REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 13 OF 2019

1. OMBUI TOM

2. THOMAS MUNIKO DANIEL .....APPELLANTS

VERSUS

ROBI NYABOSE MIAMI (suing as legal representative of the

estate of JOSEPH MWIKABE MAGIOBE (Deceased).....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. E. Muriuki Nyagah Principal Magistrate delivered on 13/12/2018)

JUDGMENT

1. The appeal subject of this judgment is against the award of damages by the trial court in a judgment arising out of an accident where one *Joseph Mwikwabe Magoge* (hereinafter referred to as **'the deceased'**), then aged 28 years old, lost his life.

2. The Appellants herein were the registered and/or beneficial owners of motor vehicle registration number KTCB 438G make Tractor as at 18/04/2014 which vehicle was involved in the accident with the deceased.

3. As a result of the demise of the deceased aforesaid the Respondent herein instituted **Migori Chief Magistrate's Civil Case No. 2414 of 2015** (hereinafter referred to as **'the suit'**) claiming *inter alia* damages under the Fatal Accidents Act and the Law Reform Act.

4. Liability in the suit was agreed by consent of the parties at 20% : 80% in favour of the Respondent. The court then assessed damages and it is the resultant assessment which prompted this appeal.

5. The Appellant raised six grounds of appeal in their Memorandum of Appeal dated on 08/01/2019 and filed on 09/01/2019.

6. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

7. The Appellants argued the appeal on three main issues. They were that the awards were inordinately high, that the court erred in not discounting the award made under the loss of expectation of life from the award of loss of dependency and that the special damages awarded were not proved.

8. Relying on **Simon Bogonko vs. Alfred Mongare Mecha & Another (suing as the legal representative of the estate of Akama Mongare (Deceased) 2019 eKLR** the Appellants submitted that the award on pain and suffering ought to be reviewed downwards from Kshs. 100,000/= to Kshs. 20,000/=.

9. On the award on loss of dependency under the Fatal Accidents Act it was submitted that the multiplicand of Kshs. 10,000/= adopted by the court was without any basis and that the right figure was Kshs. 5,218/= instead. The Appellants relied on **Gachoki Gathuri (suing as legal representative of the estate of James Kinyua Gachoki (Deceased) vs. John Ndiga Njagi Timothy & 2 Others (2015) eKLR**.

10. It was further submitted that the award made under the loss of expectation of life ought to have been deducted from the award on loss of dependency since failure to do so amounted to double compensation. The decisions in **Kemfro Africa Ltd t/a Meru Express Services (1967) & Another vs. Lubia & Another (No. 2)(1987) KLR 30** and **James Okoth Mbuya vs. James Boriga Nyaneti & Another (2018) eKLR** were referred in support.

11. On special damages it was submitted that there was no proof thereof hence no basis for the award. The Appellant prayed that the appeal be allowed accordingly and this Court re-visits the assessment of damages.

12. Opposing the appeal, the Respondent supported the impugned judgment. It was submitted that the awards were very reasonable and that there was no need of interference by this Court. The decision in **Millicent Atieno Ochuodho vs. Katola Richard (2015) eKLR** was cited. On special damages it was submitted that the Court ought to take cognizance of the fact that funeral expenses were incurred even in instances where no receipts were produced in evidence.

13. The Respondent urged this Court to dismiss the appeal with costs.

14. As the appeal is on assessment of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277**.)

15. The Court of Appeal in the case of **Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727** discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.***

16. This position was restated by the Court of Appeal in the case of **Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101** and so recently in the case of **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.**

17. I will now deal with the issues raised in this appeal. I have carefully read and understood the gist of the appeal, the pleadings, the proceedings, the impugned judgment, the submissions and to the judicial authorities referred to by the parties.

18. As to whether the award on pain and suffering before death was excessive, the starting point is the record. The Respondent was the father to the deceased. He testified and called two witness who were a police officer (**PW2**) and an eye-witness one *Zedekiah Ochieng Omolo* (**PW3**).

19. The Respondent and PW2 did not witness the accident. PW3 did. According to PW3 the deceased was knocked down by the offending vehicle when it lost control and veered off the road. He immediately called the police and reported the matter.

20. The Respondent testified that he received the news about the accident and rushed to Akidiva Hospital where the deceased had been taken to. He found the deceased already dead.

21. The Appellants submitted that since the deceased died on his way to hospital then he did not undergo prolonged pain and suffering.

22. According to the record there was no evidence to the effect that the deceased died on his way to hospital. The Appellants did not testify at all and the Respondent's case did not disclose as much. Therefore, the Appellants contention that the deceased died on his way to hospital was not supported by any evidence. As such, there is no basis to interfere with the award. The ground fails.

23. The next issue is on the multiplicand of Kshs. 10,000/=adopted by the Court. The Appellants submitted that there was evidence that the deceased was a watchman. They however took issue with the income. They submitted that there was no evidence of the income of the deceased and that the amount of Kshs. 10,000/= pleaded by the Respondent and adopted by the court was without any basis.

24. The Appellants submitted that since the deceased was in formal employment and given that there was no proof of earnings then the trial court ought to have been guided by the *Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197).* The regulations provided that the minimum monthly salary for a watchman at the time of the accident was Kshs. 5, 218/=.

