



IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 1 OF 2013

CONSOLIDATED WITH

CIVIL APPEAL NO. 2 OF 2013

BETWEEN

SIMEON KIPLIMO MUREY

& MILKA JEMENJO SANG suing as

the administrators of the Estate of

DAVID MUREY (Deceased) 1ST APPELLANT

SALLY JEBOO TUWEI

& RONALD KIPLAGAT TUWEI suing as

the administrators of the Estate of

STEPHEN KIPSOI TUWEI (Deceased) 2ND APPELLANT

AND

KENYA BUS MANAGEMENT

SERVICES LIMITED..... 1ST RESPONDENT

MARY ONGAKI 2ND RESPONDENT

EZEKIEL OMBASO OYOGO 3RD RESPONDENT

FREDRICK OCHIENG OBIERO 4TH RESPONDENT

ROBERT KIPCHUMBA KIRWA 5TH RESPONDENT

(Being a consolidated appeal from the Judgments and Decrees of Hon. P.K. Rugut in Principal Magistrates Court in Rongo, Civil Case No. 147 of 2010 and Civil Case No. 145 of 2010 both dated 13th December 2012)

JUDGMENT

1. The two appeals were consolidated because they arise from the same facts which are as follows. On 8th August 2008, David Murey and Stephen Kipsoi Tuwei were passengers in motor vehicle registration number KAS 667X owned by the 4th respondent and driven by the 5th respondent. It was involved in an accident at Kanga area, Migori County, with another motor vehicle registration number KBA 784G owned by jointly by the 1st and 2nd respondents and driven by the 3rd respondent. Both passengers died and the administrators of their respective estates filed suit seeking damages. The issue of liability was settled with each of the tortfeasors bearing equal liability.

2. The matter proceeded for assessment of damages hence the main issue in this appeal relates to damages awarded by the subordinate court under the *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)*. In order to determine this appeal it is necessary to set out the evidence before the trial court.

3. In *Civil Appeal No. 1 of 2013*, the record shows that Milka Jemenjo testified that the deceased was her brother and that he died alongside his wife leaving behind 6 children. She produced the children's birth certificates. She stated that the deceased was an employee of Kenya Power and Lighting Company Limited where he earned a monthly salary of Kshs 40,000/- which he used to cater for the children's needs. She testified that the family used about Kshs. 40,000/- to cater for funeral expenses.

4. After digesting the evidence, the learned magistrate awarded **Kshs 720,000/-** under the *Fatal Accidents Act* which was calculated as follows; multiplier of 12 years, dependency ratio of 2/3 and net monthly income amounting Kshs. 7, 500/-. The learned magistrate awarded Kshs 30,000/- as special damages for funeral expenses. Although she assessed awards for pain and suffering and loss of expectation of life at Kshs 20,000/- and Kshs 140,000/- respectively, she declined to award the same in view of the well-known principle against making an additional award under the *Law Reform Act* that would amount to duplication of the award made under the *Fatal Accidents Act*.

5. In *Civil Appeal No. 2 of 2013*, Sally Jeboo Tuwei told the court that she and her husband, Stephen Kipsoi Tuwei, had 7 children. She produced a chief's letter confirming this fact. She testified that at the time of death, the deceased was employed as a medical clerk at Kenya Flourspar Company Limited where he earned a gross monthly salary of Kshs 23,785/-. She supported her assertions by producing a certificate of service issued by the company. She stated that the family incurred funeral expenses amounting to Kshs 40,000/-.

6. The learned magistrate awarded **Kshs 182,000/-** under the *Fatal Accidents Act* calculated as follows; multiplier of 5 years, dependency ratio of 2/3 and net monthly income amounting Kshs. 4,570/-. The learned magistrate awarded Kshs 30,000/- as special damages for funeral expenses. She assessed damages for pain and suffering and loss of expectation of life at Kshs 20,000/- and Kshs 140,000/- respectively but declined to award the same on the ground that this would amount to duplication of awards under both the *Law Reform Act* and *Fatal Accidents Act*.

