REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 61 OF 2013

1. DAVID TUYA ….....1ST APPELLANT

2. ROAD STAR LIMITED.....2ND APPELLANT

VERSUS

SUSAN KERUBO ACHANDO(SUING AS THE ADMINISTRATOR OF THE ESTATE OF **EZEKIEL OMBASO ONDARI..... RESPONDENT**

(Being an appeal arising from the Judgment and/or Decree of Hon. E. Riany, Resident Magistrate in Naivasha PMCC No. 362 of 2009 delivered on 11th April 2013)

JUDGMENT

1. The appeal before me is against an award of damages emanating from the death of one Ezekiel Ombaso Ondari, (deceased) following a road traffic accident on the 29th January 2009 involving the deceased and the respondents motor vehicle registration Number KAS 278T.

The issue of liability was resolved by a consent order recorded by parties on the 28th March 2013 in favour of the plaintiff now appellant at 80%. It was adopted by the court.

2. In their grounds of appeal, the appellants state that the award of damages by the trial Magistrate is inordinately high so as to represent an erroneous estimate of the damages. It is urged that the said award be set aside and be reviewed downwards.

I have read the judgment of the trial court as well as the plaint dated 22nd April 2009.

The plaints claim was based both on the Law Reform Act and the Fatal Accidents Act. Particulars pursuant to statute were given. The dependants of the deceased were also stated as the children and wife of the deceased who died at the age of 34 years.

Evidence was adduced by the Respondent, who stated that she was the widow at the date of death, the deceased was a driver with the second appellant earning a monthly salary of Kshs. 10,000/=, and that he used to provide for the family. PW1 produced a limited grant of Letters of Administration, for the Estate of her late husband. Birth certificates produced confirmed that the children were sired by both the respondent and the deceased and therefore dependency was proved.

3. The trial Magistrate assessed damages both under the **Law Reform Act** and the **Fatal Accidents Act**.

Under the **Law Reform Act**, she awarded:

(a) For pain and suffering Kshs.20,000/=

(b) Loss of expectation of life, Kshs.150,000/=

Under the **Fatal Accidents Act,** the trial Magistrate adopted the following:

(a) Income - Kshs.3,000/=

(b) Multiplier - 20 years

(c) Multiplicand - 2/3

and arrived at a Loss of dependency of Kshs.482,400/=. On special damages a sum of Kshs.29,400/= was allowed as having been proved. Upon reducing the said sum by 20% contributory negligence the award to the respondent came to Kshs.553,320/= plus costs and interest.

4. In their submissions on the appeal, the appellants fault with the trial Courts Judgment is that the trial Magistrate failed to discount awards under the **Law Reform Act** from the award under the **Fatal Accidents Act** thus giving double benefit to the beneficiaries of the deceased.

Further the appellants without giving any reasons, state the award of Kshs.553,320/= was inordinately high. No submission was tendered on this ground.

5. The first limb of the appeal is that the court ought to have discounted the award under the **Law Reform Act** from award under **Fatal Accidents Act**.

This is a sum of Kshs.170,000/=.

In **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini -vs- A.M.M. Lubia & Another (1982-88) I KAR 777** it was observed that:

> ***"----the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the Court to Appeal of Eastern Africa to be that it must be satisfied that the Judge in assessing the damages failed to take into account a relevant factor or took into account an irrelevant factor, and short of that, that the award is so inordinately low or high that it represents an erroneous estimate of the damage---"***

The appellants complaint is that the award was too high and is an erroneous estimate of the damage. This they say is only because the trial Magistrate failed to discount the Kshs.170,000/= from the total awarded of Kshs.553,320/=, citing authorities that support their claim.

6. They have no complaint on the multiplier, multiplicand or the income adopted by the court.

In the case **Kemfro Africa** (Supra) the Judges held:

> ***"the net benefit inherited by the dependents under the Law Reform Act must be taken into account from the damages under the Fatal Accidents Act because loss suffered under the latter Act must be set-off by the gain from the estate under the former Act."***

The above has been held repeatedly in many decisions in our courts.

7. The Respondent on her part in opposing the appeal states that the appellants have not shown in what manner or aspects the award of the trial court is high. It is submitted that under **Section 2(5) Law Reform Act**, the trial Magistrate could not deduct the said Kshs.170,000/=.

Section 2(5) of the **Law Reform Act** states:

> ***"The rights conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in denogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act---"***

In the **Kemfro Africa case**, the Learned Judges of Appeal sought to give meaning to the above Section.

It was further held that the rights and benefits accruing from those rights under the **Law Reform Act** are in addition to the rights under the **Fatal Accidents Act** and benefits resulting from the **Fatal Accidents Act.** That means that a party entitled to sue under the Fatal accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

They went ahead to state that "**taking into account and to be deducte**d" are different.

The words in **Section 4(2) of Fatal Accidents Act** are **"taken into account**." It says **"should be taken into account and not necessarily deducted."**

The Judges continued to state that it is enough to show that the Judge has taken into account or considered the award, and that there is no requirement in law or otherwise for him to engage in a mathematical deduction.

8. I am alive to the principles in assessment of damages as stated in the case **Beatrice Wangui Thairu -vs- Ezekiel Bargetuny and Another NBI HCCC No 1638 of 1988** by J. Ringera (as he then was).

> ***"--- that the sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature---"***

The Learned Judge went on to state that where a claimant gets awards under both acts, the former should be deducted from the later, and for that, cited the principle explained by the **Court of Appeal in Kemfro -VS- A.M. Lubia** that"

> "***that the net benefit will be inherited by the same dependents under the Law Reform and must be taken into account in the damages awarded under the Fatal Accidents Act because the Loss suffered under the latter must be set off by the gain from the estate under the former Act.****"*

9. The above principles have been applied widely in our jurisdiction and courts.

For the above reasons, I find that the trial magistrate failed to deduct the award of Kshs.170,000/= from the award on the Fatal Accident Act.

I therefore set aside the said award of Kshs.553,320/= and substitute it with a total award of Kshs.383,320/=. This sum is to be subjected to the agreed contributory negligence of 20% leaving a sum of Kshs.306,656/=. The appeal succeeds to that extent only.

Each party shall bear their costs of the appeal.

Dated, signed and delivered in open court this 22nd day of September 2016

JANET MULWA

JUDGE