REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 5 OF 2017

KARANJA NDIRANGU...APPELLANT

VERSUS

WILSON P KARIUKI (administrators of the estate of

LILIES GATHUMBI...RESPONDENT

(An appeal from the original judgment in the Chief Magistrate's Court at

Murang'a CMCC No. 180 of 2014 delivered by A.K. Mwicigi, PM on 3rd March 2017).

JUDGMENT

1. The Appellant was the Defendant in Murang'a Chief Magistrate's Civil Case No.180 of 2016. The Respondent was conversely the Plaintiff. In an amended plaint filed on 28th July 2015 the latter sued the Appellant seeking judgment for special damages amounting to Kshs.110,325.00, general damages under the Law Reform Act and Fatal Accident Act, Costs and interest and any other remedy the Court may deem fit and just to grant.

2. The Respondent brought the suit in his capacity as the legal representative of the estate of Lilies Nyambura Gathumbi, deceased, who was travelling as a passenger in motor vehicle registration No.KAR 508N Toyota Station Wagon near Wathenge Trading Centre along Kiriaini - Murang'a Road within Murang'a County. The Appellant was sued in his capacity as the registered owner of the vehicle which was involved in an accident on 5th day of March, 2013.

3. In the Court below no evidence was adduced. Instead, parties recorded a consent on 16th September, 2016 in the following terms:-

> (a) *The documents attached to the amended Plaintiff's list of documents dated 20th day of July, 2015 be admitted without calling the makers..*
>
> *(b) Pain and suffering to be agreed at Kenya Shillings Twenty Thousand (Kshs.20,000.00) only.*
>
> *(c) Loss of expectation agreed at Kenya Shillings Seventy Thousand (Kshs.70,000.00) only.*
>
> *(d) The honourable Court to assess damages on dependency ratio, Multiplicand and computation of damages for loss of dependency.*
>
> *(e)Parties to file written submissions on multiplicand and dependency.*
>
> *(f) Matter to be mentioned on 14th day of October 2016.*

4. The trial Court accordingly proceeded to assess damages on dependency ration of 2/3 and applied a multiplicand of six years. Thus, damaged under the Fatal Accidents Act were assessed at Kshs.103,170 x 2/3 x 6 x 12 = Kshs.4,952,160.00. The figure of Kshs.103,170.00 was arrived at as a daily income of Kshs.3,439.00 which added to Kshs.103,107.00 per month. The total income was deducted by 15% contribution which was Kshs.742,824.00 leaving a net award of Kshs.4,209,336.00. In addition a total of Ksh.105,075.00 was awarded as special damages which were pleaded and proved. In sum judgment was awarded as follows:

(a) Pain and suffering – Kshs.20,000.00

(b) Loss of expectation life Kshs.70,000.00

(c) Loss of dependency Kshs.4,952,160.00

(d) Special damages – Kshs.105,075.00

The above sums were to be reduced by 15% contributory negligence giving a net total award of Kshs.4,209,336.00

5. The Appellant being aggrieved by the trial court's judgment filed the instant appeal citing the following grounds:

a)*That the trial magistrate erred in law and in fact in entering judgment where there was no evidence that proved that the deceased's income was Ksh 103,170/= thus the award was excessive in the circumstances.*

b) That the trial magistrate erred in law and in fact in adopting the said amount as monthly earnings and further failed to take into account the pleaded amount as per paragraph 7 of the amended plaint dated 20/7/15 where the amount was allegedly stated as Ksh 3,439/= .

c)That he erred in law and in fact in adopting a multiplier of 6 years and he failed to take into account the vicissitudes of life.

d) That the special damages amount of Ksh 105,075 /= was excessive and unwarranted thereof and granted in disregard to trite law that special damages must be pleaded and proved strictly.

e) Also that the findings were against the weight of evidence adduced.

f)The magistrate erred in introducing new evidence without being prompted by parties.

g)He did not uphold the principle that parties are bound by their pleadings.

6. Before this Court parties equally agreed on judgement on liability to the ration of 85:15 in favour of the Respondent. Parties were thereafter to file written submissions on quantum.