7. As this appeal is limited to the issue of quantum, the parties are agreed on the principles applicable. The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, 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 based on no evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727, *Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014]eKLR). The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 stated as follows;

An appellate Court will not disturb an award of damages unless it is so inordinately high or

law as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

8. Counsel for the appellants, Mr Alwang'a, submitted that this appeal concerns the assessment of damages under the **Fatal Accidents Act**. As regards the case of David Murey, **Civil Appeal No. 1 of 2013**, Mr Alwang'a submitted that the learned magistrate erred in the manner she calculated the gross and net salary of the deceased in that she relied on the minimum wage when the plaintiff had provided sufficient evidence to prove that the deceased was working and earning a salary. He further submitted that the learned magistrate erred when she held that there was no proof of earning as the deceased's payslips had not been provided yet there was a letter of from Kenya Power and Lighting which confirmed this fact and which was produced by consent of the parties.

9. Counsel attacked the decision concerning Stephen Kipsoi Tuwei, **Civil Appeal No. 2 of 2013** on the basis that the learned magistrate erred in determining the multiplicand by accepting all the total deductions from the gross salary before arriving at the net income of the deceased. He submitted that only statutory deductions should be taken into account as the other deductions such as SACCO loans were for the benefit of the dependants. He thus submitted that there was an error in calculating the multiplicand.

10. Mr Okoth, learned counsel for the respondents, submitted that the errors identified by the appellants do not amount to a denial of justice as the awards were not inordinately low so as to attract interference by the court. He further stated that the learned magistrate's analysis of the evidence was proper in light of the evidence presented by the parties. In the written submissions the respondents contended that the injury in question, being non pecuniary loss, its assessment does not entail arithmetical calculation because money is not awarded as a replacement for other money, rather it is being awarded as a substitute for that which is generally more important than money and the awards were the best the subordinate court could do. Mr Okoth maintained that the conclusion reached by the subordinate court was fair in both cases and that the appeal should be dismissed.

11. I have analysed and re-evaluated the evidence in light of the written and oral submissions and I take the following view of the matter. The manner of assessment of damages under the **Fatal Accidents Act** was set out in **Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749** where the Court of Appeal for Eastern Africa stated adopted the following succinct statement of law;

The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants. [Emphasis mine]

12. In **Civil Appeal No. 1 of 2013**, the learned magistrate expressed herself as follows,

The deceased [David Murey] is said to have been an employee of Kenya Power and Lighting Company Limited earning a basic salary of Kshs. 41, 883 and a house allowance of Kshs 8,500, a letter produced from his employer dated 13th September 2012 was produced to that effect. However the court cannot tell whether it was the gross or basic salary and whether tax

pleased that the deceased was earning a net sum of Kshs. 20,000 monthly. A party is bound by his pleadings, the departure from Kshs 20,000.00 to Kshs 41, 883 leaves a lot to be desired by the court. It has also not escaped the court's attention that the employer's letter is dated 13th September 2012 was drafted way after the suit was filed in court on 23rd July 2010. It is therefore not persuasive. I will proceed to apply the government minimum wage guideline of Kshs. 7,500 as the deceased's earning."

13. From the evidence, it is clear that the deceased and his wife perished in the accident hence the court ought to have taken into account the fact that the witness would not have been a position to obtain documents ordinarily held by the couple. The learned magistrate's inference regarding the authenticity of the letter from Kenya Power and Lighting could not be supported by the evidence as the deceased's employer was best placed to provide information of the deceased's employment and income. It was clear from the plaint, witness statement and testimony that the deceased was working for Kenya Power and Lighting Company. As the letter from the employer was produced without objection from the respondents, it could not have been an afterthought. It was therefore wrong for the learned magistrate to use the government minimum wage as the basis for calculating the multiplicand when the employment and income of the deceased had been proved on a balance of probabilities. Dealing with the issue of the nature of evidence to support a case under for dependency under the *Fatal Accidents Act*, the Court of Appeal in *Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR* observed as follows;

We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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.

