REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 194B OF 2016

MERCY MURIUKI.....1ST APPELLANT

UWEZO DTM LIMITED.....2ND APPELLANT

VERSUS

SAMUEL MWANGI NDUATI & ANOR (Suing as the legal administrators

of the estate of the late **ROBERT MWANGI)..... RESPONDENT**

J U D G M E N T

A. Introduction

1. This is an appeal from the judgement and decree of the Honourable Senior Principal Magistrate in Milimani CMCC No. 4762 of 2013 delivered on the 11th April 2016.

2. The respondents herein filed a suit for compensation in terms of both special and general damages payable to the estate of the deceased under the Fatal Accidents Act & the Law Reform Act. The case was determined in favour of the respondents against the appellants at 100% on liability and the court proceeded to access damages as follows;

i. Special Damages	*Kshs.*	*89,150*
ii. Pain & Suffering	*Kshs.*	*10,000*
iii. Loss of expectation of life	*Kshs.*	*100,000*
iv. Loss of Dependency		*Kshs. 3,124,800*
Total		***Kshs. 3,323,950***

3. The appellant's filed a memorandum of appeal dated 15th April 2016 based on 5 grounds of appeal which can be summarised as;

a) That the learned magistrate erred in law and in fact in apportioning liability against the appellants.

b) That the trial magistrate erred in law and in fact by adopting a multiplicand of Kshs. 10,850 per month and a multiplier of 2/3, as well as awarding the deceased 36 years without appreciating the appellant's evidence and submissions on record.

c) ***That the trial magistrate erred in law and in fact in awarding general and special damages of Kshs. 3,323,450***

4. The parties agreed to dispose off the matter by way of written submissions.

B. Appellant's Submissions

5. On liability, the appellants' submitted that the respondents did not tender enough evidence to discharge the burden of proof imposed by law and neither did the respondents establish the elements of negligence on their part to warrant the trial court's apportionment of liability. The appellants relied on the cases of **Mbugu David & Anor v Joyce Gatthoni Wathena & Anor [2016]eKLR, Patrick Nguthira Gichuki v David Denny [2013] eKLR, Donoghue v Stevenson [1932] AFR1** and **Statpack Industries v James Mbithi Munyao [2005] eKLR.**

6. Under the Law Reform Act and on Pain & Suffering, the appellants submitted that the deceased died on the spot and thus proposed an award of Kshs. 10,000, they relied on the cases of **John Mureithi Kariuki v George Mwangi [2012] eKLR** and **David Ngunje Mwangi v The Chairman of the Board of Governors of Njiri High School [2011] eKLR.**

7. On loss of expectation of life, the appellants relying on the case of **Anne Njoki Mwangi v Paul Ndungu Muroki [2004] eKLR** proposed the figure of Kshs. 100,000. On loss of dependency, the appellants submitted that since the respondents failed to prove that the deceased earned Kshs. 1,000 per day, the court should use the minimum wage at the time which was Kshs. 3,347 per month.

8. The appellants thus urged the court to use a multiplicand of Kshs. 3,334, a dependency ratio of 1/3 since the deceased did not use all his earnings on his family and a multiplier of 20 years.

9. The appellants further submitted that the court ought to deduct the award under law reform act under the fatal accidents act to avoid a situation of double compensation as was held in the case of **Kiarie Shoe Stores Ltd v Hellen Waruguru Waweru [2013] eKLR.**

10. On special damages, they submitted that the respondents only proved Kshs. 89,100 out of the pleaded Kshs. 99,300.

C. Respondent's Submissions

11. On liability, the respondents submitted that the trial court did not err in apportioning liability as the testimony of PW2 and DW1 was clear on who was responsible for the accident.

12. On the multiplicand and dependency ratio adopted, the respondents submitted that the appellant failed to lead any evidence at all to dispute or contradict the claim under this head. It was submitted that where a person is employed and his salary is not determined, his income may be determined by reference to the government wage guidelines. Case of **NAIROBI HCC NO. 318 of 2012, Mary Njeri Murigi v Peter N. Macharia & Another** was relied on.

13. On dependency ratio, the respondents submitted that the deceased left two dependants, a fact that was not refuted or contradicted by the appellants.

14. On the multiplier of 36 years applied by the trial court, the respondents submitted that it was reasonable, appropriate and well founded in law as the deceased was 24 years at the time of his death whereas the retirement age is 60 years. The respondents submitted that this was never refuted or contradicted.

15. The respondents thus urged the court to dismiss the appeal with costs.

D. Analysis of Law

16. Having looked at the Appellant's grounds of appeal and the parties' respective submissions, I identify the issues for determination as follows:-

i. Whether the loss of dependency as calculated by the learned trial Magistrate was correctly done.

ii. If so, whether it is manifestly excessive and/or inordinately high in the circumstances requiring interference by this court and

iii. Whether in awarding the funeral expenses which had not been pleaded the trial court erred.

