REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 123 OF 2018

WONDER COMPANY LTD.....1ST APPELLANT

LABAN MWANGANGI KITHAMO.....2ND APPELLANT

-VERSUS-

KALONDU MUNGUTI &

JOSEPH KIOKO MUNGUTI

(Suing as the legal representative of the estate of)

JOSEPH NDUNG'U MUIRURI.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. M.M Nafula (SRM) in the Senior

Resident Magistrate's Court at Tawa, Civil Case No.25 of 2016, delivered on 26th April 2017)

JUDGMENT

Background

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 *Jackson Maingi Munguti* pursuant to a fatal road accident on 13/02/2016 along the Tawa-Mbumbuni road. They also prayed for special damages, costs of the suit and interest.

2. The Appellants denied the entire claim. On the hearing date the parties recorded a consent on liability in the ratio of 75:25 in favour of the Respondents. It was further agreed that assessment of quantum be by written submissions, with the Respondents producing supporting documents without calling the makers.

3. The court in its judgment awarded the Respondents Kshs.2,496,340/= broken down as follows:-

Pain & suffering…….Kshs.300,000/=

Loss of expectation of life……Kshs.300,000/=

Loss of dependency……..…..Kshs.1,600,000/=

Special damages……..…Kshs.296,340/=

Less 25%

Net sum ……..…Kshs.1,872,255/=

4. Aggrieved by the award, the appellants filed this appeal and listed 12 grounds which I have summarized as follows;

a) ***That*** *the learned magistrate erred in law and fact by awarding damages of Kshs.2,496,340/= which award was excessive and without any legal and/or evidential justification.*

b) ***That*** *the learned magistrate erred in law and fact by failing to appreciate the long established principle of stare decisis thereby arriving at an erroneous finding.*

c) ***That*** *the learned magistrate erred in law and fact by disregarding the defendant's submissions.*

5. It was agreed that the appeal be disposed of by way of written submissions.

The Appellant's Case

6. On pain and suffering, Mose, Mose & Millimo Advocates for the Appellants argued that the deceased died instantly and as such, an award of Ksh.10,000/= was reasonable because he did not suffer for long. They relied on **James Gakinya Karienye & Anor –vs- Perminus Kariuki Githinji (2015)** eKLR to support this.

7. On loss of expectation of life, they submitted that the deceased was 40 years old and close to retirement hence an award of Kshs.80,000/= would have been sufficient.

8. With regard to the award under the FAA, they submitted that there was no evidence to show that the deceased was engaged in any income generating activity or that he was skilled in any profession. Further that there was no form of income thus making it difficult for the court to assess the deceased's earnings. Counsel contended that the Respondent did not show that the deceased was survived by two brothers.

9. Counsel while relying on the case of **Francis Wainaina Kirungu –vs- Elijah Oketch Nairobi HCC No. 191 of 2013** submitted that the amount awarded under the LRA should be deducted from the total award.

10. On special damages, they submitted that the Respondents produced an invoice of Kshs.272,490/= from Kenyatta National Hospital (KNH) but there was no receipt to show that

the amount was actually paid. They contended that this amount should be disallowed.

The Respondents' Case

11. In supporting the award of Kshs.300,000/= M/s Mulyungi and Associates for the Respondents submitted that the deceased was hospitalized for three weeks before succumbing to his injuries. They relied on **Benedeta Wanjiru Kimani –vs- Changwon Cheboi & Anor** where Justice Anyara Emukule awarded Kshs.200,000/= for a prolonged period before death. They also relied on **Beatrice Mukulu Kang'uta & Anor –vs- Silverstone Quarry Ltd & Anor (2016) eKLR** where the deceased died on the day of the accident and the Court made an award of Kshs.200,000/=.

12. Counsel while relying on the case of **Johness Eshapaya Olumasayi & Anor –vs- Minial H. Lalji Koyedia & Anor HCCC No. 368 of 2006** submitted that the court had been properly guided in the award for expectation of life. In defence of the dependency ratio of 2/3 counsel submitted that a mother is a legally recognized dependant. They also argued that the deceased's retirement could not be tied to the official age of 60 years because he was a casual worker. They relied on **Meru HCCC No. 133 of 2008; VKM –vs- Alfonso Muteris & County Council of Tharaka** where a multiplier of 17 years was used.

13. The Respondents agreed that no document was produced to prove income but were quick to add that the court applied the minimum wage of Kshs.10,000/= correctly.

Counsel submitted that the special damages were proved through the invoice and receipt from Kenyatta National Hospital.

14. This is a first appeal and this court has the duty to reconsider and reevaluate the evidence on record and reach its own conclusion. The court must bear in mind that it did not have the benefit of seeing or hearing the witnesses. It is noted that there is no witness who testified in this case**.** See **Selle & Another –vs- Associated Motor Boat Company Limited & Others (1968) E.A 123.**

Determination

15. Having considered the grounds of appeal, the rival submissions and entire record, the only issue for determination, in my view, is whether the quantum of damages should be disturbed.

16. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In **Butt –vs Khan (1977)1KAR** it was held that;

> *"An appellate Court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low.*

17. In respect to damages under the Law Reform Act and with reference to pain and suffering, the police abstract confirms that the accident occurred on 13/02/2016 and the death certificate shows that the deceased died on 02/03/2016. Contrary to the Appellants' submissions, the deceased died approximately three weeks after the accident. It is trite that the consideration to be borne in mind while awarding damages under this head is the nature of injuries and the time that a person suffers before succumbing to injuries.

