



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 6 OF 2015**

**LUCY WANGUI MAINA (suing as the legal representative**

**of the estate of ALICE WANJIKU MAINA.....APPELLANT**

**VERSUS**

**HARRISON THUKU KAMAU.....1<sup>ST</sup> RESPONDENT**

**PATRICK IRUNGU KAMAU.....2<sup>ND</sup> RESPONDENT**

***[Appeal from the original decree of T. Nzyoki, Principal Magistrate, in Murang'a CMCC No. 285 of 2013 delivered on 19<sup>th</sup> December 2014]***

**JUDGMENT**

1. This appeal largely turns on assessment of damages.

2. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic*; and, pursuant to the *Practice Directions* published in the *Kenya Gazette* of 17<sup>th</sup> April 2020 in Gazette Notice No. 3137 of 2020, this appeal was heard electronically on 6<sup>th</sup> May 2020.

3. The Court had earlier granted directions on 27<sup>th</sup> March 2019 that the appeal be canvassed through written submissions. The appellant filed submissions on 25<sup>th</sup> April 2019 while those by the respondents were lodged on 30<sup>th</sup> September 2019.

4. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.

5. Alice Wanjiku Maina (hereafter *the deceased*) was an elderly woman of *seventy years*. She died on 19<sup>th</sup> December 2011 from injuries sustained in road traffic accident two days earlier on 17<sup>th</sup> December 2011. She was a passenger in motor vehicle KAN 969T which belonged to the 1<sup>st</sup> respondent and driven by the 2<sup>nd</sup> respondent.

6. Although the respondents denied liability, I concur with the learned trial magistrate, that they were *entirely* to blame for the accident. The 2<sup>nd</sup> respondent (DW1) claimed that he was driving uphill at a modest speed of 50 to 60 kms per hour. He said the vehicle hit a pot hole, one tyre burst and he lost control of the vehicle. The respondents' case was that the accident was inevitable.

7. I disagree. I am more persuaded by the evidence of Risper Mwangi (PW2). She was seated behind the driver and next to the deceased. She testified that the vehicle was speeding. That explains why the driver failed to see the pothole in good time or to take any evasive action. The vehicle then hit a tree and overturned.

8. Furthermore, the 2<sup>nd</sup> respondent was convicted in traffic proceedings for the offence of causing death by dangerous driving. It is not lost on me either that the deceased was a passenger who bore no contributory negligence. There is also no cross appeal on liability. I thus readily find that the respondents were 100% liable for the accident.

9. I will now turn to assessment of damages. The learned trial magistrate awarded the estate Kshs 120,000 for *loss of dependency*; Kshs 80,000 for *loss of expectation of life*; Kshs 50,000 for *pain and suffering*; and Kshs 16,610 as *special damages*. He then deducted the entire sum awarded for *loss of expectation of life* leaving a net sum of Kshs 186,610. The learned trial magistrate granted the appellant costs and interest.

10. The appellants have challenged the heads of damages through the *amended memorandum of appeal* dated 28<sup>th</sup> January 2015. There are three grounds of appeal. They can be condensed into one: That the learned trial magistrate applied wrong principles in assessing the damages.

11. Learned counsel submitted that the award was inordinately low. She was of the view that the lower court should have employed a higher multiplicand of Kshs 6,000; and, that the learned trial magistrate erred by deducting the sum of Kshs 80,000 for loss of expectation of life.

12. Learned counsel for the respondents countered that the multiplicand of Kshs 3,000 adopted by the trial court was reasonable and not far off the minimum wage of Kshs 3,765 cited in the appellant's submissions. The respondents contended that the proposed global award of Ksh 500,000 by the appellant was an afterthought. In a nutshell, the respondents' case is that the lower court applied the correct formula to assess damages. I was implored to dismiss the appeal.

13. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

14. Like I stated, the deceased was aged 70 years. She was a farmer. There was no documentary evidence of her average earnings. The claim that she earned Kshs 15,000 was just that. But she certainly earned a living and it was open to the trial court, granted the circumstances, to settle on the multiplicand of Kshs 3,000. I refuse to substitute my discretion with that of the learned the trial magistrate.

15. Considering the age of the deceased, the multiplier of 10 years was quite reasonable. All the eleven children or dependents of the deceased were adults. The ratio of 1/3 adopted by the trial court is reasonable. I thus decline to disturb the award for *loss of dependency* of Kshs 120,000.

16. However, the learned trial magistrate made a slight error by deducting the entire award for *loss of expectation of life* against his award for *loss of dependency*. As guided by the majority decision in **Kemfro v Lubia** [1982-88] KAR 727, there was no need for a *mathematical deduction*; all that the trial court was required to do was to *take into account* the award for loss of expectation of life in arriving at the overall damages.

17. This was succinctly captured by *Chesoni Ag. JA* (as he then was) in **Kemfro v Lubia** [supra]-

*To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough 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 as suggested.....*

18. I am also well guided by the recent holding by *Mabeya J* in **Eston Mwirigi Ndege & Another v Patrick Mbaya**, Meru High Court Civil Appeal 72 Of 2017 [2018] eKLR:

*[18] In my view, the requirement in the Law Reform Act is to "take into account" the award under that statute when making an award under the Fatal Accidents Act. It does not provide that sums awarded to the estate of a deceased under the Law Reform Act be deducted from damages awarded for lost dependency.*

19. Taking into account the award of Kshs 120,000 for loss of dependency, it was measly to deduct the entire sum awarded for loss of expectation of life. I will interfere with that aspect of quantum of damages to the extent that the deduction of the sum of Kshs 80,000 is reversed.

20. As stated, the deceased died in hospital two days after the accident. There is no contest about the sum of Kshs 50,000 awarded for *pain and suffering*. I also concur with the learned trial magistrate that the appellant only strictly proved the sum of Kshs 16,610 as *special damages*. I also agree that the appellant was entitled to costs and interest in the lower court.

21. The upshot is that the appeal *partially* succeeds. My final orders shall be as follows:

- i) That the judgment and decree of the lower court are partially *set aside*.
- ii) That liability is entered in favour of the appellant against the respondents at 100%.
- iii) That general damages under both the **Law Reform Act** and the **Fatal Accidents Act** are assessed at Kshs 250,000.
- iv) Special damages are awarded in the sum of Kshs 16,610.

22. That is to say that the two respondents shall jointly and severally pay to the appellant the sum of Kshs 266,610 plus interest at court rates from the date of the original decree till full payment.

23. Lastly, *costs* follow the event and are at the *discretion* of the court. I grant the appellant costs in the *lower court*. However, each party shall bear its own costs in the *appeal*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 11<sup>th</sup> day of May 2020.**

**KANYI KIMONDO**

**JUDGE**

**ORDER**

Notice of delivery of this judgment was transmitted to the parties' email addresses. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the Practice Directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March 2020 and published in the *Kenya Gazette* of 17<sup>th</sup> April 2020 as Gazette Notice No. 3137, this judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**KANYI KIMONDO**

**JUDGE**

***Judgment read in chambers in the presence of:***

Ms. Dorcas Waichuhi, Court Assistant.