



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 39 OF 2014

OMAR SHARIF.....1ST APPELLANT

SALIM KONDE WASHE.....2ND APPELLANT

CROWN PETROLEUM KENYA LTD.....3RD APPELLANT

VERSUS

EDWIN MATIAS NYONGA & MAXWELL MUSUNGU

(Suing as legal representatives and administrators of

the Estate of Enos Nyonga Deceased.....RESPONDENT

(Being an appeal from the judgment of Hon E Kimilu PM delivered on 21st October, 2014 in Naivasha PMCC No 846 of 2012)

JUDGMENT

Background

1. This appeal is against the award of quantum by the trial court in respect of an accident involving motor vehicles KAJ585G and KAD 465U owned by 1st and 3rd Apeellants. The accident occurred on 16/8/2007 at Naivasha Delamere estates on Nairobi-Nakuru highway, and resulting in the death of the deceased. The grounds are essentially that the award was excessive and unrealistic on the heads of loss of expectation of life and for loss of dependency. It is also argued that awards under both heads are not awardable.

2. The parties before the trial court agreed on liability at 70:30 in favour of the plaintiff and the award was as follows:

- Pain and suffering	Kshs	20,000.00
- Loss of expectation of life	Kshs	100,000.00
- Loss of dependency	Kshs	844,899.00
(Less 20% contributory negligence	Kshs	<u>(168,979.80)</u>
Subtotal	Kshs	675,919.00
Special damages	Kshs	<u>22,525.00</u>
Total	Kshs	818,444.00

3. In addition to the two heads of appeal, the appellants state in their submissions that they also wish to argue on an issue of jurisdiction in respect of the suit being time barred. The basis is that the suit was brought five years after the cause of action arose. However, it is clear that the respondents obtained leave of the court to file the appeal out of time by way of Originating Summons dated 3rd August 2011, which was heard and determined by Hon Rainy on 30th August 2012. There is no indication that the said ruling was appealed against, and further the

issue was not pleaded in the memorandum of appeal.

4. Given that position, I see no basis for considering the issue of jurisdiction at this stage, unless there was a substantive appeal against the ruling on jurisdiction.

5. On the substantive heads of appeal, I will deal with the two grounds consecutively.

Loss of expectation of life

6. The appellants' argument is that the trial court erred by awarding Kshs 100,000/- which was excessive.

7. I am aware that there was another suit emanating from this same accident that was determined in the lower court namely: **Henry Musuluma Iliati & Another v Omar Sharif & Salim Konde Washe CMCC 361 of 2008**. That case was appealed against and came before me as **HCCA No 34 of 2015 Omar Sharif & 2 Ors v Henry Musuluma Iliati & Another**. In that appeal against quantum, I did determine as follows: On loss of expectation of life, that an award of Kshs 100,000 was not excessive. I did grant the said award.

8. For certainty and uniformity, I do hereby adopt my decision in **HCCA No 34 of 2015 Omar Sharif & 2 Ors v Henry Musuluma Iliati & Another** in respect of loss of expectation of life, noting that the case cited by the appellants **Ali Elmi Saney & Another v Mohamed Bakari & Another Nairobi HCCCNo 2225 of 1997**, where Kshs 70,000/- was awarded for loss of expectation, was an old case, and the case of **Salim Goolamali T/A Kalenjin Auto Hardware v Lucas Okoa Nyongesa, Busia HCCC No 52 of 2001**, is more time appropriate.

Loss of Dependency

9. The trial court calculated the award as follows: $13,201.55 \times 12 \text{ months} \times 8 \text{ years} \times 2/3 = 844,899/-$. It found that the deceased was earning a gross salary of 17,633/-. The appellant argues, wrongly in my view that all deductions for loans and other benefits would leave the deceased with a net income averaging Kshs 4267/-. This would be incorrect as all income earned by the deceased less statutory deductions constitutes income enuring to the benefit of the deceased, even if applied by the deceased to pay loans or acquire other benefits

10. I will thus treat the earnings found by the trial court as the correct figure and will not disturb it.

11. I agree with the appellant that the grant of 8 years prior to retirement was perhaps generous by a year. But the calculation of compensation is not an exact science and since money cannot compensate for a lost life, unless the award resulted in an excessive award, there is no true basis for interfering with the trial court's decision. The cases of *Kemfro*

12. The appellants also submitted that an award under both the Fatal Accidents Act and the Law Reform Act for loss of dependency was improper as it amounted to double compensation and should have been deducted. The appellants cited the case of **Kemfro Africa T/A Meru Express Services & Another v Lubia and Another (1987) KLR 30**, in support of their argument. The respondent cited the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR**

13. The positions expressed in these two cases have led to confusion with regard to whether or not an award for loss of dependency under the Law Reform Act should be deducted from an award under the Fatal Accidents Act.

14. In **HCCA No 34 of 2015 Omar Sharif & 2 Ors v Henry Musuluma Iliati & Another** when dealing with loss of dependency, I held the position – supported by the appellants herein, that there had been a duplication of awards under the Law Reform Act and the Fatal Accidents Act. I determined that the trial court had to take into account and offset from the amount awarded for loss of dependency the amount for loss of expectation of life.

15. I believe that that conclusion was not well guided in legal principle, and I would not follow it in this case. I would cite the detailed argument of the Court of Appeal in *Hellen Waruguru's* case, which should be self-evident:

“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.

21The 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."

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."

16. The position is clear, and I need add nothing to the above, except to state that there is no requirement to deduct one award from the other. I thus decline the appellants' argument.

17. On this head, the appellants further submitted that the deceased perished at age 53 and would have retired at 60. They thus argue that the multiplier should have been 7 years and not 8 years as adopted by the trial court; That the dependency ratio ought to have been 1/3rd and not 2/3rd as applied by the trial magistrate since the deceased's dependants were adults and were relying on themselves.

18. I have perused the evidence of PW1. He said they were over 18 years old when the deceased died. He was an active player at Mathare FC. PW1 said in cross examination that:

"My son who was in business earning an income"

19. Based on the above, I think that the correct dependency ratio ought to have been 1/3rd not 2/3rd as applied by the trial court. I would calculate dependency as follows:

13,201.55 x 12 months x 8 years x 1/3 = 422,449.60

20. Accordingly, I set aside the award on loss of dependency and substitute with the award for Kshs 422,449.60.

Disposition

21. In light of all the foregoing, I allow the appeal only in respect of Loss of Dependency herein. The final award is as follows:

- Pain and suffering	Kshs	20,000.00
- Loss of expectation of life	Kshs	100,000.00
- Loss of dependency	Kshs	<u>442,449.00</u>
	Kshs	562,449.00
(Less 20% contributory negligence	Kshs	<u>(112,489.20)</u>
Subtotal	Kshs	449,959.80
Special damages	Kshs	<u>22,525.00</u>
Total	Kshs	469,959.80

22. The parties shall bear their own costs of the appeal.

Administrative directions

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

24. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 9th Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Chelagat for the Appellant
2. Ms Naliaka for the Respondent
3. Court Clerk - Quinter Ogutu