, there were seven (7) minor school going children whose expenses must have been high. In this respect, this court found itself in agreement with the Respondents that a dependency ratio of 2/3 was reasonable in the circumstances of the case herein.

62. Whereas this court agreed with the Appellant's submissions that the 2nd Respondent and his siblings were not the deceased's dependants by virtue of Section 4(2) of the Fatal Accidents Act, the fact still remained that it was the 1st Respondent, his Co-wife and their children who were entitled to two thirds (2/3rds) of the deceased's salary and it was immaterial that the deceased's siblings had purported to benefit from his demise.

63. In the circumstances foregoing, this court did not find any merit in the Appellant's Ground of Appeal No (4) and the same is hereby dismissed.

III. LAW REFORM ACT CAP 26 (LAWS OF KENYA)

64. This court had due regard to the case of **Butt vs Khan (1977) 1 KAR** 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."

65. As seen hereinabove, a court exercises its discretion in awarding damages for pain and suffering and loss of expectation of life. However, as was stated hereinabove, 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.

66. This court also had due regard to the cases of **Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** where the court therein awarded a sum of Kshs 75,000/= for pain and suffering and to the case of **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) v Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] eKLR** where Ougo J awarded a sum of Kshs 100,000/= for loss of expectation of life.

67. This court was clear in its mind that the award of Kshs 100,000/= and Kshs 20,000/= for loss of expectation of life and pain and suffering respectively that the Learned Trial Magistrate awarded were reasonable in the circumstances of the case hereinas the same were comparable to awards that have been made by other courts.

68. This court did not therefore find any basis for interfering with and/or disturbing the award the Learned Trial Magistrate awarded under this head. Ground of Appeal No (4) which had also dealt with the question of damages under the Law Reform Act was not merited.

IV. SPECIAL DAMAGES

69. As seen hereinabove, the Respondent filed a Cross-Appeal in which it argued that the Learned Trial Magistrate erred in law and fact in finding that no special damages were proven. Notably, the Appellant did not submit on this issue. It did not also rebut and/or controvert the Respondents' evidence in respect of the special damages the Respondents have claimed.

70. As pointed out hereinabove and also evidenced in the proceedings from the Trial Court, the 1st Respondent produced in evidence, receipts in support of funeral expenses.The receipts that were attached to the Record of Appeal totalled Kshs 32,835/=. This was exclusive of the sum of filing the Probate &Administration matter in court for purposes of obtaining a Grant of Letters of Administration.

71. This court was therefore persuaded by the Respondents' submissions that the Learned Trial Magistrate erred in law and fact by failing to address his mind to the question of special damages at all. As the Respondents had specifically pleaded for special damages in the sum of Kshs 30,750/= in their Plaint, which this court found was specifically proven, it could not award a higher sum than what they had pleaded in the Plaint. There was no indication that the Respondents amended their Plaint and consequently, they must be bound by their pleadings.

72. In the premises foregoing, this court found that the Respondents' Cross-Appeal was merited.

DISPOSITION

73. Accordingly, having considered the evidence, the Written Submissions and the case law that was relied upon by the parties herein, this was not persuaded at all that there was any merit in the Appellant's Appeal that was lodged on 17th October 2013. The same is hereby dismissed with costs to the Respondents.

74. On the other hand, the Respondents Cross Appeal dated and filed on 5th October 2016 was merited

and the same is hereby allowed with no order as to costs.

75. In the circumstances foregoing, this court hereby varies the judgment of the Learned Trial Magistrate by setting aside and/or vacatingthe sum of Kshs 1,032,000/= and instead enters judgment in favour of the Respondents against the Appellant for the sum of Kshs 1,050,300/=made up as follows:-

i. Pain and suffering	**Kshs 20,000/=**
ii. Loss of expectation of life	**Kshs 100,000/=**
iii. Loss of dependency	**Kshs 1,600,000/=**
iv. Special damages	**Kshs 30,750/=**
	Kshs 1,750,500/=
Less 40%	**Kshs 700,200/=**
	Kshs 1,050,300/=

together with costs and interest thereon until payment in full.

76. As there were minor dependants for whose benefit the claim had been brought, the Respondents' counsel is hereby directed to make the necessary application for the apportionment of monies in the Trial Court as required by the law forthwith.

77. This court hereby directs that the decretal sum shall be released to the Respondents' counsel forthwith upon obtaining an order of apportionment of the decretal sum in respect of the minors herein. For the avoidance of doubt, it shall not be necessary for the Respondents to seek further approval of this court for the release of the decretal sum once they obtain the order for apportionment in the Trial Court.

78. It is so ordered.

DATED and **DELIVERED** at **VOI** this **30th** day of **March** 2017

J. KAMAU

JUDGE