REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 22 OF 2018

SUKARU INSUTRIES LIMITED.....APPELLANT

VERSUS

LENSA AWUOR NYAGUMBA

MONICA AUMA OGUTU (suing as legal representative of

JOSEPH OTIENO OGUTU (DECEASED).....RESPONDENTS

(Being an appeal arising from the judgment and decree by Hon. Kamau C. M. Resident Magistrate in Rongo SRMC No. 220 of 2015 delivered on 27/02/2018)

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 Otieno Ogutu** (hereinafter referred to as **'the deceased'**), then aged 28 years old, lost his life. The Appellant herein was the owner of motor vehicle registration number KTCB 814H/ZE 2472 make Tractor as at 24/01/2015 when the accident occurred. The Respondents herein instituted **Rongo Principal Magistrate's Civil Case No. 220 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 Respondents. The court then assessed damages and it is the resultant assessment which prompted this appeal.

3. The Appellant raised seven grounds of appeal in their Memorandum of Appeal dated and evenly filed on 10/03/2018. 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. On its part, the Appellant had only one issue; that of the multiplicand. It submitted that the multiplicand of Kshs. 12,000/= adopted by the court was without any basis and that a figure of Kshs. 6,891/= would have been quite ideal as the minimum wage in 2015. He relied on the decisions of **David Kajogi M'mugaa v Francis Muthomi (2012) eKLR, 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. The Appellant prayed that the appeal be allowed accordingly.

4. Opposing the appeal, the Respondents 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 **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 **Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita & Another (2011) eKLR** 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) eKLR** was referred to. The First Respondent then urged this Court to dismiss the appeal. The Respondent further submitted against the alleged issue of double compensation under the Law Reform Act and the Fatal Accidents Act and urged this Court to find that the principle is not applicable in this case.

5. 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**.)

6. 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.'

7. 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.**

8. I will now deal with whether the monthly income of Kshs. 12,000/= was without any basis and ought to be interfered with. According to the Plaint the deceased was a loader. 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 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 for instance when the deceased is a minor among other cases.

9. As the deceased was an adult and a loader 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 came into operation on 01/05/2013 and was substituted by The Regulation of Wages (General) (Amendment) Order, 2015 (Legal Notice No. 117) which came into operation on 01/05/2015 since the deceased died in January 2015. The deceased would then fall under **Category (b) Column 3** thereof which provided for the wages for Turn boys 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. 13,468/50/=. Therefore, the figure of Kshs. 12,000/= adopted by the trial court, although lower than what was provided for and the court did not make that finding based on the Regulation of Wages (General) (Amendment) Order, 2013 as expected, remain fair and reasonable. The ground therefore fails.

10. 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 although the Appellant raised the issue in its Memorandum of Appeal it did not argue it in this appeal. However, since the Respondent submitted on it and for the purposes of laying the correct legal position on the issue this Court and for the completeness of the appeal, 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 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; 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."

11. 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. 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 Appellant's position on the deduction cannot stand.

12. I therefore find that the appeal is not merited. The same is hereby dismissed with costs.

13. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of March 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. Odongo instructed by the firm of Messrs. Khan & Associates Advocates for the Respondent.

Evelyn Nyauke – Court Assistant