25. While agreeing with the position that the trial court ought to have been guided by the Regulations aforesaid, the Respondent submitted that the correct minimum salary for a watchman at the time the deceased died was instead Kshs. 9,024/15. He hence submitted that the award of Kshs. 10,000/= cannot be viewed as inordinately high.

26. There is also no dispute that the deceased was employed as a watchman at the time he was involved in the fatal accident. There is also no dispute that the Respondent did not adduce any documentary evidence in support of the income of the deceased.

27. In such instances all is not lost. The law is by now well settled. A Court of Law in pursuit of justice must appreciate the fact that there are many people in our society today who are in employment but do not have documentary evidence in proof of their incomes, but all the same they earn a living. (See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited Court of Appeal at Nyeri Civil Appeal No. 22 of 2014 (2015) eKLR** among others). A Court therefore ought to revert to the applicable Regulation of Wages Order or to a global figure in appropriate cases.

28. As the deceased died on 18/04/2014 the appropriate Order was **The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197)** (hereinafter referred to as '**the 2013 Order'**) which came into operation on 01/05/2013. That Order was substituted

by *The Regulation of Wages (General) (Amendment) Order, 2015 (Legal Notice No. 117)* effective 01/05/2015.

29. According to the 2013 Order the deceased who was a watchman would fall under **Category (a) Column 3** thereof which provided for the minimum wages for a watchman within the then all Municipalities in Kenya as well as within Mavoko, Ruiru and Limuru Town Councils. Before the 2010 **Constitution** Migori town was under the Municipal Council of Migori. Therefore, the minimum monthly income inclusive of house allowance was Kshs. 9,024/15.

30. The figure of Kshs. 5,218/= proposed by the Appellants resulted from **Category (a) Column 4** of the 2013 Order. The column provided for the minimum wages for, among others, watchmen. The said column covered all the other areas in Kenya save Nairobi, Mombasa, Kisumu, all municipalities and Mavoko, Ruiru and Limuru Town Councils. It is likely that the Appellants did not appreciate that Migori town was within the Municipal Council of Migori before the new constitutional dawn.

31. The trial court adopted the figure of Kshs. 10,000/= as the monthly income for the deceased. Since the 2013 Order provided for *minimum wages* I do not find the figure of Kshs. 10,000/=, instead of Kshs. 9,024/15, to be inordinately high. The multiplicand adopted by the court was, to me, fair and reasonable. The ground therefore fails.

32. As to whether awards under the *Law Reform Act* ought to be discounted from those under the *Fatal Accidents Act*, the Court of Appeal settled the issue in **Hellen Waruguru Waweru** case (supra) where the Court put the legal position into perspective.

The Court clearly expressed itself as follows: -

> ***19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.***
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> ***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 issues of duplication does not arise.***
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> ***21. The confusion appears to have arisen because of different reporting of the Kemfro 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 Kemfro 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: -***
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> > *"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; it appears the legislation intended that it should be considered.*
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> > *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.*
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> ***22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.***
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> ***23. …… In our view, the low amounts awarded under the LRA sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate.***

33. It is therefore settled that there is no legal requirement for a court to engage in a mathematical deduction when dealing with the assessment of damages under the *Law Reform Act* and the *Fatal Accidents Act*. What a Court must however do is to bear in mind or consider the award made under the *Law Reform Act* for the non-pecuniary loss when arriving at the awards under the *Fatal Accidents Act*. The only instance where a Court may deduct the sums under the *Law Reform Act* from those awarded under the *Fatal Accidents Act* is when the beneficiaries of the deceased's estate under the *Law Reform Act* and the dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. In this case, that fact has not been proved hence the Appellants' position on the deduction cannot stand. The ground consequently fails.

34. There was the issue of special damages as well. The Court of Appeal in **Nairobi Civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another vs. Benson Omwenga** citing with approval its earlier decision in *Charles Sande vs. Kenya Co-operative Creameries Ltd Civil Appeal No. 154 of 1992* (unreported) stated as follows: -

> ***…. it is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law…***

35. The Respondent admitted that he did not adduce any evidence in support of the expenses pleaded in the Plaint. He however urged the Court to be cognizant of the fact that indeed expenses were incurred as a result of the funeral. The submission appears to be logical on the face value. However, the law is well settled. In the absence of proof of special damages any award made as such must be interfered with. The award of Kshs. 95,000/= on special damages is hereby set-aside. The ground succeeds and the prayer for the special damages is accordingly disallowed.

36. Having dealt with all the grounds raised by the Appellants, the appeal is hereby determined in the following manner: -

(a) The appeal is hereby partially allowed to the extent that the award of Kshs. 95,000/= on special damages is hereby disallowed.

(b) The general damages awarded by the trial court are hereby affirmed.

(c) Since the appeal has partially succeeded each party to bear its own costs.

(d) For clarity the Appellants shall bear the costs of the suit.

37. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. otienoadvocates@gmail.com **for** the firm of Messrs. O. M. Otieno & Company Advocates for the Appellant.

2. kerario@gmail.com for the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent.

3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE