REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 42 OF 2017

MARTIN FRANCIS OGAM.....APPELLANT

VERSUS

PELESIA ATIENO OTIENO

FERDINAND OTIENO OYAMO (suing as personal representative and administrator

of the estate of JOBIK OCHIENG OTIENO -DECEASED.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. Kamau C. M. Resident Magistrate in the Senior Resident Magistarte's Court at Rongo Civil Case No. 217 of 2015 delivered on 7/02/2017)

JUDGMENT

1. **Jobik Ochieng Otieno** (hereinafter referred to as **'the deceased')** was born on 31/07/1995 and died out of a road traffic accident on 13/04/2015. He was interred on 01/05/2015. The Appellant herein was the owner of the offending motor vehicle registration number KTCB 564J make New Holland Tractor. The Respondents herein, who were the parents to the deceased, instituted **Migori Chief Magistrate's Civil Case No. 217 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 75% and 25% in favour of the Respondents. The court then assessed damages and it is the resultant assessment which prompted this appeal.

3. The Appellant raised six grounds of appeal in their Memorandum of Appeal dated 06/03/2017 and filed on 07/03/2017. 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.

4. The Appellant submitted that the court erred in adopting a global sum of Kshs. 2,000,000/= on general damages under the limb of lost years. That it instead ought to have relied on The Regulation of Wages (General) (Amendment) Order, 2013 and treated the deceased as an unskilled labourer thereby adopting the monthly figure of Kshs. 5,218/=. It was also submitted that a multiplier of 20 years ought to have instead been adopted and a dependency ratio of 1/3 in favour of the Respondents. There was a submission as well that the amount rendered on the limb of Loss of Expectation of Life ought to have been discounted from the award in Lost Years. The awards on Funeral expenses and special damages were also challenged. The Appellant relied on the decisions in **Comply Industries Limited & Another v Martha Kiprotich Busienei (SUING AS THE LEGAL Representative of the Estate of the later Stephen Mirau Muthini (Deceased) e KLR 2014, Francis Muchee Nthiga v David N. Waweru [2014] e KLR** and **Jacob Ayiga Maruja & Another v Simeon Obayo (2005) e KLR** in praying that the appeal be allowed accordingly.

5. On their part, the Respondents who replicated their submissions and decisions (save only one decision) they had tendered before the trial court submitted, without filing either an Appeal or a Cross-Appeal, that the correct award under the limb of Pain and Suffering was Kshs. 20,000/= instead of the Kshs. 10,000/= awarded. The Respondents in effect supported the awards of Kshs. 2,000,000/= on Lost Years and Kshs. 100,000/= on Loss of Expectation of Life. The Respondents submitted that the sum Kshs. 50,000/= on Funeral expenses and that of Kshs. 20,000/= on Special Damages were rightly made. They variously relied on the decisions of **Steve Tito Mwasya & Another v Rosemary Mwasya (2015) e KLR, Kwanzia v Ngalai Mutua & Another, Daniel Mwangi Kimemi & 2 Others v JGM & Another (2016) e KLR, DMM V Stephen Johana Njue & Another (2016), Kemfro Africa LTD t/a Meru Express & Another v A. M. Lubia & Another (1982 - 88)1 KAR 727, Peter M. Kariuki v Attorney General (2014) e KLR, Bashir Ahmed Butt v Uwais Ahmed Khan (1982 -88) KAR 5), Wesley Kipkoech Kendagor v Unistar Transporters Limited, Jane Katumbu Katumbu Mwanzia and Premier Diary Limited v Amarjit Singh Sagoo & Another (2013) e KLR** in urging 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. From the outset I must reject all the submissions by the Respondents for higher awards than those made by the trial court in the judgement under appeal. The simple reason being that the Respondents, although seemingly dissatisfied with the awards by the trial court, did not lodge any Appeal or a Cross-Appeal within the requisite period or at all. (See **Section 79G** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya).

10. I will now deal with whether the award of Kshs. 2,000,000/= made under the limb of Lost Years ought to be interfered with. There is no dispute that the deceased was aged 20 years, had completed his Secondary School education and scored a Mean Grade of B Plain and was undertaking some computer studies before joining the University. The deceased was therefore yet to be in any formal employment. The trial court being guided by several decisions settled for the approach on a global sum. After considering the future prospects of the deceased the court settled for the disputed award.

