



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 161 of 2005

WINTER FRESH LIMITED.....1ST APPELLANT

PETER WERU WANGOMBE.....2ND APPELLANT

VERSUS

ESTHER MUTHONI NGUGI

(Suing as the Legal rep. of Estate of

PHILIP MWANGI MUREITHI.....RESPONDENT

JUDGMENT

This appeal is against the quantum of damages awarded to the respondent in CMCC No. 2357 of 2003 on 17th August, 2005, pursuant to a consent judgment on liability recorded on 11th May, 2005. The respondent sued the appellant claiming damages, both under **the Fatal Accidents' Act (Chapter 32 of the Laws of Kenya)** and **the Law Reform Act (Chapter 26 of the Laws of Kenya)**, arising out of the death of her husband. She claimed compensation for and on her own behalf and also for her two minor children aged nine and three years respectively. The sum awarded by the lower court, after deducting 15% agreed contribution, was Kshs 840,310/= made out as under:

- (1) Kshs.10,000/= for pain and suffering
- (2) Kshs.100,000/= for loss of expectation of life
- (3) Kshs.864,000/= general damages
- (4) Kshs.15,600/= specials

A decree for the judgment sum was issued on 17th August, 2005 and the appellant has partially settled the judgment debt to the tune of Kshs 740,000/=, inclusive of costs. However, the appellant has withheld the difference on the basis that the sum of Kshs 110,000/= awarded under the Law Reform Act (*in respect of loss of expectation of life and for pain and suffering*) ought not to have been awarded and also that the award in respect of special damages was erroneous and should be reduced by Kshs 4,500/=.

The appeal is founded on the four grounds as follows:-

1. *That the learned trial magistrate erred in fact and in law in failing to give a concise statement of points for determination and reasons for the judgement.*
2. *That the learned trial magistrate erred in fact and in law in disregarding the defendants' submissions, particularly as relates to the issue of damages payable under the Law Reform Act and the Fatal Accident's Act.*
3. *That the learned trial magistrate erred in law and in fact in awarding damages under the Law Reform Act as well as the Fatal Accidents Act.*
4. *That the learned trial magistrate erred in awarding special damages without considering whether the plaintiff was entitled to special damages or not.*

While arguing the appeal counsel for the appellant, Mr. Mahida, submitted that following the decisions in **MAINA KANIARU & ANOTHER –VS- JOSEPHAT MURIUKI WANG'ONDU H.C.C.C. NO. 2556 OF 1995** (contained in the record of appeal) and **CILA FRANKLYN ONYANGO –VS- JOSEPHINE MUMBI NGUGI & ANOTHER NAKURU H.C.C.C. NO.181 OF 2001**, a copy of which was furnished to the court, this court should find that the lower court ought to have accepted the appellants' submission that any sum recoverable under the Law Reform Act is to be deducted from the amount recoverable under the Fatal Accidents Act and not award it. Regarding the special damages, Mr. Mahida submitted that the Respondent, having not pleaded the sum of Kshs.4,000/= said to have been incurred as legal fees for obtaining a grant and Kshs.500/= in respect of the copy of Records obtained from the Kenya Revenue Authority to confirm the ownership of the accident vehicle, then the said sums ought not to have been awarded. He conceded the rest of the special damages and prayed that the award on that head be reduced by Kshs 4,500/=.