7. The duty of this Court therefore is simple; to assess the quantum of damages payable to the Respondent.

Damages under the Law Reform Act

Damages under this head were already agreed before the trial Court and there no indication that the same should be upset by this Court. I therefore confirm them as under;

(a) Pain and suffering – Kshs.20,000.00

(b) Loss of expectation of life Kshs.70,000.00

Damages under the Fatal Accident Act

8. It is trite that dependants are entitled for loss of dependency. In the amended plaint at paragraph 7 the deceased was indicated to have left 12 dependants amongst them the Respondent who was her husband and the rest being her children. As at the time of her death the deceased was aged 64 years and was in good health. She was self-employed having been engaged in business. Her source of income was demonstrated by record of her earnings which were admitted in evidence by consent in the list of documents attached to the amended plaint.

9. In the Plaintiff's submissions filed on 3rd September it is argued that the amount of income Kshs.3,439.00 which was generally agreed reflected an income of a month and not daily. According to the Appellant the learned trial magistrate erred in applying this figure to reflect a daily income of the deceased. On the other hand, according to the Respondent the daily work book annexed to the amended plaint was a clear testament that the deceased kept a record of her daily earning from milk distribution. This figure was generally agreed as at Kshs.3,439.00.

10. Back to the consent of the lower Court the work book which reflected the deceased's earnings was adduced in evidence by consent. A perusal of the same shows that the record was for the period between 15th January, 2013 and 2nd March, 2013. This was within the period the deceased died as the accident occurred on 5th March 2013. The records were made on a daily basis and reflected varied figures sometimes as low as Kshs.2,650.00 and a high of about Kshs.4,200.00. What is not clear is how the parties adopted an average figure of Kshs.3,439.00 which to this Court is generally fair having regard to the varied earnings. But a pertinent question arises; which is whether dependency was proved.

11. The definition of **"dependency" is** given in Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act as "*that part of the deceased's earnings that he/she spent on the maintenance or financial support of his/her dependants*.

12. It is true that the Respondent did not tender any evidence of dependency. The Court admitted this in the judgment while observing that the Court could not infer dependency from a cursory perusal of the witness statements. However, the Court subsequently misdirected itself by awarding damages for dependency which was impossible since the witness statements were not adopted by their makers in the first place. The Court relied on the submission of the Plaintiff when it found that the Plaintiff depended on his late wife. I underscore the fact that submission cannot take the place of evidence. It is also trite that dependency is a question of fact.

13. In **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR** the Court while relying on the case of **HCCC No 1438 of 1998 Beatrice Wangui Thairu –Vs- Hon Ezekiel Bargetuny**(unreported) stated that:-

> ***"…there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case."***

14. In this case, the Plaintiff merely pleaded the age of the dependants. The dependants were adults and also comprised of grandchildren as per particulars noted at (j),(k) and (l) of paragraph 7. The Plaintiff did not create any nexus between the provision and upbringing of the grandchildren who also had their parents and who were also adults and the income of their late grandmother who was an old woman aged 64 years.

15. Further, grandchildren do not fall within the definition of who a dependant is Section 4 of the Fatal Accidents Act. Section 4(1) of the Act recognizes a wife, husband, parent and child of the deceased as dependants entitled to benefit from any suit brought under the Act.

16. There was no evidence that her husband who was also an adult of sound mind solely depended on his late wife's income. The facts here suggest that the couple lived together over the years and grew old together. There was no suggestion that the deceased was the breadwinner over the years or as at time of her demise. If that was the position, then there had to be evidence to support it. There is no evidence that the deceased supported her adult children who were more energetic and were at the peak of their lives. Particulars in the plaint indicated that their ages ranged from 29 years to 42 years. They had probably left their parents home and had their own families.

17. **In Kenya Power & Lighting Company Ltd –Vs- E K O & another [2018] eKLR Ngugi, J** observed that ***" …….it is to be expected that the children will likely have their own lives and families and would not necessarily spend most of their resources on their parents in their adult age. I would, therefore, not disturb the quantum awarded as well."*** The court was faced with a case brought on behalf of an estate of a minor where the multiplicand of 10 years was adopted.

18. The above aside, since proof of dependency is a matter of fact it implies that a party who alleges the dependency must proof its existence. In the instant case, I have in mind that some form of evidence ought to have been adduced to show that the listed dependants were in actual fact the legal dependants of the deceased. For example the Respondent adduced no evidence to show that he was the husband of the deceased. Although no marriage certificate or other form of evidence was adduced in that respect, in the minimum, his statement would have persuaded the Court to believe the assertion that he was one, if it had been adduced in evidence. As for the children, no birth certificates or other form of evidence was adduced to show their nexus with the deceased. The same applied with the alleged grandchildren.

19. Needless to state then is that the Respondent failed to adduce any proof of dependants as listed in paragraph 7(a-i) of the amended plaint. I thus hold that there was no evidence that the deceased was her wife and the rest of the listed persons as children and grandchildren respectively. It follows that no damages were awardable under this head.

20. Be that as may, I do not think I would do justice to this judgment if I failed to consider one very paramount issue that was raised by the Appellant. This was the assertion that the learned magistrate erred in law and fact in awarding damages under the Law Reform Act and the Fatal Accidents Act as the same amounted to double compensation.

21. Reliance was placed on decisions of Courts of concurrent jurisdiction in the cases of **Joseph Wachira Maina and Another VS. Mohammed Hassan (2006) eKLR** and **Ryce East Africa Ltd VS Ali Mombo Shaban (2016) eKLR t**o buttress the submission.

22. In the case of **Livingstone Mwambugu Mwakhungo & Another VS Sara Anyango Jaoko (201) eKLR** the High Court sitting at Kisumu relied on a Court of Appeal decision **in Kemfro Africa Limited t/a "Meru Express** Service {1976}" & Another Vs. Lubia & Another (No.2) (Suppra) to hold that the learned trial magistrate in the Court below ought to have reduced the award under the Law Reform Act from the award under the Fatal Accidents Act. In so holding the Court delivered itself as follows:

> ***"The trial magistrate did not in his judgment indicate that he had taken into account the damages awarded under the Law Reform Act and they would have been reduced from the award under the Fatal Accidents Act. However as I have stated the award under the Fatal Accident Act shall be set aside. The award under the Law Reform Act shall be left undisturbed so that judgment for the Respondents against the applicant shall be for a sum of Kshs.80,000/- together with interest from the date of judgment. …."***

23. In the case of **Kemfro Africa Limited (Supra)** the Court of Appeal delivered itself as follows;

> ***"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."

24. The law is that the awards under the two Acts are made for the benefit of the estate. The Courts have an obligation, though discretionary to discount or consider the awards given under the Law Reform Act where parties also claim under the Fatal Accidents Act .

25. Section 2(5) of the Act provides that:

"(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom."

26. In **Mary Njeri Murigi –Vs- Peter Macharia & another [2016] e KLR Aburili J** noted that:

"In the United Kingdom, the applicable law and principles are common law jurisprudence as adopted and applied by Kenyan Courts. Thus, under the Law Reform Act, the Courts are entitled to award damages for pain and suffering by the deceased and loss of expectation of life. The correct mode of assessing damages under the Law Reform Act is that the net benefit inherited by the dependants under the Law Reform Act must be taken into account in respect of damages awarded under the Fatal Accidents Act because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased under the Law Reform Act" (emphasis mine).

27. In **Kemfro Africa** case (supra) the Court held that if the net benefit from both the Law Reform Act and the Fatal Accidents Act is for the benefit by the same dependants, it ought to be discounted to avoid double benefit that the law does not allow. However, **Section 1(5) of the Law Reform** (Miscellaneous provisions)1934 confers all rights under the Act for the benefit of the estate of deceased's persons in addition to, and not in derogation of any rights conferred on the dependants of the deceased by the **Fatal Accidents Act.**

28. *In* ***Pleasant View School Limited vs. Rose Mutheu Kithoi & another*** **[2017] eKLR** Kamau J held as follows:

" Any damages under the Law Reform Act in respect of loss of expectation of life and pain and suffering are benefits to the deceased's estate. Section 2(5) of the Law Reform Act Cap 26 (Laws of Kenya) is clear that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act. This Court could not see any other interpretation of that provision as the same was not ambiguous.