18. In addition to the authorities cited by the parties, I have looked at **Julian Njeri Muriithi –vs- Veronica Njeri Karanja & another [2015] eKLR** where death occurred after 3 days and Justice Onyancha awarded kshs 200,000/=. In **E M K & another –vs- E O O [2018] eKLR,** death occurred after about 2 months and Justice P. Nyamweya awarded ksh 150,000/=. In **Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah [2016] eKLR,** death occurred after one day and Justice Janet Mulwa awarded Kshs.500,000/=.

19. Taking all these into account plus the circumstances of this case, I find the award of Kshs.300,000/= not to be inordinately high. I do not find any justification for interference with the award by this court.

20. On loss of expectation of life, the conventional award is kshs 100,000/=. In **Benham –vs- Gambling, (1941) AC 157,** it was 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 loss of future pecuniary prospects."*

21. It is therefore my considered view that the award of Kshs.300,000/= given by the trial court with no reasonable explanation was on the higher side and should be substituted with Kshs.100,000/=.

22. On damages under the Fatal Accidents Act and with regard to the multiplicand, the parties agree that indeed there was no proof of income and the trial Court was right to resort to the minimum wage. The point of departure is whether the correct minimum wage was applied. The deceased having died on 02/03/2016, the applicable minimum wage is as provided in the **Regulations of wages (General) (Amendment) Order, 2015** which came into operation on 01/05/2015.

23. According to the death certificate, the deceased was a casual worker and a resident of Makueni. Accordingly, his category was that of a general laborer from *'all other areas'* and entitled to a minimum wage of Kshs.5,844.20/=. The multiplicand of Kshs.10,000/= adopted by the trial court has no basis, and is therefore erroneous.

24. With regard to the multiplier, the deceased was 40 years old. In adopting a multiplier of 20 years, the learned trial magistrate opined that the deceased would have worked past the normal retirement age as a casual laborer. The Appellant did not submit on this issue and there is no specific complaint about it in the memorandum of appeal.

25. I have nevertheless looked at the trends in decided cases. In **RMM & Anor –vs- FKM (2013) eKLR** a multiplier of 15 years was used for a 40-year-old deceased. In **Benjamin K. Koech –vs- Robert T. Ngetich & Anor [2013] eKLR,** a multiplier of 20 years was used for a 40-year-old deceased. It is therefore my considered view that the multiplier used by the trial court is within an acceptable range.

26. As for the dependency ratio, the recognized dependants under section 4(1) of the FAA are; wife, husband, parent(s) and child (ren) of the deceased. It was therefore erroneous for the learned trial magistrate to consider the two brothers of the deceased as dependants when there was no evidence to show that they depended on him. The only dependant was his mother and I am of the view that a dependency ratio of 1/3 is reasonable.

27. The award for loss of dependency should therefore work out as follows; 5,844.20 x 12 x 20 x 1/3 = 467, 536/=.

28. As for the special damages, the amounts pleaded and allowed by the learned trial magistrate were as follows;

Police abstract	200/=
Motor vehicle search	500/=
Medical & funeral expenses	275,490/=
Death certificate	150/=
Obtaining letters of administration	20,000/=
Total	**296,340/=**

29. I have scrutinized the invoice from KNH and note that it indicates the invoice amount as 272,490/=. The same amount is also indicated in the *'Total receipts'* section which means that the amount was actually paid. It is therefore my view that the amount was pleaded and proved as required. That means that the pleaded funeral expenses were Kshs 3,000/= *(275,490-272,490)*, a figure which is not realistic. Being a special damage the court will confine itself to that.

30. Apart from the motor vehicle search, no receipts were produced for the other items and this means that strict proof was not achieved. A receipt from the court should have been produced in respect to the letters of administration.

31. As for the deduction of the award under the LRA, I find it 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."***

32. From the above, it is clear that an estate of a deceased person can get awards under both Acts, that there is no requirement to engage in a mathematical deduction and that it is not erroneous for a Judicial officer to effect the deduction especially where the beneficiaries under both regimes are the same. The court has to take into consideration all the circumstances, of each case

33. In this case, paragraph 7 of the plaint pleads as follows;

> *"As a result of the said accident, the deceased's estate, the plaintiff and other beneficiaries suffered loss and damage and…"*

34. On a balance of probabilities, I deduce that there are other beneficiaries who will benefit from the award under the LRA in addition to his mother who is getting compensation from the FAA. It is therefore my view that the learned trial magistrate did not err by not effecting the deduction.

35. Upon considering all I have stated above, I find the award to be as follows;

Pain & suffering	300,000/=
Loss of expectation of life	100,000/=
Loss of dependency	467,536/=
Special damages	275,990/=
Total	**1,143,526/=**
Less 25%	285,881.50/=
Net award	**857,544.50/=**

36. The result is that the appeal succeeds. **The judgment by the trial court is set aside. It is substituted with a judgment for Kshs.1,143,526/= less 25% contribution bringing the net figure to Kshs.857,544/50, for which judgment is entered with interest at court rates from date of filing suit. The Respondent will get 75% of the costs in the lower court and in the High Court.**

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 4TH DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE