



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCA NO. 5 OF 2017**

**INTEX CONSTRUCTION COMPANY LTD.....APPELLANT**

**VERSUS**

**JOHN MBERE IGUNA.....1<sup>ST</sup> RESPONDENT**

**JAPHET MUGAMBI IGUNA (Suing as legal representative of JOHN**

**KIURA IGUNA (DECEASED).....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from judgment and Decree of the learned trial Magistrate Hon. Sudi SRM in Chuka CMCC no.97 of 203 dated and delivered on 4/4/2017)**

**J U D G E M E N T**

1. This is an appeal against the judgment delivered in **Chuka Chief Magistrate's Civil Case No.97 of 2013** which judgment was delivered on 4<sup>th</sup> April 2017. In that case the Appellant had been sued by the Respondents who were suing on behalf of the estate of the late **JOHN KIURA IGUNA** (deceased) who had perished in a road traffic accident along Ishiara- Ciakariga road.

2. The Respondents brought an action against the defendant for tort of negligence which they claimed caused the accident where the deceased died. The record of proceedings indicates that on 17<sup>th</sup> January 2017 parties recorded a consent on liability at **35 % : 65%** against the Appellants and so what the trial court was really left to do was to quantify the damages payable which it did as follows:-

- a. General damages for pain and suffering - Kshs.10,000/-**
- b. Loss of expectation of life - Kshs.100,000/-**
- c. Loss of dependency - Kshs.1,200,000/-**
- d. Special damages - Kshs.44,700/-**

***Sub Total* Kshs.1,354,700/-**

Less 35% contribution Kshs.474,145/-

Total payable plus **Kshs.880,555/-**

Plus costs and interests.

3. The Appellant was dissatisfied with the judgment and filed this appeal raising the following grounds namely:-

- i. That the trial magistrate erred in adopting an income of Kshs.10,000/- which amount, the Appellant feels was not proved.**
- ii. That the trial magistrate erred in adopting a 2/3 dependency whereas dependency was not proved.**

iii. That the learned magistrate erred in law by failing to discount the award under Law Reform Act while awarding damages under Fatal Accidents Act..

iv. That the learned magistrate erred in failing to discount the damages to the deceased's estate on account of accelerated payment and therefore arrived at an excessive award.

v. That the judgment of the court is against the law and weight of the evidence on record.

4. In its submissions filed on 8<sup>th</sup> January 2020 through Ms Mithiga & Kariuki Advocates, the Appellant submits that the trial magistrate adopted a multiplicand of 10,000/- a multiplier of 15 years and a dependency ratio of  $\frac{2}{3}$ . It contends that the deceased was 43 years old and adopting a multiplicand of 15 years was on the higher side given uncertainties of life.

5. The Appellant points out that there was no proof tendered to show that the deceased earned Kshs.15,000 per month. It argues that the minimum wage as per Regulations of Wages (General amendment) was

Kshs.5,218/- . It submits that going by that the total amount should have been Kshs.626,160/-.

6. The Appellant has however contended that in situations where an income of a deceased uncertain, or unproven, a lump sum figure would have been appropriate. It has relied on the decision in the case of M'Rarama M'Nthieri - vs- Luke Kilombe Murithi [2015] eKLR. It urges this court to find that a global award of Kshs.500,000/- would suffice and has relied on the decision in the case of Kenya Power and Lighting Company -vs- Charles Obegi Ogeta (suing as legal representative to the estate of Esther Nyanchoka Obegi [2016] eKLR). It is its contention that the award of Kshs.1,354,700/- should set aside and an award of Kshs.500,000/- be given before apportioning liability as was agreed between the parties.

7. The Appellant have further relied on the following authorities;

i. M'rarama M'Nthieri v Luke Kiumbe Murithi (2015)eklr where Gikonyo J stated that he was in agreement with the sentiments of Ringera J in Kwanzia vs Ngalali Mutua and another in that the multiplier is just a method of assessment and can be abandoned where facts do not facilitate its application. The multiplier is useful where the factors such as age of the deceased, annual or monthly dependency are known without undue speculation. To insist on this approach speculatively would be to sacrifice justice on the altar of methodology. Gikonyo J went on to state that the claimant bore the burden of proof and a court of law cannot act on unsubstantiated evidence to assume income or dependency. Nonetheless, dependency and earnings is a matter of records and documents. The court found a global award of Kshs 500,000/= for loss of dependency reasonable subject to the liability of 50:50 that was agreed. The court also awarded the sum of Kshs. 50,000/= for pain and suffering as the deceased died the day after the accident but the magistrate had failed to award it.

ii. KPLC v Charles Obegi Ogeta(HCCA 123 of 2014). In this case, the court was of the view that the evidence did not give basis to the multiplicand used and the court awarded a global sum instead for loss of dependency.

8. On the other hand the Respondents have opposed this appeal through written submission filed by Ms Khan and Associates. They contend that the liability was conceded and have urged this court not to disagree the finding of fact by the trial court.

### **RESPONDENTS SUBMISSIONS**

They rely on the case of Butler v Butler CA 49 of 1983(1984)KLR where the COA held that in awarding damages, the court considers the picture generally of the circumstances, effect of injuries and uniformity in awards but the assessment remains an exercise in discretion. The appellate court would be slow to reverse the finding of the trial court unless it acted on very wrong principles and considered matters it ought not to have considered thus arrived at a wrong decision. They submit that the challenge herein is on matters of fact and the court should be slow to challenge the lower court which perceived the witness evidence first hand. They further hold the position that the appellants did not tender any evidence to contradict the testimony that the deceased had 2 children and was engaged in selling of livestock.

9. The Respondents contend that there was no doubt that the deceased made a living and that the trial used its discretion to use a multiplicand of Kshs.10,000/- They contend that the Appellant did not challenge the fact that deceased was a businessman and to them it was unfounded to treat him as a labourer.

10. The Appellants have further supported the finding of the trial court that the deceased was likely to work for another 15 years as he was 43 years old arguing that as a self employed businessman there was nothing that might have prevented him running his business for another 15 years. They state that the cases referred to by the Appellant are different as in the Kenyan Power and Lighting Company case, there was completely no prove of income given while in M'Rarama case, the court in their view held that either method (that is using a specific multiplicand or awarding lumpsum figure) was correct. They have relied on the following authorities.

i. Joseph Kimani Mwega -v- Selina Okune (suing as personal representative to the etstae of Philemon Muga Okune) COA Nakuru Civil Appeal 150 of 1995. This was an appeal to the COA. The courts solely believed the witness that the deceased was a businessman who used to send her between 3000-4000 shillings per month. He also used to stay with the couple's 5 children whom he fed and educated in Nairobi therefore the use of Kshs. 10,000/= as multiplicand even without further evidence was not excessive. There was also said to be nothing unreasonable about the court's presumption that the deceased would have earned income until 60 years. The appeal was found to be unmerited.

ii. Francis Karani v Simeon Obyao (suing as admin to the estate of Thomas Ndaya Obayo)(2005)eklr. This was a matter at the

CoA Kisumu where the court said the need to demand production of certificates as proof of earning would be a great injustice to many Kenyans who are illiterate, keep no records and yet earn livelihoods in different ways. When records are available, that is well and good but it is not the only way to prove those things. In this case, a multiplier of 5,000/= shillings was used and the court found it to be reasonable at the deceased was a carpenter with two school going children who he must have been providing for. The court also noted that they knew of no law providing that a self-employed carpenter must retire at 55 years and there was no reason to interfere with the Judge's decision that the deceased could have practiced his trade for another 8 years, having died at age 53. The court did however reduce the sum claimed as funeral expenses by half as it was not itemized and proved sufficiently and the said award of half was strictly based on circumstances of the case.

**iii. Joyce Mumbi Mugi (administratrix of the estate of Celestine Mugi Maingi)- v- Coop Bank and 2 others. CoA Nyeri Civil Appeal No 214 of 2004.** This was an appeal from a claim by the estate of a deceased passenger of a RTA that was dismissed at both the trial court and the HC. The Judges of the COA held that the plaintiff sued both drivers of the vehicles in the accident and though the courts could not decide who was more to blame, it did not lend them cause to dismiss the appellant's suit. The courts should have held the defendant drivers equally liable. The deceased had been operating a business, an engineering firm, which the CoA felt reasonable to place a figure of Kshs. 50,000/= monthly and not Kshs. 10,000/= monthly as proposed by the HC Judge. They set a dependency ratio of 2/3rds.

**iv. Beatrice Nyanchama Obuya(suing as personal rep of Charles Nyangau Owori) V Hussein DAIRY Limited(2010)EKLR .** This was a decision on assessment of damages from a fatal RTA. In this matter, the court had a pay slip to show proof of income and used an upper age of 60 to calculate the years to retirement and a multiplier of 2/3rds because the deceased had a wife and two children who were dependent on him. The court also gave an award under the Law Reform Act but then deducted it from the total award as it was deemed that the dependants of the estate cannot benefit twice.

**v. Aphia Plus (Program for Appropriate Technology Health) and Cephas Owuoth Najum and Collins Najuma (suing as legal reps of the Estate of Sela Auma Najuma) (2015)Eklr.** This was an appeal on the issue of quantum. The court was of the view that the evidence of the deceased's spouse as to the dependency and income from her business were believable and the receipts produced were not controverted. The court also held that the timeframe of 12 years was reasonable.