14. I now turn to the issue of the net income. The learned magistrate correctly pointed out that plaintiff was bound by the pleadings which showed that the deceased's salary was Kshs 20,000/- although the proved salary was Kshs 40,000/-. Although the statutory deductions were not disclosed, the court could readily ascertain these from the relevant law. I would estimate that statutory deductions such as income tax, NSSF and NHIF would amount to about one third of the gross salary leaving a net income of about Kshs 26,000/- less a reasonable sum the deceased would spend on himself. The appellant, in the pleadings and submissions, accepted that the amount pleaded and proved is Kshs 20,000/- and the same should have been awarded as the net income. I therefore find and hold that the multiplicand is **Kshs 20,000.00**.

15. The total claim under the *Fatal Accidents Act* is therefore **Kshs 20,000 x 12 x 12 x 2/3 = Kshs 1,920,000/-**.

16. In *Civil Appeal No. 2 of 2013*, the evidence showed that Stephen Kipsoi Tuwei was earning a basic salary of Kshs 16,785/-. Apart from salary slips, the plaintiffs produced a certificate of service that confirmed this fact. The learned magistrate concluded that the net monthly salary as evidenced by the payslips was Kshs 4,510/-. The net income reflected in the payslips was the result of statutory and other deductions like salary advance, SACCO Loans, School Fee and School Boarding Programme. The net income used as the multiplicand is the net income which would have been available to the deceased to support his family. It is the gross income excluding statutory deductions (see *Chunibhai J. Patel and Another v P. F. Hayes and Others (supra)*). The learned magistrate therefore erred by excluding all deductions in calculating the net salary. Apart from statutory deductions, it is clear that the other deductions were for the benefit of the family and they ought to be taken into account in calculating the multiplicand. In the circumstances, the appellate court is entitled to intervene.

17. From the certificate of service and paylips, it is evident that the deceased's gross salary of Kshs 16,785/- less PAYE, NHIF and NSSF is **Kshs 14,959/-** which is the proper multiplicand. As a

result I find and hold the proper award under the *Fatal Accidents Act* is **Kshs 14, 959/- x 12 x 5 x 2/3 = Kshs. 598,360/-**

18. Although the learned magistrate assessed the amount due for pain and suffering and loss expectation of life *Law Reform Act*, she did not award the same on the ground that awarding this would have amounted to double compensation. This principal was explained by the Court of Appeal in *Kemfro v A. M. Lubia & Another [1982-1988] KAR 727* as follows;

[T]he 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.

19. As explained by the Court of Appeal, the 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 hence an award for lost years under the former *Act* and for loss of dependency under the latter *Act* will go to the same persons. This principal does not mean that the estate of the deceased should be denied damages for pain and suffering and loss of expectation of life which are only awarded under the *Law Reform Act* for the benefit of the estate. The issue of double compensation or duplication of awards does not arise in these circumstances (see *Beneta Wanjiku Kimani (suing on behalf of Estate of Samuel Njenga Ngunjiri) v Changwon Cheboi & Another NKU HCCC No. 373 of 2008 [2013]eKLR*). The only award that could be duplicated is an award for lost years under the *Law Reform Act* given to the same dependants who are set to benefit under the *Fatal Accidents Act*. The learned magistrate therefore erred in failing to award damages for pain and suffering and loss of expectation of life to the estate of the deceased.

20. I therefore set aside the judgments and substitute the same with the following awards subject to liability agreed upon;

Rongo RMCC No. 147 of 2010

Pain and Suffering	Kshs 20,000/-
Loss of expectation of Life	Kshs 140,000/-
Loss of Dependency	Kshs 1,920,000/-
Special Damages	Kshs 30,000/-

Rongo RMCC No. 145 of 2010

Pain and Suffering	Kshs 20,000/-
Loss of expectation of Life	Kshs 140,000/-
Loss of Dependency	Kshs 598,360/-
Special Damages	Kshs 30,000/-

21. Interest on the respective judgments shall accrue from the date of judgment in the subordinate court. The respondents shall bear the costs of suit in the subordinate court and of the appeal.

22. When the court makes an award under the *Fatal Accidents Act*, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the

appellants to file the necessary application for consideration before the subordinate court in due course.

DATED and DELIVERED at HOMA BAY this 30th day of October 2014.

D.S. MAJANJA

JUDGE

Mr Alwang'a, instructed by Alwang'a & Company Advocates for the appellants.

Mr Okoth instructed by Magare Musundi & Company Advocates for the respondents.