17. The principles on which an appellate court will disturb an award of damages are well settled: That an appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages.

18. It was held in the case of **Butt v. Khan Civil Appeal No. 40 of 1997** thus: -

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low."*** See also **Kemfro Africa Ltd and Another vs A.M. Lubia & Another (1982-1988)**

19. And **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia C.A. 21 of 1984 (1882-1988)1 KAR 727** where the said principles were also established.

20. From the evidence, it was evident from the unrefuted evidence of PW2 that the deceased was lawfully walking on the pedestrian pavements when DW1, from his testimony, admitted to be driving at 60 – 70km/hr, veered off the road and hit the deceased. DW1 in cross examination revealed that he did not take any action to avoid the accident.

21. This evidence remains uncontroverted and it leads me to conclude that the respondent proved his case on the balance of probability just as the learned magistrate found. I find that liability against the appellant had been proved.

22. Under the Law Reform act, In **Rose vs Ford, (1937) AC 826** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in **Benham vs Gambling, (1941) AC 157** it was further held that only moderate awards should be granted under this head for the following reasons:

> ***"In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not f loss of future pecuniary prospects."***

23. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

24. In the present case it is evident that the deceased died instantly. The awards of Kshs 10,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life were therefore reasonable and in order, and are upheld.

25. With regards to compensation under the Fatal Accidents Act and particularly on loss of dependency, it is clear from the proceedings of trial, that the respondents were not sure how much the deceased used to earn from the testimony by PW1. During his evidence in chief, PW1 stated that the deceased gave him and his wife Kshs. 15,000/= monthly whereas in cross examination he stated that he didn't have prove of the deceased's earning but that the deceased used to get Kshs. 1,000/= daily.

26. Due to the inconsistencies highlighted above, I am of the view that this was not a fit case for using the multiplier method on arriving at the damages payable. The trial Court should have awarded a global sum.

27. In **MWANZIA -VS- NGALALI MUTUA KENYA BUS LTD** and quoted in **ALBERT ODAWA -VS- GICHUMU GITHENJI NKU HCCA NO.15 OF 2003 [2007], KLR,** Justice Ringera was of the following view;

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

28. This reasoning was adopted in **MARY KHAYESI AWALO & ANOTHER -VS- MWILU MALUNGU & ANOTHER ELD HCCC NO. 19 OF 1997 [1999] EKLR** where Nambuye J., stated that: -

> ***"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."***

29. I am of the considered view that the award of the trial court on loss of dependency should be set aside and substituted with a lump sum.

30. Taking into account the rate of inflation, I rely on the case of **Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR where the deceased were 18 & 30 years old respectively. The court awarded Kshs. 700,000/= to each plaintiff for loss of dependency.**

31. This considered, I hereby award the respondent a global sum of Kshs. 1,000,000/= for loss of dependency.

32. On the issue of double compensation as raised by the appellant's counsel and having read the Court of Appeal decision in **Kemfro** (supra) I do not find the interpretation assigned by the Appellants' counsel on the issue acceptable. The counsels have argued *interalia* that: -

> ***"where a claim is made under both the Fatal Accidents Act and the Law Reform Act, and where the claimant succeeds in both, the award under the Law Reform Act must be deducted in full from the award made under the Fatal Accident Act as the deceased's estate cannot benefit twice."***

33. With respect, that is not the dictum of the **Kemfro case**. The brief passage in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein. I therefore find it necessary to quote in *extenso* what the Court of Appeal said in **Hellen Waruguru (supra)** on the matter.

34. The learned judges of appeal had this to say:

> **"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.

The 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 decindendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:-

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.

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.

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.

The deduction of the entire amounts made under the LRA in this case was erroneous and once again…….*"*

35. In my considered view, it would be a futile exercise for a court to labour to make an award under the Law Reform Act and then proceed to deduct it from the award under the Fatal Accidents Act. Effectively such deduction would nullify the benefits intended by the two Acts of Parliament for deserving claimants.

36. It is my finding that the trial court herein was entitled to make awards under both the Law Reform Act and the Fatal Accidents Act.

37. On special damages, it is trite law that for special damages to be awarded, they must be specifically pleaded and also strictly proved. It was held as follows in **Maritim & Another –v- Anjere (1990-1994) EA 312 at 316** in this regard:

"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

38. From the court record it is evident the respondents only proved special damages of which figure the learned magistrate rightly awarded Kshs. 89,150/=.

39. The upshot of the above is that the trial magistrate's judgement is varied in the following terms;

i.	Special Damages	Kshs. 89,150
ii.	Pain & Suffering	Kshs. 10,000
iii.	Loss of expectation of life	Kshs. 100,000
iv.	Loss of Dependency	Kshs. 1,000,000
	NET	**Kshs. 1,199,150**

40. The appeal is only partly successful.

41. The respondent is hereby awarded costs of the appeal as well as those of the court below.

42. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE