



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 259 OF 2017**

**AINU SHAMSI HAULIERS LTD.....APPELLANT**

**-VERSUS-**

**ANASTACIA NDINDA MWANZIA & LUCY IRENE MWENDWA**

**(Suing as the administrators of the estate of)**

**HARRISON MWENDWA KAVILI.....RESPONDENT**

*(Being an Appeal from the judgment of Hon. P.M.Wambugu (SRM) in the Senior Resident Magistrate’s Court at Kilungu Civil Case No.254 of 2016, delivered on 19<sup>th</sup> September 2017)*

**JUDGMENT**

1. The Respondents filed a suit in the lower court seeking general damages for pain and suffering, loss of life and lost years on behalf of the Estate of **Harrison Mwendwa Kavili** pursuant to a fatal road accident on **23/11/2013** along the **Nairobi-Mombasa highway** at **Ngokomi** area. They also prayed for special damages, costs of the suit and interest.

2. The Appellant filed a statement of denying the claim. The matter was heard and judgment delivered. The learned trial magistrate apportioned liability in the ratio of 80:20 in favour of the Respondent. On quantum, he awarded Ksh.s 510,420/= made up as follows;

<b>Pain &amp; suffering.....</b>	<b>Kshs.50,000/=</b>
<b>Loss of expectation of life.....</b>	<b>Kshs.100,000/=</b>
<b>Loss of dependency.....</b>	<b>Kshs.480,000/=</b>
<b>Total.....</b>	<b>Kshs.630,000/=</b>
<b>Less 20% contribution</b>	
<b>Net.....</b>	<b>Kshs.504,000/=</b>
<b>Add Special damages.....</b>	<b>Kshs.6,420/=</b>
<b>Total.....</b>	<b>Kshs.510,420/=</b>

3. Aggrieved by the decision, the Appellant filed this appeal and listed the following 3 grounds;

a) *That the learned Magistrate erred in law and fact by awarding damages under the Law Reform Act as well as under the Fatal Accidents Act against the well laid down principles.*

b) *That the learned Magistrate erred in law by adopting a multiplicand of Ksh.s.20,000/= without proof of income.*

c) *That the learned Magistrate erred in law and facts in apportioning liability and failed to take into account the judgment of the court in **Makindu PMCC No. 117 of 2014** which was the test suit where the issue of liability was settled.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellant agrees that ground No. 3 is spent as the issue of liability was determined in a judgment delivered by this court on 16/05/2019 in HCCA No.13 of 2018. Accordingly, this appeal is purely on quantum.

#### **The Appellant's Submissions**

6. The Appellant submits that that the general damages awarded were excessive and against the laid down principles of law and general awards in similar matters.

7. On ground (a), the Appellant does not contest the award for loss of dependency under the Fatal Accidents Act (FAA). He however contends that the award under the Law Reform Act (LRA) should be deducted to avoid double compensation as the beneficiaries under both Acts are the same. It relies *inter alia* on **Estate of EMM (deceased) (2015) eKLR** where it was held that;

***“the trial magistrate did not consider that the award under loss of expectation of life was to be deducted from the grand total once an award for lost years was made and therefore erred in this respect when it came to the computation of damages hence deducted Kshs.120,000/= from the total sum of damages...”***

8. On ground (b), the Appellant submits that the pleaded income of Kshs.20,000/= was not proved and as such, the learned trial magistrate erred by adopting the amount as the multiplicand. That PW3 only stated the deceased's income as the driver of the ill fated bus but did not produce any payslips. It relies on **Kisii Civil Appeal No. 68 of 2005 (2011) eKLR; Nyamira Tea Farmers Sacco –vs- Wilfred Nyambati Karaita & anor** where it was held that;

***“In absence of income, the trial magistrate ought to have reverted to regulation of wages (General amendment order 2005...)”***

