REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 26 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon T. Gesora (S.P. M) Delivered on 20th August 2019

in Narok CMCC No. 209 of 2018)

SOUTH SIOUX FARMS LIMITED.....APPELLANT

-versus-

JANE NYAMBURA KINUTHIA.....RESPONDENT

JUDGMENT

Impugned judgment

[1]. In the judgment delivered in NAROK SPMCCC No. 209 of 2018 on the 20th August 2019, the trial court: -

a) ***Apportioned liability; defendant to bear 100% liability.***

b) ***Awarded General damages***

i. ***Pain and suffering Kshs. 50,000/=***

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

iii. ***Loss of dependency 24,000 x 12x 18x2/3 Kshs. 2,592,000/=***

c) ***Special damages Kshs. 58,030/=***

TOTAL Kshs. 2,800,030/=

d) ***Ordered the defendant to pay costs of the suit and interest.***

[2]. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 27th August 2019 in which they cited eleven (11) grounds of appeal but all of which relate to three issues; (i) limitation of actions, (ii) liability and (iii) quantum of damages.

APPELLANT'S CASE

[3]. The appellant called two witnesses whose evidence is already on record. They blamed the deceased for the accident for he rammed into the rear of their stalled lorry that had been parked on the side of road. In their submissions in support of the appeal, the appellant submitted that the respondent filed her suit 7 years after the occurrence of the accident. Although the respondent obtained leave to file suit out of time, the appellant lamented that despite raising issues on the leave, the trial magistrate did not consider the matter for the reason that no preliminary point was raised. They argued that once the issue was raised in the appellant's defence, the respondent had a duty to prove that the leave so granted was merited. They did not. They merely rebuffed the appellant's contention. They urged this court to find that the respondent did not prove that the leave so granted was merited. They relied in the following cases. ***Mary Wambui Kabugu v Kenya Bus Service Limited [1997] eKLR, and Yunes K. Oruta & Another V Samwel Mose Nyamato (Civil Appeals No. 96 Of 19840 Unreported,***

[4]. The appellant contends that the learned trial magistrate misapprehended the evidence tendered by DW2. They argued that the police abstract produced by the respondent confirming the occurrence of the accident and the deceased's involvement in it was written from the entry in the occurrence book –**D Exh 1.** But, this evidence was ignored by the trial magistrate- did not take it into account yet the police abstract was accepted as evidence. In such circumstances, they argued that the circumstances of the accident as per the **OB** extract where the abstract was derived from should also have been accepted. The trial magistrate relied on the evidence of the eye witness whom the police had no record of. The appellant urged this court to rely on the evidence of the circumstances of the accident as indicated in the OB extract and find that the deceased caused the accident by ramming into a stationary motor vehicle.

[5]. On quantum, the appellant submitted that the trial court award of Kshs 50,000/= was inordinately high and urged this court to interfere. They proposed Kshs. 10,000/= for pain and suffering since the deceased died on the spot. They relied on the case of ***Paul Ouma V Rosemary Atieno Onyango & Another (Suing As The Legal Representative In The Estate Of Jose Onyango Amollo (Deceased) [2018]***

[6]. The appellants submitted that the award of Kshs. 100,000/= for loss of expectation of life was reasonable.

[7]. On Loss of dependency, the appellant submitted that the multiplicand applied by the trail court was not supported or proved by the respondent. The appellant in the circumstances proposed that the minimum wage of a driver of a medium size vehicle as per column 4 of the minimum wage guide legal notice no. 65 of 2011 be applied. The same being Kshs. 10,553/= per month. Thereby arriving at the following calculations: -

10,553 x 18 x 12x 2/3 = 1,519,632/=

[8]. The appellant submitted that the award under the Law Reform Act be deducted from the award under the Fatal Accidents Act to avoid double compensation. They cited the case of ***Maina Kaniaru & another V Josephat M. Wang'ombondu [1995] eKLR.*** thereby proposing the following calculations;

1,519,632.00 – 110,000.00 = 1,409,632.00/=

[9]. On special damages, the appellant submitted that the trial magistrate awarded special damages a pleaded by the respondent with no confirmation that indeed the same had been proved. The respondent pleaded Kshs. 58,030/= however the receipts attached to the list of documents amount to **Kshs 23,580/=.**

[10]. In conclusion, the appellant urged the court to allow the appeal and set aside the trial courts judgment and dismiss the suit.

RESPONDENT'S CASE

[11]. The Respondent called two witnesses in support of her case.**PW1**- Jane Nyambura Kinuthia. She testified that the deceased was her husband. She sued the defendant because their vehicle was involved in the death of her husband. The accident occurred on 18/8/2011. She stated that her husband was going to Kericho from Nairobi. He was driving motor vehicle no. KAL 362L belonging to his friend. He was a matatu driver and he was going to work. He was on Mulot Narok road. She was informed by the father in law to travel to Narok. At Narok the police commander informed them of the fatal accident which had involved her husband. She started that a post mortem was done before burial. She stated that her husband was 38 years at the time of the accident and there were blessed with three children. She stated that her husband was working as a matatu driver at Kericho at a wage of Kshs. 1,000/= per day. She was a house wife. They therefore depended on her husband. She stated that she filed the suit after limitation period. She stated that she was given leave to file this suit. She produced documents ***P Exh 1-14.*** At the time of deceased's death the children were aged 13, 10 and 4 years.

[12]. **PW2** Raphael Kinoru Wandaka. He recalled that on 18/8/2011 they were heading to Kitakala taking cattle with them. As they came to where they had left the vehicle which they were to use to ferry the animals, a lorry came heading to Nairobi not so fast but it kept veering off to the other lane. It passed them. There was a vehicle coming from Nairobi. The lorry veered again and the two collided. The lorry was a trailer. The small vehicle was thrown off. They ran to the scene, he noticed there were two people in the vehicle.

[13]. On cross examination, he stated that he witnessed the accident the lorry was **KAR 354 U** and the small vehicle was **KAL.** He blamed the lorry driver.

[14]. The respondent submitted that the trial magistrate should not be faulted for finding that the appellant had admitted the jurisdiction of the trial court to hear and determine the matter because they did not raise or take up the matter of their intended objection even at the *inter partes* hearing on 7/5/2019, 16/7/2019 or even on 26/7/2019. They cited the case of ***Owners of Motor Vessel 'Lilian 'S' Vs Caltex Oil (Kenya) Ltd Civil Appeal No. 50 Of 1989 KLR 1.***

[15]. The respondent submitted that liability can only be established through evidence. That with the evidence before the trial magistrate, the court did not have a lot of difficulties in determining liability as it did. Therefore, urged this court not to fault the finding of the trial magistrate on liability. She cited the case of ***Ndirangu Githua Vs Sophie Musembi Njue***

[16]. The respondent submitted that this honourable court should not interfere with the award on pain and suffering.

[17]. On loss of dependency, the respondent submitted that during hearing the respondent testified that the deceased was earning Kshs. 1,000/= per day and she produced a driving licence as **P Exh 3**. The said driving licence was stamped for commercial vehicles. Therefore, the deceased was licenced to drive commercial vehicles which includes a matatu and heavy commercial vehicles. She argued that the appellant had suggested a daily pay of Ksh 500/=for a matatu driver during cross examination of PW1. She contends that the finding of a trial magistrate on the loss of dependency ought not to be faulted because he fairly considered and evaluated the evidence that was before him.

The trial magistrate explained his reasons for finding that the deceased could as a matatu driver earn Kshs. 1,000/= per day. She therefore urged this court to find no reason to interfere with the finding of the trial magistrate because the reasoning on multiplier, dependency ratio and earnings are the same. That the evidence of the respondent was uncontroverted. She cited the cases of ***Uneek Electrical Company Company Limited Vs Joseph Fanuel Alela Nairobi Hcca No. 676 Of 2002 And Checkers And Trading Limited & another Vs Fatuma Kimanthi and Another –Civil Appeal No. 317 of 2003.***

[18]. On multiplier and ratio, the respondent submitted that the appellant has conceded the trial magistrate 's finding and award of 18 years' multiplier and dependency ratio of 2/3 and loss of expectation of life as the trial magistrate had found in his judgment