"***….. that the Court was fully aware that there seems to be two (2) schools of thought on this issue. However, this Court therefore associated itself fully with the holdings of Emukule J, Karanja J and Mativo J in the cases of Benedeta Wanjiku Kimani vs Changwon Cheboi & Another[2013] eKLR, Richard Omeyo Omino vs. Christine A. Onyango [2009] eKLR and David Kahuruka Gitau & another vs. Nancy Ann Wathithi Gitau & another [2016] eKLR respectively where the said learned judges were emphatic that damages awarded under the Law Reform Act are not to be deducted from the damages that are awarded under the Fatal Accidents Act but merely need to be taken into account."***

29. Emukule J (as he then was) in the case of Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another (Supra) rendered himself as follows: -

"…These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above…"

30. My understanding of the above decision, more so, the **Kemfro** one, is that the Court was categorical that a party can sue for damages both under the Law Reform Act and the Fatal Accidents Act. What it was quick to clarify is that the words "*to be deducted*" must be distinguished from the words "*taken into account*" referred to under Section 4(2) of the Fatal Accidents Act. It also clarified that what should be taken into account should not necessarily be deducted. Further, that it is sufficient and prudent that a judgment of the lower Court should indicate that in reaching the figure awarded under the Fatal Accident Act the trial Court bore in mind what was awarded under the Law Reform Act.

31. In that regard, I depart from the decisions of concurrent courts that rendered that awards of damages under both statutes amounts to a double compensation. I understand the Court of Appeal in the Kemfro case to be stating that in awarding damages under the Law Reform Act the Court should not award such high damages as may be construed to amount to a double compensation in that the Plaintiff would still be benefitting from an award under the Fatal Accidents Act. In that regard therefore, the learned trial magistrate did not err in failing to deduct the amount awarded under the Law Reform Act from the award under the Fatal Accidents Act. I am also of the view that the amount agreed upon by the parties as damages under the Law Reform Act was a reasonable award and cannot be considered to be tantamount to a double competition merely because an award under the Fatal Accidents Act was given. Accordingly, this ground of appeal lacks merit.

32. I emphasize that the principle set out is that the awards must be capped to the minimum or the awards made under the Law Reform Act must be considered . The trial magistrate neither noted that an award under the Law Reform Act for pain and suffering and also loss of expectation of life was entered nor did he consider them in his judgment for loss of dependency. This may not be a great error in law and

fact since the awards entered by consent were capped to the minimum and totaled to Ksh 90,000/=. Again, the argument does not assist the superior Court since the awards made under the Fatal Accidents Act could not stand in the absence of proof of dependency.

33. In so finding, I am further persuaded by the decision in **Stella Nasimiyu Wangila & another –Vs- Raphael Oduro Wanyamah [2016] eKLR** in which it was held that the awardable benefits under the two acts are not for the benefit of the same beneficiaries, the Court having found that the plaintiffs failed to prove dependency.

34. The totality of my observation is that the appeal succeeds under this head. I rule that the Respondent was not entitled to damages under the Fatal Accidents Act.

35. As regards Special Damages the learned trial magistrate arrived at the correct decision in awarding a sum of Kshs.105,075.00 as that is the sum that was specifically proved.

36. In sum, the appeal partially succeeds with the following orders.

(a) General Damages awarded as follows:

(i) Loss of expectation of life kshs.70,000.00

(ii) Pain and suffering kshs.20,000.00

(b) Special damages – ksh.105,075.00

Subtotal – Kshs. 195,095

Less 15/100 contributory negligence of Ksh. 29,264.25.

Balance payable Ksh.165,830.75.

37. As for cost,s the Appellant shall be entitled to 50% of the costs of this appeal but shall be entitled to full costs of the court below.

DATED AND DELIVERED AT MURANG'A THIS 10TH DAY OF SEPTEMBER, 2019.

G.W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. Mr. Mabeya h/b for Mr. Wanjohi for the Appellant.

2. Mr. Mwangi h/b for Kinuthia for the Respondent