



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO.22 OF 2015

(FORMERLY MERU HCA 23 OF 2012)

JAMES NTWIGA KANAKE.....1ST APPELLANT

GULZAR AHMED MOTORS LTD.....2ND APPELLANT

VERSUS

**AILEEN MUKWANJERU JEDIEL (Suing as the Administratrix of
the Estate late JEDIEL NTWIGA).....RESPONDENT**

***(An Appeal from Ruling of KIRUI R.K. –SPM made on 29/8/2010 in Chuka Senior Principal
Magistrate’s Court Civil Case No. 49 of 2010).***

JUDGMENT

1. On 29th June, 2010, the Respondent lodged in the Principal Magistrate’s Court at Chuka a plaint as the administratrix of the estate of the late JEDIEL NTWIGA RURE (hereinafter “ the deceased”). In it, the Respondent claimed that the deceased was lawfully walking off Meru-Chuka Road at Giampampo on 11th July, 2009, when the 1st Appellant negligently drove or controlled motor vehicle registration No. KAX 531W that he caused the same to knock the deceased who succumbed to the injuries he sustained from the said accident. The Respondent set out what she considered to be particulars of negligence.

2. The Respondent further alleged that at the time of his death, was the deceased was aged 70 years, of good health and was gainfully employed as a watchman at a monthly salary of Kshs.7000/-. That he left behind dependants who included the Respondent and six (6) children. The Respondent claimed that the estate had incurred an expense of Ksh.25,650/-as a result of the said accident and consequent death of the deceased. She therefore claimed the said sum as special damages. The Respondent further claimed general damages under both the Fatal Accidents Act Cap 32 Laws of Kenya and Law Reforms Act, Cap 26 Laws of Kenya. She also claimed the costs of the suit and interest.

3. The 1st Appellant filed a Defence to the Respondent’s claim. He denied the Respondent’s claim in toto. He denied the occurrence of the accident as pleaded by the Respondent. In the alternative, the Appellant pleaded that the deceased was to blame for the occurrence of the accident and gave the particulars of the alleged negligence. The 1st Appellant finally denied that the Fatal Accidents Act and Law Reforms Act were applicable in this case and urged that the suit be dismissed. The 2nd Appellant did not file any defence neither was any interlocutory judgment entered against it.

4. After trial, the trial court found the Appellants liable and entered judgment against them on the basis of

70%- 30%. The court quantified the claim at Kshs.535,700/- which after contribution amounted to Kshs.374,990/- .

5. Aggrieved by that decision, the Appellants have appealed against the same to this court citing seven (7) grounds which can be summarized as follows:-

- a. *that the trial Court erred in allowing evidence to be led on unpleaded matters;*
- b. *that the trial Court erred in awarding damages under both the Fatal Accidents Act and the Law Reforms Act thus amounting to double compensation;*
- c. *that the trial Court misapprehended the evidence and applied wrong principles thereby awarding damages that were inordinately high; and*
- d. *that the trial Court erred in ignoring the Appellants submissions without any reason to do so.*

6. This being a first appeal, it behoves this Court to re-evaluate the evidence afresh and come to its own independent conclusions and findings **See Selle--v- Associated Motor Boat Co. Ltd [1968] EA 123.** However, in doing so the Court must have in mind that it did not see the witnesses testify.

7. The evidence before the trial Court was tendered by three (3) witnesses on behalf of the Respondent. PW1 told the court that she was the wife of the deceased. That on 11/7/2009, she was at home when PW2 came at about 7 p.m. and informed her that the deceased had been involved in an accident at Giampampo. She ran to the hospital where she found the deceased admitted. He died three (3) days later. She produced a Police Abstract (P Exht 1), registrar's record for motor vehicle KAX 531W (P Exh 3) grant of letters of administration ad litem dated 29/1/2010 (P Exh 4), death certificate (P Exh 6) and the Chief's letter confirming who the dependants of the deceased were (P Exh 8). She also produced other exhibits to prove the expenses she had incurred as proof of special damages. She confirmed to the court that the deceased died aged 60 years, was in good health and was at the time working as a watchman at Njaina Primary School earning Ksh.3000/- per month.