[19]. On reduction of damages under the law reform act, the respondent submitted that they are in agreement with the holding of court of appeal cited by the appellant in the case of ***Maina Kanairu & another V Josephat M Wang'ondu Civil Appeal No. 14 of 1989.***

[20]. On special damages, the respondent submitted that the trial court was persuaded by the decision to grant / award the rest of the special damages that had not been receipted. She argued that in the case of ***Jacob Ayiga Maruja & another Vs Simeon Abayo Civil Appeal No. 167 Of 2002*** where the court of appeal made a decision for reasonable funeral expenses of the then Kshs. 9,000/=. Considering the inflation rates it is reasonable to award Kshs. 35,000/= 14 years later as funeral expenses. She therefore urged this court not to fault the decision of the trial court to award Kshs. 58,030/= as special damages.

[21]. In conclusion, the respondent conceded the reduction of the damages under the Law Reform Act just as the appellant conceded multiplier and dependency ratio. She proposed a final award as follows;

Liability at 100% against the appellant.

Pain and suffering Kshs. 50,000/=

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

Loss of dependency 24,000 x 2/3 x12x 18 =Kshs. 3,456,000/=,

Special damages Kshs. 58,030/=

TOTAL Kshs. 23,664,030/=

Less damages under Law Reform Act Kshs. 150,000/=

Net award Kshs. 3,514,030/=

[22]. On costs, the respondent relied in Section 27 of the Civil Procedure Act. She urged this court to award the respondent ¾ of the costs of the appeal because the appellant has partly succeeded in respect to damages under the Law Reform Act. The respondent is also to be entitled to the same 3/4 of the costs before the trial magistrate court.

ANALYSIS AND DETERMINATION

Duty of court

[23]. According to Section 78(2) of the Civil Procedure Act, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted thereto. Thus, the duty of the first Appellate Court is to subject the evidence to a fresh evaluation and make own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

ISSUES

[24]. Arising from the evidence, the grounds of appeal, submissions of parties as well as a plethora of authorities cited, are the following issues: -

i. The limitation of action; potency of leave granted by the learned magistrate to file suit out of time for damages, for the fatal injuries the deceased sustained in the accident herein;

ii. Whether the Learned Trial Magistrate erred in the;

a) apportionment of liability.

b) award of damages Under Fatal Accidents Act and Law Reform Act; and

c) award of Special Damages

Limitation of time.

[25]. The appellant canvassed limitation and leave to file suit out of time. They now claim that this issue was not taken into account and that the leave granted by the trial magistrate was arbitrary and not based on law.

[26]. What does the law say about limitation of actions?

[27]. In law, the question of limitation of actions is a matter for trial and may not be determined summarily or as a preliminary issue. The question of limitation and leave to file suit out of time was canvassed in the applicant's submissions in that trial court.

[28]. I will therefore examine sections 4 (2), 27, 28 and 30 of the Limitations of Actions Act, for they are directly relevant to these proceedings.

[29]. Under section 4(2) of the Act, an action founded on tort shall not be brought after the expiration of three (3) years from the date in which the cause of action occurred. However, Section 28 of the Act vests in the court the power to extend time and grant leave to the applicant to file suit out of time. The learned trial magistrate in **CM Misc. Case No. 18 of 2018 of 2018** heard the *Ex parte* application under that Section and exercised discretion in favor of the respondent to file the suit as legal representatives of the Estate of the deceased against the appellant.

[30]. The appellant contended that they raised the question of leave as a preliminary issue but the trial court did not consider it. It bears repeating that limitation of actions is a matter for trial and should be so determined. I do note that the Ex parte application as well as the ruling does not disclose the central reason upon which leave was granted to file outside the limitation period of 3 years. I do note also that the trial court did not consider the issue of limitation of actions during trial. I should think that, perhaps the trial court took the view that, it was not necessary to determine the question of limitation or leave granted was sufficient for all purposes. This notwithstanding, I should establish whether the respondent's suit should be dismissed for being time barred.

[31]. Considerations outlined in section 27, 28, 29 and 30 of the Limitations of Actions Act should be seen within the principle of justice that; justice shall be done to all parties in a judicial proceeding. Similarly, of significant note is that the law loathes delay, for being insidious and an affront to justice. Therefore, whereas access to justice is a cardinal constitutional principle of justice, care should be taken, where delay in seeking remedy is manifest, not to deny or implode the right of the defendant to the defence of limitation of actions except in accordance with the law.

[32]. Of the effect of delay, I do no better than *Hardiman J*. in his judgement in ***J. O'C V The Director of Public Prosecutions [2000]3 1R 478,499-500*** which may be summarized as follows; -

> ***a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice.***
>
> ***b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard.***
>
> ***c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that took place after a long lapse of time.***
>
> ***d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice.***
>
> ***e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.***

[33]. Therefore, there is a public interest element in the provisions on limitation of actions. See ***Peart J.*** in ***Byrne V Minister for Defence [2005]1 IR 577,585*** where it was stated as follows; -

> ***"a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and important time of the Courts and thereby reduce the availability of that much used and need resource to plaintiffs and defendants who have acted promptly in their litigation, as well as increase the cost to the Courts Service and through that body to taxpayers, of providing a service of access to the Courts which serves best the public interest."***

[34]. Be that as it may, I am aware that it has been held that requirements in section 27(2) of the Limitation of Actions Act are stringent and constitute the test on whether to grant or not to grant leave to file suit out of time. I am also aware that it has been held that in the context of statutory limitation provisions, the amount of delay may not be relevant. On this see the case of ***Crispus Ned Ngari and another V Churchill Odera CA No.233 of 1998 (1999) 2 EA 241,*** and ***Barclays Bank of Kenya Ltd V the Commissioner General of Kenya Revenue Authority CA No. 67 of 1998.***

[35]. Therefore, is there any decisive material factor which justifies filing of this suit out of time?

[36]. Considerations of material factors, fairness and equity permeate the statutory limitations of time to file suit. Arbitrary locking out of a plaintiff from seeking remedy due to limitation of time is awful. However, organized and democratic societies which are governed by the

Rule of Law do recognize the need for causes of actions to be commenced within reasonable time and have prescribed statutory limitation of time. Thus, except as may be allowed in law, it is oppressive to a defendant to be dragged into civil claims long after the circumstances that gave rise to the cause of action have changed or lapsed since the occurrence of the loss and damage.

[37]. This is a claim founded on alleged negligence of the appellant. The Limitation of Actions Act sets out material facts of a decisive character and circumstances in which a person may be permitted to file suit out of time. For purposes of this appeal, I draw from the excerpts of section 30 which provides as follows; -

> ***(1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following—***
>
> > ***a) The fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;***
> >
> > ***b) The nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty; (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.***
>
> ***(2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.***
>
> ***(3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person, if, but only if—***
>
> > ***a) He did not know that fact; and***
> >
> > ***b) In so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose ascertaining it; and***
> >
> > ***c) In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.***

[38]. The record shows that the respondents knew of the fact of the accident and did ascertain that following the accident, that, for purposes of a relief in damages a suit ought to be instituted before a court of law.

[39]. From the record, it is clear that the respondent was aware of the accident herein in which the deceased died. Again, the respondent took steps to petition for grant of letters of administration intestate on behalf of the estate of the deceased. This is an indication that, all along the respondent was aware of the process and the need to file a claim for damages against the appellant. Needless to state that, a special grant Ad litem under section 54 of the Succession Act to prosecute the suit was at all times available to the Respondent. Therefore, there is no material fact of decisive character that was outside the knowledge of the respondent in relation to the accident. The delay of 4 years in bringing this suit is inexcusable and has not been explained in accordance with section 27, 28, 29 and 30 of the Limitation of Actions Act.

[40]. Failure by the learned trial magistrate to consider limitation of time at the trial in light of sections 27 and 30 (3) of the Limitations Act was an error in principle. The language used in sections 27-30 of the Limitation of Actions Act does not intend exercise of discretion in granting leave to be at whim or caprice. It takes an inquiry in accordance with the said sections to make a determination of leave to file suit.

A. Liability

[41]. Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya places the legal burden of proof on the person who alleges. At the risk of stating what may look too mundane a matter, this being a civil case, the standard of proof is on a balance of probabilities. See ***Phipson on Evidence,*** 16th Edition (2005) at pp. 154-55 paragraph 6-53 that: -

> ***"The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not."***

[42]. In similar wording section 3 (2) of the Evidence Act states -

> ***"A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists."***

[43]. It was therefore upon the respondent to prove negligence on the part of the appellant.

The ever dependable method of dispute resolution

[44]. The parties herein and their witnesses have given quite varied accounts as to how the accident occurred.

[45]. How should the court resolve such tension between the account rendered by the Appellant and Respondent on liability?

[46]. The established judicial method, which rests on the singular dependability of the *fact-base,* and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result. See the dissenting opinion of Ojwang SCJ in the ***Supreme Court of Kenya, Election Petition No. 1 of 2017, Raila Odinga & Another vs. IEBC & 2 Others [2017] eKLR***.

[47]. The appellants account is that their vehicle had broken down and had been parked off the road when the deceased rammed into its rear. See evidence of DW1. This evidence was corroborated by the OB extract which states that: -

> ***''the deceased namely Joseph Kinuthia Mueo was driving motor vehicle reg. no. KAL 362 M Toyota crown saloon car from Narok direction towards Mulot direction. He rammed behind a stationary lorry trailer reg. no. KAR 354U ZC 0781 make Mercedes Benz being driven by Andrew Kinyanjui Ngugi to the impact the driver died.''***

[48]. DW2 produced a police abstract drawing from the OB extract which confirmed the occurrence of and the manner the accident occurred. It is in this accident that the deceased was killed.

[49]. The testimony of PW2 on the other hand claimed the said lorry was in motion and it collided with the saloon car. PW2 claims to be an eye witness. He also claimed to have attended the funeral of the deceased and had learnt that it was of a person whose accident he witnessed. He was referring to the subject accident herein. Yet, he did not attempt to or record any statement with the police about the accident. Worth of note also is that his testimony comes several years after the accident. I have scanned through his evidence and I do not find any such succinct details which creates a vivid scenario of how the accident.

[50]. Be that as it may, the OB extract draws from the official record by the police; it was recorded on 18th August, 2011 at 10:40 am- this was the date of the accident- and it states clearly that the saloon car which was being driven by the deceased rammed into the rear of the lorry which had been parked outside the road. From the testimony of DW1 and DW2 the two vehicles were facing Mulot direction. There is absolutely no cogent evidence which detracts from the record of the OB in the manner the accident occurred.

[51]. DW1, the driver of the lorry took sufficient precautions by parking the lorry off the road and at a place he said he was sure it would not inconvenience other vehicles. He also placed warning signs on the road, that is, leaves and life safer about 16 meters from the stalled vehicle. In the circumstances, he bears no blame for the accident.

[52]. There being no other evidence that could lead to any other probability, the Court, on a balance of probabilities test, believe the account as narrated by the appellant and its witnesses of the manner the accident occurred to be more probable than not that the accident so happened. See ***Civil Appeal No. 7 of 2019 Isaac K. Chemjor & Another vs Laban Kiptoo (2019) eKLR.*** Accordingly, I find that, the deceased was the author of his own misfortune. Thus, 100% liable for the accident herein. On that account his case is lost.

[53]. On that basis I set aside the finding by the Learned Trial Magistrate which blamed the appellant for the accident at 100% in favour of the respondent.

B. Quantum

[54]. The foregoing notwithstanding, I will assess damages. According to the case of ***Kemfro Africa Ltd v Lubia (supra)***: -

> **"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

Claim under Law Reform and Fatal Accidents Act

[55]. This claim was founded on Law Reform Act and Fatal Accident Act. These law provides for awards being made for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

Loss of Dependency

[56]. The quarrel is on quantum of damages for loss of dependency under the Fatal Accidents Act. Section 4 thereof becomes relevant; it provides as follows: -

> ***"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if 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 cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct."***

The concepts of multiplicand and multiplier

[57]. Of the concepts of multiplicand and multiplier; see the case of ***Beatrice Wangui Thairu V Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 Of 1988*** where *Ringera J* (as he then was) stated:

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Acts are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. 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 a lump sum and would if wisely invested yield returns of an income nature."***

Multiplier

[58]. The trial magistrate found that the deceased was of the age of 38 years when he died. He accepted and apportioned the dependency factor going by the testimony of the Respondent and documentary material admitted at the trial of the claim. The children and wife are dependants of the deceased and are entitled to be compensated for the loss arising from the premature death of the deceased. Dependency was proved and has not been controverted. I so find.