### Analysis and determination

11. This appeal raises three issues basically which are;

**i. Whether the trial magistrate erred in using a multiplicand of 10,000/-.**

**ii. Whether the sum of Kshs.100,000/- awarded for loss of expectation of life should have been subtracted from the sum awarded for loss of dependancy and whether the decision of the trial court is against the law and weight of evidence.**

#### **(i) Whether the multiplicand of 10,000/- was proper**

12. It is quite apparent from the evidence tendered that the deceased person was said to be a businessman. However there was no document tendered to show or prove that he was a livestock trader and the amount he made in business.

13. The first Respondent, a brother to the deceased only claimed that the deceased made Kshs.50,000/- per week. There were no bank statements to show that the claims were factual. Courts must be careful when using any figure claimed as multiplicand because a party can make a crazy claim just for purposes of obtaining some benefit from demise of deceased persons. In my considered view, a party must prove or show basis for arriving at a figure as income.

14. In the absence of bank statements or statements of accounts accompanied by annual income declarations it is not safe to go by claims made by parties that the deceased was involved in A or B business and made so much without any *iota* of evidence particularly documentary evidence. In this instance the Respondents did not tender trade licences, statements of account or any other statements to show that the deceased made 50,000/- per week. The trial court in my view used its discretion to award 10,000/- but that was speculative and unfounded because of lack of basis.

15. There is no dispute that the Respondents had the evidential burden to prove to the trial court that the deceased made so much per month with a view to guiding the trial court in arriving at a suitable multiplicand. In the absence of proof of regular income, the only plausible award in my view would be to give a global award commensurate with the loss suffered. To this and I find the decision of **M'Rarama M'Nthieri -vs- Luke Kiumbo Murithi [2015] eKLR** to be persuasive because in that case the income of the deceased was unproven and unknown just like the present instance. I find that a lump sum award of Kshs.650,000/- would suffice in this instance owing to factors such as effluxion of time and inflation.

#### **(ii) Whether an award of Kshs.100,000/- should have been deducted from the sum awarded for loss of dependancy**

16. The Appellant has contended that the learned magistrate erred by failing to discount the award under Law Reform Act after making an award under Fatal Accident Act. The Appellant has however not cited a provision of the law that bars a court from making awards both ways or a bar to an award being given on both under Law Reform Act and Fatal Accident Act. This court is well guided by the following Court of Appeal decisions in **HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MWENJA (DECEASED) V KIARIE SHOE STORES LIMITED [2015] EKLR** stated that there is no requirement that an assessment under the head of loss of expectation of life should be deducted from an award on loss of dependency. The Judges stated;

“ 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. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. 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:-

“6. 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.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore 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.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

From the above decision it is apparent that a court can make an award both under Law Reform Act and Fatal Accident Act without deducting any award. included both leading of loss of expectation of life as well as loss of dependency. It is therefore a misconception for the Appellant to contend that the award under Law Reform Act should have been subtracted from an award under Fatal Accidents Act.

**Whether the judgment from the trial court is back by the law and evidence**

17. The Appellant has not made any representations on this point but this court finds that the trial court's decision was well founded save for the reservations I have observed above regarding the multiplicand adopted. This is because as I have observed, the Respondents' case was settled on liability and the trial court was only required to render itself on quantum. The trial court found that the special damages pleaded and proved was Kshs.44,700 which covered the following:-

a. Legal fees	-	20,000/-
b. Post mortem fees	-	4, 200/-
c. Motor vehicle search	-	500/-
d. Coffin	-	<u>20,000/-</u>
Total		<b><u>44,700/-</u></b>

The Respondents had further pleaded that they incurred other funeral expenses but no receipts were tendered to prove how much was expended. The trial court did not make any further award on that heading and cannot be faulted though it was given that the deceased family must have spent some amount in funeral expenses but it is trite that special damages must not only be pleaded but must be proved.

In the end this appeal is only allowed to the extent that the award on loss of dependency for the aforesaid reason is set aside and in its place a lump sum figure of Kshs.650,000 less 35% conceded liability is awarded. In summary and for clarity judgment for the Respondents is entered as follows:-

i. General damages for pain and suffering	-	Kshs.10,000/-
ii. Loss of expectation of life	-	Kshs.100,000/-
iii. Loss of dependency	-	<u>Kshs.650,000/-</u>
Sub total	-	760,000/-
Less 35% liability		266,000/-
Total amount awarded	-	<b><u>494,000/-</u></b>

The Respondents will have costs and interest from date of judgment in the lower court and half costs in this appeal to be agreed or to be taxed.

**Dated, signed and delivered at Chuka this 3<sup>rd</sup> day of March 2020.**

**R. K. LIMO**

**JUDGE**

**3/3/2020**

Judgment signed, dated and delivered in the open court in presence of Maeli holding brief for Kariuki for Appellant and in absence of Respondent.

**R.K. LIMO**

**JUDGE**

**3/3/2020**