REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 109 OF 2017

JORAM ONYANGO AGER

(Suing on his own behalf and on behalf of the estate of

ELIDA AKINYI ONYANGO (Deceased).....PLAINTIFF

VERSUS

KENNEDY NYAMBOGA NDEGE

PETER ISAAC WACHIRA NDEGWA.....DEFENDANTS

(Being an appeal arising from the judgment and decree by Hon. …….delivered on ……..)

JUDGMENT

1. This judgment is on the appeal against the award of damages by the trial court in a judgment arising out of an accident where one **Elide Akinyi Onyango** (hereinafter referred to as **'the deceased'**), then aged 41 years old, lost her life. The Appellant herein was the owner of motor vehicle registration number KAL 304Q make Isuzu Canter, one of the motor vehicles involved in the fatal accident which occurred on 17/11/2014. The First Respondent herein instituted **Migori Chief Magistrate's Civil Case No. 711 of 2015** (hereinafter referred to as **'the suit'**) claiming *inter alia* damages under the Fatal Accidents Act and the Law Reform Act.

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

3. The Appellant raised five grounds of appeal in their Memorandum of Appeal dated and evenly filed on 24/11/2017. 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. However, the second Respondent did not take part in the hearing of the appeal. On his part, the Appellant submitted that the multiplicand of Kshs. 12,000/= adopted by the court was without any basis and that a figure of Kshs. 6,320/= would have been quite ideal as the minimum wage in the Agricultural industry in 2014. He relied on the decisions of **David Kajogi M'mugaa v Francis Muthomi (2012) e KLR, Petrocity Enterprises (U) Ltd v Roseline Sikudi suing as legal representative of the estate of Pascal Ngadi (Deceased) & 2 other (2017) e KLR and Ursula Mulandi v Kyalo Mutunga & others (2017) eKLR** in support of the submission.

4. The Appellant also submitted for a multiplier of between 16 – 19 years was proposed as opposed to that adopted by the court of 24 years based on the formal retirement age of 60 years. The First Appellant relied on the decisions of **Abdimana Abulwahab & Another v G S M (suing as legal administrator of the Estate of the Late S W N (2018) e KLR, Petrocity Enterprises (U) Ltd v Roseline Sikudi suing as legal representative of the estate of Pascal Ngadi (Deceased) & 2 others (20117) e KLR, Doris Nyaguthi Muhindi & Another v Kariuki Karanu Kago & Another (2007) e KLR, Charles Omwenga Ongiri & Another v Daniel Muniko (2017) e KLR and Rahab Wanjiru Nderitu v Daniel Muteti & 4 others (2016) e KLR** in support of the submission. The award on special damages was also challenged. The Appellant prayed that the appeal be allowed accordingly.

5. Opposing the appeal, the First Respondent submitted that the Appellant had not demonstrated that the trial court erred in making any of the awards. Counsel made reference to the decisions of **Butler v Butler (1984) KLR 225** and **Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727** In support of the multiplicand of Kshs. 12,000/= it was submitted that the figure was within the minimum wage under the Regulation of Wages (General Amendment Order) and the decision in **Mombasa Maize Millers Limited v W I M suing as the representative of J A M (Deceased) (2016)e KLR** was referred to. On the submission that the multiplier of 24 years was reasonable the decision in **The Board of Governors of Kangurbiri Girls High School and Another v Jane Wanjiku Murithi (2014) e KLR** was referred to. The First Respondent then urged this Court to dismiss the appeal.

6. As one of the limbs in this 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**.)

7. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services** (supra) 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.'***

8. 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.**

9. I will now deal with whether the monthly income of Kshs. 12,000/= was without any basis and ought to be interfered with. There is consensus that the deceased was a trader mainly hawking fruits within Migori town. There is also no dispute that no documentary evidence was adduced in support of the income of the deceased. 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 illiterate and 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 for instance when the deceased is a minor among other cases.

10. As the deceased was an adult and a hawker then in the absence of any formal evidence of income a Court can safely revert to the appropriate order. In this case the appropriate category would be **The Regulation of Wages (General) (Amendment) Order, 2013 (Legal Notice No. 197)** which was applicable in 2014 since the deceased died in 2014. The deceased would then fall under **Category (a) Column 3** thereof which provided for the wages of General labourers including cleaner, sweeper, gardener, children's ayah, house servant, day watchman and messenger 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. The monthly income inclusive of house allowance was Kshs. 12,972/=. Therefore, the figure of Kshs. 12,000/= adopted by the trial court was reasonable although the court, with respect, did not make that finding based on the Regulation of Wages (General) (Amendment) Order, 2013 as expected. The ground therefore fails.

11. On the multiplier of 24 years, I likewise associated myself with the School of Law that in the interest of certainty, uniformity and predictability of the law the official government's retirement age ought to be the guide. Currently, that age is 60 years except otherwise specifically provided in law. The deceased being 41 years old had 19 years more to reach the age of 60 years. A multiplier of 19 years would therefore be reasonable and realistic. With tremendous respect, I must hence interfere, which I hereby do, with the multiplier of 24 years and replace it with that of 19 years.

12. On special damages, the First Respondent who was the husband to the deceased laid a basis for the twin receipts in dispute. He explained how and where he incurred the expenses which expenses are reasonably incurred in funerals. I find that the expenses were proved accordingly.

13. As to whether awards under the Law Reform Act ought to be discounted from those under the Fatal Accidents Act, I must take caution that the issue was not raised for determination in this appeal. However, since the Appellant submitted on it and for the purposes of laying the correct legal position on the issue this Court is under a legal obligation to, at least say something on it. Suffice to say that 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.***
>
> ***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.***
>
> ***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 decindendi 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; 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 account' and 'to 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.

23. The consequence of our intervention in the various awards boils down to the following final assessment of damages: -

Pain and suffering 10,000/=

Loss of life expectation 100,000/=

Loss of life dependency (19,373 x 122 x 1 x 2/3) 154,984/=

Farming (20,000 x 12 x 5 x 2/3) 800,000/=

Total 1,064,984/=

Less

30% contribution 319,495/=

Balance 745,489/=

In our view, the low amounts awarded under the LRS 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."

14. 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 as long that court bears in mind or considers the award made under the Law Reform Act for the non-pecuniary loss.

15. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

16. I therefore find that the appeal succeeds partly and to the extent of reviewing the multiplier of 24 years to 19 years. The other awards remain as made by the trial court. Each party to bear its own costs of the appeal.

17. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ouma Otieno instructed by the firm of Messrs. O. M. Otieno & Company Advocates for the Appellant.

Mr. Abisai instructed by the firm of Messrs. Abisai & Company Advocates for the Respondent.

Evelyn Nyauke – Court Assistant