[59]. There is no contention on the multiplier of 18 years used by the learned trial magistrate. In controversy is the multiplicand used; net income of Kshs. 24,000/= per month.

[60]. According to the appellant, the trial court ought to have considered the minimum wage of a matatu driver. I note from the record that the trial court relied on the testimony of the respondent herein in the ascertainment of the multiplicand for purposes of loss of dependency. There was no evidence to support the allegations stated by the Respondent. A driving licence alone is not sufficient. Accordingly, the trial court committed an error in principle in the multiplicand it adopted in assessing loss of dependency in this case. As such, the discretion thereto is amenable to interference by this court. I set aside the multiplicand adopted by the trial court.

[61]. In the absence of evidence to support that the deceased was employed or at all or how much he was earning, the minimum wage guide legal notice no. 65 of 2011 being Kshs. 10,553/= per month would have been most appropriate. Accordingly, I work out loss of dependency thus: **-10,553 x 18 x 12x 2/3 = 1,519,632/=**

[62]. For the above reasons I allow this appeal on the above ground and set aside the award for loss of dependency made by the trial court.

Pain and Suffering

[63]. The appellant also contends that the award of damages for pain and suffering were excessive. The court appears to have been influenced by the case of Rebecca ***Saveth Mwangi Hccc No 2750 of 1998*** where the court awarded Kshs. 50,000/= for pain and suffering where the deceased had died on the spot.

[64]. In my view the trial court properly exercised its discretion in making the award of Kshs. 50,000/= which I uphold. I also uphold the award of Kshs. 100,000/= for loss of expectation of life.0

Special Damages

[65]. On special damages, it is trite law that they should be specifically pleaded and strictly proved. The respondent claimed a sum of Kshs. 58,030/= being special damages. Both parties are in agreement that receipts of Kshs. 23,030/= was produced. The court will not disturb this award.

[66]. As regards to funeral expenses, though alluded to in the plaint, there was no indication of what was or may be reasonably have been spent. The court cannot speculate.

[67]. Before I close, I wish to address ground 12 of the appeal on double awards under the Law Reform Act and Fatal Accidents Act. A straight answer comes from the Court of Appeal decision ***Civil Appeal No. 22 of 2014 Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja) vs Kiarie Shoe Stores Limited (2015) eKLR*** that:-

> ***"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; 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, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under The Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under The Law Reform Act, hence the issue of duplication does not arise."***

[68]. The final assessment of damages is as follows: -

a) Deceased is 100% liable.

b) Pain and suffering **Kshs. 50,000/-**

c) Loss of dependency **10,553 x 18 x 12x 2/3 = Kshs. 1,519,632/=**

d) Special **damages** **Kshs. 23,030/=**

Total **Kshs. 1,592,662/-**

Conclusions and orders

[69]. In this appeal extension of time can only be and had been granted whimsically, thus, an implosion of the rights of the appellant. Nothing was provided to support permission to file suit out of time under the law. A proper inquiry as provided for under section 27, 28 and 30 of the Limitation of Actions Act Cap 22 of Laws of Kenya is necessary to justify denial of a party's right to plead the defence of limitation of action. This is not mere adornment of statute. This suit is time barred. In any case, I also found the deceased to be 100% liable for the accident.

[70]. The upshot therefore is that I dismiss the respondents suit in the lower court.

[71]. I will nonetheless, in light of the circumstances of this appeal order each party to bear own costs in the trial court as well as this appeal.

[72]. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 21ST DAY OF SEPTEMBER, 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. Wambugu Kariuki for the Respondent

2. Safari for the Appellant

3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE