



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K. Kemei, J)

CIVIL APPEAL NO. 101 OF 2018

GEMSTAR IMPORTERS.....1ST APPELLANT

JACKSON JUMA.....2ND APPELLANT

VERSUS

EDWARD NTHIWA MUTISO (*Suing as a Legal Representative the Estate of*

CHARLES NZIOKI NTHIWA (Deceased).....RESPONDENT

(An appeal from the judgment of Mavoko Senior Principal Magistrate Court

delivered on the 12th day of July 2018 in Civil Case No.249 of 2015)

BETWEEN

EDWARD NTHIWA MUTISO (*Suing as a Legal Representative the Estate of*

CHARLES NZIOKI NTHIWA (Deceased).....PLAINTIFF

VERSUS

GEMSTAR IMPORTERS.....1ST DEFENDANT

JACKSON JUMA.....2ND DEFENDANT

JUDGEMENT

1. By an Amended Complaint dated 31.12.2015 filed on 27.01.2016, the Respondent sued the Appellants on his behalf and on behalf of the Estate of **Charles Nzioki Nthiwa**. In the Complaint, it was pleaded that on 1.04.2014, the deceased was lawfully walking along Nairobi-Namanga Road near Shell Petrol Station when motor vehicle registration number KAR 282J lost control, left the road and hit the deceased who succumbed to his injuries.

2. In the Complaint, the Respondent sought general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 42,150/- plus costs and interest of the suit. The particulars of negligence against the Appellants driver, servant and/or agent were pleaded thereof. The Respondent filed list of witnesses, statement and list of documents dated and filed on even date. The 2nd Appellant defended the suit by filing his defence on 11.10.2016. In response, the Respondent filed a Reply to defence on 31.10. 2016 reiterating the contents of the Complaint.

3. On 6.04.2017, **Edward Nthiwa (Pw1)** testified by first producing documents numbers 1,3,5,6,7,8,9 and 10. He stated that he came to court due to Nzioki. According to him, on 1.4.2014 at 9.00pm his cousin alerted him that Nzioki had been involved in an accident along Mombasa road. He rushed to the scene but found that Nzioki had been taken to hospital. He stated that the deceased passed on while in the hospital. He

blamed the driver and asked for compensation. The Respondent's case was closed. There is no indication whether the Appellants case was closed. The Respondent's counsel filed written submissions on 28.08.2017.

4. The 2nd Appellant and Respondent compromised on liability by recording a consent on 31.05.2017 in respect of liability in favour of the Respondent at 80:20 and hence the learned trial magistrate proceeded to assess damages as follows:-

(a) Pain and suffering	Kshs. 30,000/-
(b) Loss of Expectation of life	Kshs. 120,000/-
(c) Special damages	Kshs. 42,150/-
(d) Loss of dependency	Kshs. <u>1,152,000/-</u>
Total	Kshs. <u>1,344,150/-</u>
Less 20% liability	

5. Aggrieved by the decision, the Appellant appealed citing the following grounds:-

- (1) ***THE learned trial magistrate erred in law and in fact by failing to carefully weigh the legal status of the Plaintiffs in the case and make a finding on whether they were dependants of the deceased before making a dependency award.***
- (2) ***THE learned trial magistrate erred in law and in fact by making a dependency award that was not merited in the circumstances of the case.***
- (3) ***THE learned trial magistrate erred in both law by making an award that was too high as to amount to a completely wrong estimate.***
- (4) ***THE learned trial magistrate erred in law by failing to take into account the award under Law Reform Act while making an award under the Fatal Accident Act***

6. The Appellant urges the court to set aside the lower court judgement and award costs in the appeal and lower court. This appeal was canvassed by way of written submissions. The Appellants and Respondent submissions are dated 9.10.2020 and 30.10.2020 respectively.

Determination

7. I have considered the evidence tendered before the lower court as well as the submissions filed herein.

8. This being the first appellate court, I am therefore required to re-evaluate and subject the evidence before trial court to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed in ***Selle vs. Associated Motor Boat Co. Ltd [1986] EA 123*** and in ***Peters –vs- Sunday Post Limited [1958] EA 424***.

9. The issue for determination is *whether the learned trial magistrate awarded damages that were inordinately high.*

10. The court is cautioned as held in the case of ***Bashir Ahmed Butt vs. Uwais Ahmed Khan [1977]1KLR 1*** where the Court held that:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (magistrate) proceeded on wrong principles, or that the misapprehended the evidence in some material aspect and so arrived at a figure which was inordinately high or low.”

11. The learned trial magistrate awarded the deceased Kshs. 120,000/- for loss of expectation of life. The Appellant submitted that the same be substituted with Kshs.100, 000/- for being excessive. In ***Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR*** that:-

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while pain and suffering the awards range from Kshs. 10,000/- with higher damages being awarded if the pain and suffering was prolonged before death.”

12. In ***Petronila Muli vs. Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR Limo J.*** held that he was not persuaded that at this time, given the economic situation and the inflation in Kenya, an award of Kshs.100,000 can be termed as excessive or too high to require an intervention of this court. In ***Moses Akumba & Another vs. Hellen Karisa Thoya (2017) eKLR Chitembwe J.*** held that an award of Kshs. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. I see no reason to disturb the

award. The award is not excessive as it is within conventional limits.

13. As regards loss of dependency, the Respondent stated in his witness statement found at page 9 of the Record of Appeal that the deceased supported the family morally and financially which they no longer enjoy. The learned trial magistrate held that it was not clear how much the deceased earned since he was not salaried. The learned trial magistrate found Kshs.12, 000/- would be the approximate earnings. The deceased was aged 31 years hence due to uncertainties of life, the learned trial magistrate adopted a multiplier of 24 years. According to the learned trial magistrate, the deceased did not have dependants hence a ratio of 1/3 was applicable thus the computation for damages under this head; $Kshs.12, 000/- \times 24 \times 1/3 = Kshs.1, 152, 000/-$.

14. **Ringera J.** in the case **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR)** stated as follows:-

"The principles applicable to an assessment of damages under the Fatal Accidents Act 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."

15. The Appellants fault the learned trial magistrate for estimating the deceased's income without giving reasons and not taking into consideration the applicability of the *Regulation of Wages(General)(Amendment) Order 2013* where no income has been proved. I agree with the learned trial magistrate that there was no clear evidence of how much the deceased earned a month but also disagree with him for estimating the deceased's income when the 2013 Wage Order was available for reliance. It is trite that the court will apply the minimum wage where earnings have not been proved. However, that will only be when there is absence of income that the court will apply the minimum wage as held by **Asike-Makhandia J.** in **Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR**.

16. According to the Respondent, the deceased was a casual labourer. A casual labourer under Section 2 of the Employment Act, 2007, is defined as one who is paid at the end of the day and not engaged for longer period than twenty four hours at a time. According to the birth certificate, the deceased's place of residence is Riverside, Athi River. The *2013 Wage Order (supra)* prescribes a daily wage rate for a *general labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, messenger* in 'All municipalities and Mavoko, Ruiru and Limuru Town Councils' to be Kshs.432.40/- and Kshs.9,024.15/- monthly. According to the Appellants, a casual labourer cannot be guaranteed work on a daily basis hence it would be fair to find that the deceased would have worked 4 days a week hence earning Kshs.1,729.6/- in a week and Kshs.6,918.4/- a month. It is true that a casual labourer is not guaranteed work daily but in my view the Appellants assertions as to the number of working days has no basis since the issue was not cross-examined by the Appellants in court while at the same time the Respondent did not adduce evidence on the same. I am inclined to adopt 5 working days for a casual labourer for the reason that under *Section 27 of the Employment Act, 2007* an employer is required to ensure that an employee rests one day out of the seven working days thus the computation will be $Kshs.432.40 \times 5 \text{ days} = Kshs. 2,162/-$ weekly and $Kshs.8,648/-$ monthly.

17. On the choice of multiplier, the learned trial magistrate took into consideration the uncertainties of life hence adopted a multiplier of 24 years. The Appellants submitted that the learned trial magistrate should have adopted a multiplier of 13 years. Reliance was placed on the case of **Kamau & 2 Others vs. Mugamangi & Another [2004] eKLR** where court adopted a multiplier of 13 years noting the uncertainties of life. According to the Respondent, the deceased had no health challenges capable of reaching the age of 55 years. **Ringera J.** in **Leonard Ekisa & Another vs. Major Birgen [2005] eKLR** stated that in determining the right multiplier, the right approach is to consider *the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the visciditudes of life and factor accelerated by payment in lump sum*. The deceased was aged 31 years at the time of his demise. The deceased was healthy. The deceased was not employed, so it was possible for him to have worked for more than the retirement age of 60 years but taking into consideration the uncertainties of life, I find no reason to disturb the learned trial magistrate choice of multiplier. A multiplier of 24 years was reasonable.

18. As regards the dependency ratio, the learned trial magistrate applied 1/3 for the reason that the deceased was unmarried and did not have children. The ratio has not been challenged by the Appellants. In the result the damages for loss of dependency are now calculated as follows: $Kshs.8, 648/- \times 1/3 \times 12 \times 24 = Kshs.830, 208/-$.

19. According to the Appellants, the learned trial magistrate failed to take into account the award under the Law Reform Act while making an award under the Fatal Accident Act. In my view the issue of duplication of the awards does not arise. I find the position was settled by the Court of Appeal in **Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Ltd [2015] eKLR** where the court noted the confusion in regard to the concept of double compensation put across by *Kemfro Africa Limited* case. The learned Judges expressed themselves as follows:-

".....The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:

An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered."

20. **Majanja J.** in **Richard Matheka Musyoka & another vs Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR** where the learned Judge guided by the Court of Appeal decision in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** held at paragraph 10 and 20 that:-

“10. The principal 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 regarding that aspect of the award.”

“20. 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.”

21. Similarly, in *Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR* counsel for the Appellant submitted an award under the Law Reform Act must be deducted in full from the award made under the Fatal Accident Act as the deceased’s estate cannot benefit twice but *Meoli J.* disagreed with counsel by stating at paragraph 23;

“With respect, that is not the dictum of the *Kemfro* case. The brief passage in *Hellen Waruguru* quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein”

22. In addition, the Appellant submitted that the Respondent cannot benefit under the Fatal Accident Act since he is a brother to the deceased. Paragraph 5 of the Plaintiff listed the beneficiaries to be; **1. Edward Nthiwa Mutiso (Brother) 2. Ngali Nthiwa Mutiso (Brother) 3. Nzivo Nthiwa Mutiso (Brother).** Section 4 (1) of the Fatal Accidents Act is to the effect that actions under the Act shall be for the benefit of the wife, husband, parent and child of the deceased. Section 4(1) provides that:-

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

23. *Chemitei J.* in *Wamalwa Wandika (suing as the Legal Representative of the Estate of the Late Grace Wandika) vs. Samuel Mwenjeri & another [2021] eKLR* stated that:-

“Actions brought under the Law Reform Act are for the benefit of the estate while actions under the Fatal Accidents Act are for the benefit of the dependents and not for the estate. From the section above it is evident that an action under the Fatal Accident’s Act can be brought by an executor/administrator on behalf of a child..”

24. In *Pleasant View School Limited vs. Rose Mutheu Kithoi & another [2017] eKLR* the court held that;

“. Indeed, it is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the Fatal Accidents Act were dependants of a deceased prior to his death.”

25. In *John Mungai Kariuki & Another vs. Kaibei Kangai Ndethiu & 2 Others (2020) eKLR* the court held that:-

“...the brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation to expand the list of dependants to include siblings of the deceased.”

26. It is urged by the Respondent that on a balance of probabilities, the brothers were dependents of the deceased by dint of Section 29(b) of the Succession Act, Cap.160 where a list of who are dependents is provided for. *Muriithi J.* in *Mohamed Hirbo Shande & another vs. George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena) [2021] eKLR* was faced with a similar situation where the learned Judge stated at paragraph 26:

“From the foregoing, it is clear that the former law, the Fatal Accidents Act is what this court and what the trial court was concerned with as what was being sought was compensation following a fatal accident. The latter law will be relevant once all that is due to a Deceased’s estate has been identified and this would involve filing a succession matter under the Probate and Administration procedures of the Court.”

27. The Respondent sought damages pursuant to the Fatal Accident Act and the Law Reform Act. The Respondent and his brothers were not beneficiaries for purposes of the Fatal Accident Act. The learned trial magistrate noted that the deceased was childless. By virtue of Section 4(1) and decisional law, the learned trial magistrate misdirected himself to award loss of dependency without satisfying himself as to whether the Respondent and siblings qualified to be dependants.

28. From the foregoing, I find the appeal partially succeeds by setting aside the award for loss of dependency under the Fatal Accident Act

and affirming the award of general damages under the Law Reform Act and special damages as follows;

a. Pain and Suffering *Kshs. 30,000/*

b. Loss of Expectation of Life *Kshs. 120,000/*

c. Special Damages *Kshs. 42,150/*

Kshs. 192,150/

Less 20% contributory negligence *Kshs 38,430/*

Total award at *Kshs. 153,720/*

29. Each party shall bear their costs in the appeal while the respondent will have full costs and interest in the lower court.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2021.

G. V. ODUNGA

JUDGE