11. There is no doubt the deceased was a hardworking young man and had a brilliant future. He scored a good grade in Secondary School and his prospects of becoming a Doctor were achievable. To prepare himself in facing the myriad challenges of the modern world, the deceased had began training in computer classes. Taking all relevant factors into account, I find the award to be very reasonable and fair in the circumstances. I further find that the approach on reliance on the Regulation of Wages (General) (Amendment) Order, 2013 would, in the circumstances of this case, be very speculative and therefore inappropriate.

12. By taking the approach on a global sum aforesaid, the court was not under a duty to determine the Multiplicand, Multiplier and Dependency Ratio. That is so because there are at least two ways of determining an award on Lost Years or Loss of Dependency. One way is the mathematical one by determining the monthly income (Multiplicand), the number of years the deceased would likely live (Multiplier) and the Dependency Ratio. A multiplication of the three items would then result to the award. The other way is by a trial Court coming up with a global figure after taking into account all the circumstances of the case including any of the three items if applicable. The second approach is mainly adopted in cases where the deceased was a minor or the income cannot be reasonably ascertained or rightly assumed. A Court can only settle for one of the approaches and that was the case herein where the trial court rightly settled for the global-sum-approach.

13. The Appellant has not challenged the global-sum-approach. Instead, he has made submissions on the Multiplicand, the Multiplier and the Dependency Ratio. With utmost respect to Counsel, those submissions must be rejected, which I hereby do, for the reason that the Appellant has failed to demonstrate how the trial court erred in adopting the global-sum-approach in arriving at the award on Lost Years and why the other approach was ideal in the circumstances of this case.

14. The other issue for determination is whether awards under the Law Reform Act ought to be discounted from those under the Fatal Accidents Act. I have severally dealt with this issue which is by now well settled by the Court of Appeal in **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.** The Court went to great length and put the correct legal position on the issue 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 decindendi 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.***

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 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."

15. 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. In this case the trial court first dealt with the aspect of Lost Years and it was only thereafter that it dealt with the aspect of Loss of Expectation of Life. The court cannot therefore be faulted in not taking into account the award on Lost Years when it dealt with the award of Loss of Expectation of Life. The ground therefore fails. However, since the Respondents did not appeal on the trial court's deduction of the award of Kshs. 100,000/= from the award of the Lost Years I will not disturb that finding.

16. As to whether the funeral expenses of Kshs. 50,000/= ought to be allowed, the Appellant vehemently challenged the award, but in light of the Court of Appeal decision in **Jacob Agiya Maruja & Another vs. Simeon Obayo (2005) eKLR** the Appellant proposed an award of Kshs. 40,000/= instead. I would have disallowed this ground of appeal but it appears like I must allow it. It must be understood that pleading an issue is different from proving that issue. An issue can only be considered for proof if it is specifically pleaded. In this case the funeral expenses were not pleaded in the Plaint dated 21/10/2015 and filed on 23/10/2015. How can such alleged expenses therefore be awarded? Given that they were not part of the pleadings before Court the same do not lie and the trial court, respectfully, erred in making that award. (See the respective Supreme Court and Court of Appeal binding decisions in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR)**. The award of Kshs. 50,000/-= on Funeral expenses is hereby disallowed and set-aside from the judgment of the trial court.

17. On special damages both parties have rightly reiterated the legal position that such damages must not only be pleaded but also proved. The Respondents pleaded for Kshs. 20,000/= being the Legal Fees and expenses incurred in pursuing the Limited Grant of Letters of Administration. That was under paragraph 7 of the Plaint. Further, the Respondents produced an official receipt from Messrs. Khan & Associates Advocates dated 03/07/2015 in proof of the expenses. The claim was hence properly pleaded and proved. The Appellant's otherwise contention does not hold and is hereby rejected.

18. Having considered all the issues raised in the appeal and 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.

19. I therefore find that the appeal succeeds partly and to the extent of reviewing and setting aside the sum of Kshs. 50,000/= on Funeral Expenses. The other awards remain as made by the trial court. Since the appeal has succeeded on an issue which had otherwise been admitted by the Appellant, the Appellant shall bear pay two-thirds of the costs of the appeal to the Respondents.

20. 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: -

Miss. Rose Ongira Counsel instructed by the firm of Messrs. Odhiambo Owiti & Company Advocates for the Appellant.

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

Evelyn Nyauke – Court Assistant