



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL APPEAL NO. 31 OF 2018**

**TITUS NDUNG’U NJUGUNA.....1<sup>ST</sup> APPELLANT**

**CHARPENEL ENTERPRISES.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**HANNAH WARUGURU GICHUHI & ELIZABETH WANJIRU NDUNG’U(sued as the  
legal representative of the estate of) JOSEPH NDUNG’U MUIRURI.....RESPONDENTS**

**(Being an Appeal from the Judgment of Hon. A. Ndung’u (RM) in the Principal Magistrate’s Court at Makindu Civil Case No.218  
of 2016, delivered on 22<sup>nd</sup> February 2018)**

**JUDGMENT**

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *Joseph Ndung’u Muiruri* pursuant to a fatal road accident on 11/08/2015 along the Nairobi-Mombasa road. They also prayed for special damages, costs of the suit and interest.

2. There was a 3<sup>rd</sup> Defendant in the matter (*Kyooga Hauliers Ltd*) which is not a party in this appeal.

3. The Appellants filed a joint statement of defence denying the claim. Before the hearing commenced a consent judgment was entered on liability against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the ratio of 85:15.

4. Later, judgment was delivered in favour of the Respondents in the sum of Kshs.1,481,610/= made up as follows:

Pain & suffering.....Kshs.100,000/=

Loss of expectation of life.....Kshs.100,000/=

Loss of dependency.....Kshs.1,296,000/=

Special damages.....Kshs.85,610/=

Less

Loss of expectation of life.....Kshs100,000/=

5. The trial magistrate further apportioned liability in the ratio of 50:50 between the Appellants and 3<sup>rd</sup> Defendant.

6. Aggrieved by the judgment, the Appellants filed this appeal listing 4 grounds stating that the learned trial magistrate erred in law and fact by;

a. Using Kshs.18,000/= as the multiplicand when calculating loss of dependency when there was no proof of earning given during

the hearing.

- b. Relying on a multiplier of nine (9) years while calculating loss of dependency when the same was excessive in the circumstances.
- c. Failing to consider in totality the submissions filed on behalf of the Appellant and the legal authorities submitted by the defence in support thereof thus arriving at a wrong decision.
- d. Relying on the Respondent's Plaintiff's evidence against the Appellant/Defendant's evidence on a wrong basis.

7. The Respondents filed a cross-appeal raising 3 grounds stating that the learned trial magistrate erred in law and fact by;

- a. Apportioning liability as she did when that issue had already been determined by consent of the parties.
- b. Failing to take into account a relevant issue and taking into account an irrelevant issue while addressing the issue of multiplier.
- c. Failing to appreciate the consideration in law when making awards under the Law Reform Act and Fatal Accidents Act respectively.

8. The appeal was disposed of by way of written submissions.

### **The Appellants' case**

9. The Appellants reiterate their submissions in the trial court that there was no proof of earnings as the Respondent did not produce a pay slip or letter from the employer.

10. They also submit that under the LRA, damages are awardable for pain and suffering, lost years (which is similar to loss of dependency under the FAA) and special damages. They contend that while it was indeed proved that the deceased was a licensed driver, that cannot be sufficient proof that he was working as a driver. That even if it was to be assumed that the deceased worked as a driver, there is still no proof of how much he was earning. In the circumstances, it is their submission that the minimum wage at the time of the accident should have been adopted as the multiplicand.

11. With regard to the multiplier, they submit that the deceased was 53 years old and a multiplier of seven (7) years was most appropriate. They rely on the case of **Milicent Atieno Ochuonyo –vs- Katola Richard (2015) eKLR** where a multiplier of 7 years was adopted for a deceased who died aged 53 years.

12. They submit that the deceased died immediately after impact and as such, the award for pain and suffering should have been 10,000/=. They rely on the case of **Tessie Margaret Kariuki & anor –v- Shaklanga kwa Jirongo & anor (2014) eKLR**.

