



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 734 OF 2016**

**SIMON MURIITHI MUTAHI.....1<sup>ST</sup> APPELLANT**

**ULTRA VENTURES LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARY ACHIENG OYATH (Suing as the Legal representative of the estate of**

**HENRY OMONDI OYATH (Deceased).....RESPONDENT**

**(Being an appeal from the Judgment/Ruling delivered on 7<sup>th</sup> November, 2016**

**by Hon. Orange K.I (Senior Resident Magistrate) Chief Magistrate's Court**

**at Nairobi in CMCC No. 681of 2014).**

**JUDGMENT**

1. Vide a plaint dated 14<sup>th</sup> February, 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, Simon Mutiithi Mutahi and Ultra Ventures Limited were sued by the Respondent, Mary Achieng Oyath (Suing as the legal representative of the estate of Henry Omondi Oyath (Deceased) for damages arising out of a road traffic accident which occurred on 29<sup>th</sup> May, 2013 which resulted in the death of the deceased. The Respondent attributed the accident to the Appellants negligence as the owners of motor vehicle registration No. KBS 218D Isuzu matatu.

2. The Appellant filed a statement of defence and denied the claim. In the alternative, the Appellant blamed the accident as solely caused or substantially contributed by the negligence of the deceased.

3. On 20<sup>th</sup> September, 2016, the parties entered a consent judgment on liability at 70% against the Appellants and 30% against the Respondent.

4. The Respondent (PW1), an elder sister to the deceased proceeded to testify. Her evidence was that the deceased died the same day while undergoing treatment. She produced a Police Abstract, Death Certificate, Grant of letters of administration, copy of records from Kenya Revenue Authority on ownership of the motor vehicle and the receipt thereof as exhibits. She further testified that the deceased was not married, was healthy and worked with the Kenya Defence Forces at a salary of Ksh.24,000/= per month and supported his younger sister's four children and the Respondent catered for her own three children.

5. The trial court entered judgment in favour of the Plaintiff for a total sum of Ksh.1,329,556/= (subject to liability ) as follows:

(a) Pain and suffering Ksh.20,000/=

(b) Loss expectation of life Ksh.70,000/=

(c) Loss of dependency Ksh.1,239,556/=

(d) Interest and costs

6. The Appellants were dissatisfied with the said judgment and appealed to this court on grounds which can be summarized as follows:

**a) That the judgment was against the weight of the evidence.**

**b) That the wrong principles of the law were applied on the award under the Fatal Accidents Act and the Law Reform Act.**

**c) That the trial magistrate failed to consider the submissions made by the Appellants and disregarded the cited authorities.**

7. The Appellants prayed that the Appeal be allowed, the Decree and Judgment of the lower court be set aside and substituted with an order dismissing the entire suit with costs and/or the general damages be re-assessed and reduced.

8. During the hearing of the Appeal, the parties relied on written submissions. I have considered the said submissions.

9. This being the first appellant court, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

10. In the lower court, the Appellants submitted that there was no sufficient evidence to establish dependency. The Appellants relied on Section 4(1) of the Fatal Accidents Act Cap 32 Law of Kenya which provides as follows:

**“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”**

11. Reliance was placed on the persuasive case of **Elizabeth Gacoka w/o Kihara v Paul Ekulan & another [1987] eKLR** where it was held by

**“...the Fatal Accidents Act states that dependents are wife, husband, parent and children. The defendant urged the court to dismiss the present suit as the issue of dependency was not proved...The Fatal Accidents Act Cap 32 Laws of Kenya, does require that the full particulars of the deceased’s dependents be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency. The plaintiffs were under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also the duration of that dependency.”**

12. Other persuasive authorities cited were as follows:

**(a) Rose Kemunto Asiago v Hussein Dairy Ltd & another [2012] eKLR**

**(b) Samuel Njoroge Kamunya v Lucy Wambui Kibe [2004] eKLR**

**(c) Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suring as the Administrators of the Estate of the Late Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga Both Deceased) v World Vision Kenya & 2 others [2014] eKLR.**

13. The Appellants proposed the award herein as follows:

(a) Loss of expectation of life Ksh.100,000/=

(b) Pain & Suffering Ksh.80,000/=

(c) Special Damages Ksh.25,500/=

Total **Ksh.205,500/=**

14. Before this court the Appellants counsel relied further on the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia (1985) 1 KAR 727** where the general principle in assessment of damages was set out and the grounds upon which the Appellate court can interfere with the discretion of the lower court stated as follows:

**“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the**

**damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”**

15. The Appellants’ counsel essentially reiterated their submissions made before the lower court on the lack of sufficient evidence on dependency and cited the persuasive cases of **Aphia Plus Western Kenya & another v Mary Anyango Kadenge & another [2015] eKLR** and **Multiple Hauliers Co. Limited v David Lusa [2012] eKLR**.

16. The awards on loss of expectation of life, pain and suffering and special damages were not opposed.

17. The Respondent in the submissions before the lower court relied on the Fatal Accidents Act and the Law Reform Act and submitted for an award for loss of expectation of life, loss of earnings and lost years, pain and suffering plus special damages. The following persuasive cases were relied on

**(a) William Juma v Kenya breweries Ltd Nrb HCCC 3514/1985**

**(b) Laban Njogu Wainaina v Daniel Kariuki Nrb HCCC 4148/1989.**

**(c) Fredrick Gataka Mungai v George N. Kibunyi & another Nrb 1993/1990.**

**(d) Johanna Karonji v Abdallah Toto & another Nrb. HCCC 5158/89.**

18. The Respondent’s counsel prayed for an award of Ksh.100,000/= for pain and suffering, Ksh.200,000/= for loss of expectation of life, Ksh.2,239,556 (Ksh.24,343 x 23 x 12 x 1/3) for lost years and Ksh.2,300/= special damages and further relied on the following persuasive cases:

**(a) Pauline Kuloba Mwadime v Duncan M. Mwikamba Nrb No. HCCC 2774/ 1992**

**(b) Richard Chege Nganga v Solomon K Mbugua Nrb HCCC 4049/1990**

19. Before this court, the Respondent’s counsel supported the award on the loss of dependency. He further relied on Section 2 (1) of the Law Reform Act which he submitted provides for the causes of action subsisting against or vested in the deceased shall survive against or for the benefit of the estate of the deceased. The said provision states Section 2(1)

**Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate...”**

20. Further reliance was placed on the **Kemfro case (supra)**. It was argued that the Fatal Accidents Act and the Law Reform Act complement each other. The Respondent’s counsel reiterated the submissions made in the lower court and supported the judgment of the lower court.

21. The contestation herein is on the award made on the loss of dependency.

22. As stated by the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kiarie shoe Stores Ltd [2015] eKLR**:

**“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.”**

23. The trial magistrate did not err in awarding damages under the Law Reform and Fatal Accidents Act. The decision is buttressed by the Court of Appeal in the case of **Kemfro (supra)**

**“.....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 and so it appears the Legislature intended that it should be considered. Section 2(5) of the Law Reform Act says this:**

**“(5) the rights conferred by this part are for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased person by the Fatal Accidents Act... To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Act are “taken into account.” The Section says what should be taken into account and not necessarily deducted. For me it is enough 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 law or otherwise for him to engage in mathematical deduction as suggested by Mr. Barasa.”**

24. From the foregoing, this courts view is that the Law Reform Act and the Fatal Accidents Act complement each other. Once the two awards made under the said two Acts are taken into consideration, and that the beneficiaries to benefit are the same, that is sufficient. It is not meant to be a mathematical calculation.

25. In the African set up, siblings are part of the family expected to benefit materially from the deceased. The uncontroverted evidence adduced was that the deceased herein was financially assisting his younger sister. The sister's children were therefore dependants of the deceased (See for example **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & other (1982-88) 1KAR 946** and **Mary Kerubo Mabuka & Newton Mucheke Mburu & 3 others [2006] eKLR**).

26. In the upshot, I see no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered in Nairobi this 16<sup>th</sup> day of May, 2019

**B. THURANIRA JADEN**

**JUDGE**