8. PW2 was the eye witness. He told the court that he was with the deceased at the time of the accident. That as they were crossing the road, motor vehicle registration No. KAX 531W came from Chuka direction and hit the deceased. The vehicle was in high speed as it stopped about 150 metres from the point of impact. That the deceased rolled to a trench and was rushed to and admitted in hospital but died three (3) days later. PW3 was the police officer who investigated the accident. He confirmed to the Court the occurrence of the accident and the subsequent demise of the deceased.

9. The first ground was that the trial Court erred in allowing evidence to be led on unpleaded matters. I have looked at the submissions of the Appellants. They have not identified the evidence that was allegedly allowed to be led that never formed part of the pleadings. Having looked at the pleadings and the evidence as analyzed above, this court forms the opinion that there was no evidence that was led and admitted at the trial that was not informed by the pleadings before court. That ground fails.

10. The next ground was that the trial court fell into error in awarding damages under both the Law Reforms Act and the Fatal Accidents Act thereby amounting to double compensation. From the record, it is clear that the Respondent had pleaded that the suit had been brought for damages under both the pieces of legislation. She obtained a limited grant of letters of administration and properly pleaded the facts and particulars to bring her suit within the said Acts. The trial court awarded the Respondent Kshs.100,000/- for loss of expectation of life under the Law Reforms Act and Kshs.400,000/- for loss of dependency under the Fatal Accidents Act. The Appellants contend that the trial Court should have subtracted the sum of Kshs.100,000/- from the overall award since there was also an award under the Fatal Accidents Act. The case of **Kisii HCCA No. 68 of 2005 Nyamira Tea Farmers Sacco –v- Wilfred Nyambati Keraita [2011] eKLR** was cited as an authority for that proposition.

11. The general rule is that great caution should be exercised in awarding damages under the Law Reforms Act and Fatal Accidents Act so as to avoid duplication of awards. In the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini .v. A.M Lubia [1982-1988] 1 KAR 727** the court stated that:-

“..... the net benefit will be inherited by the same dependants under the Law Reforms Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act This is so despite the provisions of Section 15 (5) of the Law Reforms (Miscellaneous provisions) 1934 Act which declares that the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased’s by the Fatal Accidents Act..... anyway.....”

12. On appeal, **Kemfro Africa t/a Meru Express Services (1976) & Anor .v.Lubia & Anor (No.2) [1987] KLR 30, Kneller JA** observed at pg 38 thus:-

“ And did the Judge take into account of the assessment for the estate under the Law Reforms Act when it came to that for Lubia under the Fatal Accidents Act? He added all the assessments together, it is true, but in my judgment, an arithmetical deduction need not be set out as for an examination answer- The test is whether or not this court can be satisfied the Judge remembered before he assessed the loss for Lubia at Kshs.150,000/- that Lubia would inherit Kshs.25,000/- from Myra’s Estate? In my view he did and I base that on the way in which he directed himself and the sum he awarded Lubia under the Fatal Accidents Act which even if the Kshs. 25,000/= under the Law Reform Act not taken into account was not manifestly excessive”.

13. This court associates itself with the sentiments of the Court of Appeal in the aforesaid case. I think the spirit of the law is that no one should benefit twice or from double compensation for the same wrong. That the estate of a deceased person should not benefit twice from the same death. When faced with a similar question in the case of **Peris Wambui Kinuthia & Another .v. S.S Mehta & Sons Ltd NRB HCCA No. 568 of 2010** the court held that:-

“Section 2(5) of the Law Reforms Act, Cap 26, Laws of Kenya reiterate the above quoted provision. It stipulates:

“(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act.....”

There was no complaint on the amount of award under the Law Reform Act. The only complaint was that the same should not have been deducted from the award under the Fatal Accidents Act.

*In the case of **Kemfro Africa t/a Meru Express Services (1976) & Anor –v- Lubia & Anor (No 2) (1987) KLR 30** the Court of Appeal was categorical that the words “to be taken into account” and “to be deducted” are two different things. That the words used in Section 4 (2) of the Fatal Accidents Act are “taken into account”. That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction.*

*Accordingly, what is required in order to avoid double compensation is for the court to have in mind and therefore take into account the award under the Law Reform Act when making an award under the Fatal Accidents Act. In my view, this is the better way of construing Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act Cap 26 Laws of Kenya. Otherwise there will be no need of having to bring the suit under both statutes only for the award in one to be deducted from the award made in the other. Indeed, in the **Kemfro Africa Ltd** case (supra), the Court of Appeal*

declined to deduct Kshs.25,000/- that had been awarded under the Fatal Accidents Act Cap 32 Laws of Kenya on the basis that the trial court had taken into account the said award”.

14. This Court is still of the same persuasion. The sum of Kshs.100,000/- awarded under the Law Reform Act , in my view is not a statutory maximum. Neither is it manifestly excessive. Further, the sum of Kshs.400.000/- awarded under the Fatal Accidents Act, in my view not 500 manifestly excessive as to warrant the deduction of the Kshs.100,000/- already awarded under the Law Reform Act. That ground is accordingly rejected.

15. The other ground was that the trial Court ignored the Appellants submissions without any reason of doing so. In their submissions before this court, the Appellants did not point out the aspect of their submissions made the lower court that were ignored. This court has considered the Appellants submissions in before the trial court. The Appellants submitted, inter alia, that the deceased was aged 60 years and was earning Ksh.3000/-, according to the evidence of PW1; that considering the age of the deceased of 60 years, a convessional sum of Kshs.70,000/- should be awarded for loss of expectation of life and that the multiplicand of Kshs.2000/- should be applied for a term of 3 years. These issues were never addressed by the trial court. It is the opinion of this court that had the trial court addressed itself to the said submissions, it might have arrived at a different award. This ground succeeds.

16. The last ground was that the trial court misapprehended the evidence and applied wrong principles thereby awarding damages that were inordinately high. The Respondent had pleaded that the deceased was aged 60 years at the time of his death earning Kshs.7,000/- per month. However, at the trial, PW1 told the court that the deceased was employed as a watchman at Njaina Primary School and was earning Ksh.3000/- per month. However, the trial court assessed the multiplicand at Kshs.5000/- allegedly being the minimum wages set out in the law. To this court’s mind that was wrong. Neither the sum of Kshs.5000/- nor the minimum wage had been pleaded by the Respondent. There was no evidence that was tendered to show that in Chuka area in 2009, the minimum wage for a watchman was Kshs.5000/-. In this court’s view, the Respondent was bound by her evidence that the deceased was earning Kshs.3000/-. To that extent, there was no basis for the trial court to award Kshs.5000/-. As the multiplicand. As regards the age of the deceased, this court will take judicial notice that in rural Kenya, old men work as watchmen in such institutions as Primary Schools health institutions et cetra to their twilight years. It is likely that the deceased could still have worked for another 10 years. I will not disturb the finding of the trial court on that aspect.

17. Before concluding this judgment, one observation that I should make is that the assessment of pain and suffering at Kshs.20,000/- was too low. Considering that the deceased died after three (3) days, he must have suffered a lot of pain. However, since there was no cross appeal on this aspect, I will not disturb the trial courts award.

18. Accordingly, the appeal will succeed on one limb, the multiplicand. The trial court’s judgment will be disturbed accordingly and affirmed as follows:-

a. Loss of expectation of life	- Kshs.100,000/-
b. Loss of dependency - Kshs.3,000/- X 12 X 10 X 2/3	- Kshs 240,000/-
c. Pain and suffering	-Kshs.20,000/-
d. Special damages-	<u>-Kshs.15,000/-</u>
Total	<u>Kshs. 375,000/-</u>
Less 30% contribution	Kshs. 112,500/-
Grand Total	<u>Kshs. 262,500/-</u>

19. I will also award interest on the decretal sum from the date of judgment in the lower court at court rate. The Respondent will also have costs in the lower court. Since the Appeal was partially successful,

each party will bear own costs of the appeal.

It is so decreed.

DATED at Chuka this 25th day of February, 2016.

A.MABEYA

JUDGE

Court:

Judgment read and delivered in open court in the absence of the Counsel for the Respondent who was present when the Judgment date was given.

A.MABEYA

JUDGE

25/2/2016