Submitting for the respondents learned counsel Mr. Ndegwa, stated that the argument that awards under the Law Reform Act ought to be deducted from the total award does not represent the correct legal position. Relying on the authorities of:

1. **JACKLINE MKENI NZIOKA –VS- JETHA RAMJI KERAI C.A. NO.155 & 156 OF 1996.**
2. **KAKIKI –VS- ABDO AND TWO OTHERS H.C.C.C. NO.834 OF 1990**
3. **MUCHOKI –VS- THE A.G. H.C.C.C. NO.2733 OF 1996**
4. **MARY MUTHONI KARIUKI –VS- NYANJA ASSOCIATES & ANOTHER H.C.C.C. NO. 1982 OF 1995**
5. **SOUTH NYANZA SUGAR CO. LTD –VS- JAMES MARTIN MATOKE C.A. NO.91 OF 1997,**

copies of which were made available to the court, counsel submitted that, although courts have held that damages awarded under the Law Reform Act ought to be taken into account when awarding damages under the Fatal Accidents Act, the same does not mean that those damages be disallowed or deducted from the final figure but that a reduction ought to be considered where there is a likelihood of double compensation. I agree with counsel on this. What the court must do in my considered view, is to consider factors which may justify a reduction of the sum awarded under the Law Reform Act. Such factors will include any status of affairs as would have a likelihood of affecting the deceased (*had he not died*) in such a way as would impact on his normal expectation of a full life. I see nothing to suggest the existence of such factors in the evidence adduced before the lower court as regards the deceased, who was aged 31 years at the time of his demise. I am therefore not persuaded that the sum of Kshs.100,000/= awarded under this head should be deducted or interfered with in any other way. In this regard I reiterate my own decision in the case of **United Millers Ltd –vs- Yano Omoro Oino KSM H.C.C.A. NO. 2 OF 2004** where, following **KEMFRO AFRICA T/A MERU EXPRESS SERVICES & ANOR –VS- A. M. LUBIA & OLIVE LUBIA [1982-88] 1 KLR**, I held that damages recoverable under the Law Reform

Act are, basically, the loss that the deceased himself would have been entitled to had he not died, and that what the law requires is that the loss suffered under the Fatal Accidents Act is off-set by the gain from the estate under the Fatal Accidents Act.

As regards the specials, counsel for the Respondent submitted that the sums challenged, having been supported by documents produced with the consent of the appellants then the same were properly awarded and should not be deducted. I do not agree. The law is that special damages must be pleaded and then proved. Whereas the court will allow pleaded specials without strict proof (*where it is of the view that the same are reasonable*) the reverse is not the case. Anything that is not pleaded cannot be awarded as special damages. The appellants' counsels' consent to the production of exhibits evidencing those claims cannot alter the legal position since it is the court that determines the evidential value and/or legal validity of exhibits.

I accept the appellants' submission, therefore, that the sum of Kshs 4,500/= allowed by the lower court in calculating special damages ought not to have been awarded and must be deducted from the award of Kshs 15,660/=.

Although the judgment of the learned trial magistrate was extremely short and unreasoned, I do not consider the same to have caused such prejudice to the appellant as would amount to a miscarriage of justice. The same be excused on the ground that it was based on submissions and documents only. The submissions themselves were very short. It is stated in the judgment that submissions by counsel on both sides were duly considered. I have no reason to find otherwise, particularly since the lower court decided to award the appellants' figure of Kshs.10,000/= in respect of pain and suffering instead of the Respondents' figure of Kshs.30,000/=.

In view of the above, I find that the appeal succeeds only in part and the sum of Kshs.15,600/= awarded as special damages is hereby reduced by Kshs.4,500/= leaving Kshs.11,100/=. I am of the view that the special damages ought not to have been subjected to the 15% deduction in view of the contribution ratio which in my considered view applies to the general damages only. Accordingly judgment is hereby entered for the appellant in the sum of Kshs. 839,000/= calculated as follows:

a) Damages for pain and suffering Kshs. 10,000/=

b) Loss of expectation of life Kshs. 100,000/=

c) Loss of dependency Kshs. 864,000/=

Kshs. 974,000/=

less 15% Kshs. 146,100/=

Kshs. 827,900/=

add d) Special damages 11,100/=

TOTAL **Kshs. 839,000/=**

Orders accordingly.

Dated signed and delivered at Nakuru this 18th day of September, 2009.

M. G. MUGO

JUDGE