13. The Appellants do not dispute the award of Kshs.100,000/= for lost years but contend that the award under the LRA should be deducted from the award under the FAA to avoid double compensation. Accordingly, they urge this Court to disturb the lower court's judgment.

### **The Respondents' case**

14. The Respondents submit that in awarding damages, the learned trial magistrate exercised her judicial discretion using the evidence placed before her and cannot therefore be faulted. They also submit that the Appellants have not shown that the exercise of discretion was improper. They rely on *inter alia* **Nairobi C/A Civil Application No. 21 of 1999; Samken Ltd & Anor –vs- Mercedes Sanchez** where the Court of Appeal held that;

“The burden of proving that a single judge in exercising unfettered discretion conferred by rule 4 of the Court of Appeal rules has exercised his discretion improperly lies on the person challenging the same”.

15. They also relied on **Nairobi Court of Appeal Civil Application No. 204 of 1998; Peter Mburu Echaria –vs- Priscilla Njeri Echaria** where the Court stated that;

“...we have said on numerous occasions that the discretion conferred on a single judge under rule 4 is exercised on behalf of the Court and on a reference from his decision, the full Court cannot interfere with that exercise unless it is shown;

- a. That in the exercise of its discretion, the single judge took into account irrelevant matters.
- b. That he did not take into account a relevant factor.
- c. That he misapprehended the law applicable.
- d. That the decision is plainly wrong”

16. They submit that the Appellants have failed to persuade this court that the trial magistrate was wrong in her finding on the issue of

quantum.

17. With regard to the cross-appeal, they submit that it was erroneous for the trial magistrate to deduct the award for lost years as the law allows for the award of damages under both the LRA and FAA. They rely on **Kisumu Court of Appeal, Civil Appeal No. 91 of 1997; South Nyanza Sugar Co. Ltd –vs- James Martin Matoke.**

18. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

#### **Analysis and determination**

19. Having considered the grounds of appeal and cross- appeal, the rival submissions and entire record, I find the following issues to arise for determination;

a. Whether the trial court erred by further apportioning liability in light of the consent by the Appellants and Respondents.

b. Whether the quantum of damages should be disturbed.

20. I will proceed to deal with the issues under the distinct heads.

#### **a. Whether the trial court erred by further apportioning liability in light of the consent by the Appellants and Respondents.**

21. The 3<sup>rd</sup> Defendant was evidently not a party to the consent indicated above. It cannot therefore be said that the issue of liability was conclusively determined by the parties, since the 3<sup>rd</sup> Defendant was never discharged by the consent.

22. The Respondents pleaded that the deceased was travelling as a passenger in motor vehicle KBP 396U which collided with KBN 794X thus causing fatal injuries to the deceased. PW1, the only witness in the matter testified that her husband (*deceased*) was a passenger and died after a collision between the two vehicles.

23. In her judgment, the learned trial magistrate opined that the defendants were to blame for the accident and even though they blamed each other, none of them substantiated their position, by way of evidence.

Consequently, she apportioned equal liability between the 1<sup>st</sup> & 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant.

24. Having re-evaluated the evidence on record, I am inclined to agree with the learned trial magistrate. In the absence of evidence showing that one of the defendants was more to blame than the other and in light of the fact that the 3<sup>rd</sup>

Defendant was not party to the consent, apportioning equal liability was the just thing to do in the circumstances.

#### **b. Whether the quantum of damages should be disturbed.**

25. As rightly submitted by the Respondents, awarding damages is largely an exercise of judicial discretion which the appellate court should be slow to interfere with.

26. With regard to the multiplicand, PW1 testified that the deceased was employed as a driver by the 2<sup>nd</sup> Appellant and earned Kshs.18,000/= per month. The learned trial magistrate observed that indeed there were no documents adduced to prove the earnings. She however adopted the said amount as the multiplicand and relied on the Court of Appeal decision in **Jacob Ayiga Maruja & Anor –vs- Simeon Obayo (2005) eKLR** which was to the effect that production of documents is not the only way to prove earnings. The cited authority is binding on this court.