#### **The Respondents' Submissions**

9. The Respondents submit that there is no double compensation as the deceased's dependants under both Acts are different. They rely on **Nyeri Civil Appeal No. 22 of 2014; Hellen Waruguru Waweru (suing as the legal representative of) Peter Waweru Mwenja –vs- Kiarie Shoe Store Ltd** where the Court of Appeal stated that;

***“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 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. 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”***

10. On the issue of proof of income, they rely on **Civil Appeal No. 167 of 2002; Jacob Ayiga Marija & Anor –vs- Simeone Obayo** where it was held that;

***“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”***

11. They also submit that the minimum wage applicable for a heavy commercial driver was Ksh.22,070/= and since the deceased had long experience in driving, his salary was bound to have gone beyond the Ksh.20,000/= awarded. They urge the court to maintain the award of the trial Court.

12. 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 it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See the case of **Selle & Anor –vs- Associate Motor Boat Co. Ltd 1968 EA 123**.

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

#### **Whether the Quantum of damages should be disturbed**

14. 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.***

15. The submissions of the Appellant are misleading in that; it states that the award for loss of dependency is not contested but goes on to contest the multiplicand adopted by the trial Court. I will nevertheless deal with the issue of the multiplicand as it has been raised in the grounds of appeal.

16. The income of the deceased was pleaded as Kshs.20,000/= and PW3, the deceased's wife testified that the deceased was a bus driver earning Kshs.20,000/= per month out of which he would give her Kshs.15,000/= for upkeep and save the rest.

It is true that PW3 did not produce any evidence to prove the deceased's income but proof of income or lack of it should be dealt with on a case by case basis in line with the Court of Appeal decision in the **Jacob Ayiga case (supra)**. It is however generally accepted that where income is not proved, Courts should resort to the minimum wage.

17. It is not in dispute that the deceased was the driver of the bus that was involved in the accident. This fact was pleaded in paragraph 5 of the plaint and there was no express denial by the Appellant. A bus is certainly in the category of heavy commercial vehicles.

18. The **Regulation of wages (General)(Amendment) Order 2013 which came into operation on 01/05/2013**, prescribed the minimum wage for drivers of heavy commercial vehicles within Nairobi, Mombasa and Kisumu to be Kshs.22,070/= per month. In my view, this is the amount that should have been adopted as the multiplicand but since there is no cross appeal, the amount adopted by the trial court shall be maintained.

19. On the issue of deducting the award under the LRA, it is now trite that where beneficiaries are not the same under both regimes, the estate of a deceased person can get awards under both Acts.

20. The beneficiaries indicated in the plaint are the wife and children of the deceased. The recognized beneficiaries of a deceased's estate, under Section 4(1) of the FAA, are wife, husband, parent and child of the deceased.

21. In this case, it is clear that the beneficiaries under both regimes are the same and it was the duty of the trial court to deduct the award for lost years, as it would amount to double payment. I find the correct breakdown of the award to be as follows.

<b>Pain &amp; suffering.....</b>	<b>Kshs.50,000/=</b>
<b>Loss of dependency.....</b>	<b>Kshs.480,000/=</b>
<b>Loss of expectation of life .....</b>	<b>Kshs.100,000/=</b>
<b>Total.....</b>	<b>Kshs.630,000/=</b>
<b>Less loss of expectation of life .....</b>	<b><u>Kshs.100,000/=</u></b>
<b>Total.....</b>	<b>Kshs.530,000/=</b>
<b>Less 20% contribution.....</b>	<b><u>Kshs.106,000/=</u></b>
<b>Kshs.424,000/=</b>	
<b>Add special damages .....</b>	<b>Kshs. 6,420</b>
<b>Net.....</b>	<b>Kshs.430,420</b>

22. I therefore set aside the judgment on 19<sup>th</sup> September, 2017 and substitute it with a judgment for Kshs. 430,420/= (*Four hundred and thirty thousand, four hundred and twenty shillings*) plus costs in the lower court and half costs in the High Court. There shall be interest on the decretal sum from 19<sup>th</sup> September, 2017.

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 11<sup>TH</sup> DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.**

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**H. I. ONG'UDI**

**JUDGE**