27. In their submissions before this court, the Appellants have contested the occupation of the deceased as a driver but in their submissions before the trial court, they submitted that a minimum wage of Kshs.15,239/= should have been adopted. According to the **Regulation of wages (General) (Amendment) Order, 2015**, that was the monthly minimum wage for a driver of a medium sized vehicle in all other areas apart from Nairobi, Mombasa and Kisumu cities. In essence, that submission was a concession that indeed, the deceased's occupation was that of a driver.

It is therefore my considered view that the evidence of PW1 and the concession by the Appellants proved on a balance of probabilities that the deceased was a driver.

28. Pw1, who was his wife testified that the deceased earned Kshs.18,000/= p.m. The 2<sup>nd</sup> Appellant who was the deceased's employer should have told the court what his salary was but chose not to give any evidence to assist the court on this issue of the salary. I find that the testimony of Pw1, on the deceased's salary remains unchallenged. The learned trial magistrate did not therefore err in adopting Kshs.18,000/= as the multiplicand, which figure is slightly below the minimum wage for a driver of a medium sized vehicle in Nairobi, Mombasa and Kisumu.

29. With regard to the multiplier, the learned trial magistrate adopted 9 years which the Appellants say is excessive. They proposed 7 years. In **Kisumu Civil Appeal No. 157 of 2002; Jacob Ayiga Maruja & Anor –vs- Simion Obayo**, the deceased was 53 years old and the Court of Appeal approved a multiplier of 8 years that had been adopted by the trial court. In **James Maluu Kiilu –vs- Lawrence Githinji & another [2015] eKLR**, a multiplier of 10 years was adopted for a 54-year-old deceased. The deceased herein was aged 53 years at the time of his death.

30. Having looked at other decided cases, it is my considered view that the multiplier adopted by the learned trial magistrate was within an acceptable range, and should not be interfered with by this court.

31. As for pain and suffering, I do not find anything in the evidence to show that the deceased died immediately after impact as submitted by the Appellants. In concluding that the deceased suffered a lot of pain before death, the learned trial magistrate referred to the cause of death in the death certificate *to wit*;

“Cardiopulmonary collapse due to severe chest trauma due to road traffic accident”

32. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.

Evidently, the death certificate does not indicate for how long the deceased suffered. However, in **Premier Dairy Limited –vs- Amarjit Singh Sagoo & Anor (2013) eKLR**, The Court of Appeal upheld an award of Kshs.75,000/= in respect of a deceased who died on the spot. This authority guides me in taking the view that the award given by the learned trial magistrate was not inordinately high as to amount to an erroneous estimate, since it has not been shown by way of evidence when the deceased died. What is clear is that the pain was extreme and unbearable.

33. As for the award under the LRA and FAA, the Appellants support the deduction while the Respondents contend that it is legal to award under both Acts. I think it is imperative to reproduce the explanation that was given by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –vs- Kiarie Shoe Stores Limited [2015] eKLR**. The learned Judges expressed themselves as follows:

“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 issue 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 Act*; 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 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.”

34. From the above, it is clear that an estate of a deceased person can get awards under both Acts, and that there is no requirement to engage in a mathematical deduction. Further, it is not erroneous for a Judicial officer to effect the deduction especially where the beneficiaries under both regimes are the same. Such deduction however confirms that the trial court did physically consider the award already made. Such consideration may however be made without any mathematical deduction.

35. In this case, there is no dispute that the beneficiaries under both regimes are the same. It is therefore my considered view that the deduction of the award for lost years took into account this fact hence not erroneous, and this balanced the award by the lower court.

**36. In conclusion, I find no merit in both the appeal and cross appeal which are hereby dismissed. Each party to bear its own costs of the appeal. The judgment by the lower court is upheld.**

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 16<sup>TH</sup> DAY OF MAY 2019, IN OPEN COURT AT MAKUENI.**

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**H. I. ONG'UDI**

**JUDGE**