



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 111 OF 2017**

**1. DONALD ELIAKIM OHON**

**2. GILBERT BUSOLO.....APPELLANTS**

**VERSUS**

**PHILIP KANYORO NDERITU.....RESPONDENT**

**(Being an appeal from the Judgment of Mbungi CM delivered on 5<sup>th</sup> December, 2014 in Thika CM's Civil Case No. 575 of 2010)**

**JUDGMENT**

1. This appeal emanates from, the judgment of Mbungi, Chief Magistrate in **Thika Chief Magistrate's Civil Case No. 575 of 2010**, delivered on 5<sup>th</sup> December 2014. The suit had been filed by **Philip Kanyoro Nderitu** in his capacity as the personal representative of the deceased **Peter Kangethe Kanyoro**, against **Donald Ehaki Ohon** and **Gilbert Busolo** (1<sup>st</sup> and 2<sup>nd</sup> Defendants) to recover damages in respect of the death of the deceased. The said Plaintiff, now Respondent pleaded negligence against the two Defendants (now the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively) concerning the road accident in which the deceased sustained fatal injuries.

2. The accident occurred on 19<sup>th</sup> March 2008 and involved the vehicle **KAW 970M**, which was at the time registered in the name of the 1<sup>st</sup> Appellant and was being driven by the 2<sup>nd</sup> Appellant along Kenol – Sagana Road. Although the Appellants had denied liability in their defence, the parties recorded a consent on liability on 20<sup>th</sup> July 2013 in the ratio 90:10% in favour of the Respondent.

3. In his judgment, the trial magistrate made the following damages awards:

a) Pain and suffering	-	KShs.50,000/=
b) Loss of expectation of life	-	KShs. 100,000/=
c) Lost dependency	-	Kshs. 960,000/=
d) Special damages	-	Kshs. 111,000/=
Total	-	Kshs.1,220,000/=
Less 10% contribution		
Net Kshs.1098,000/=		

4. Aggrieved by this outcome, the Appellants preferred the present appeal. The amended memorandum of appeal contains five grounds, principally attacking the award in respect of lost dependency which was said to be excessive. On his part, the Respondent filed a cross - appeal on 4<sup>th</sup> August 2017. The three grounds of appeal in the cross-appeal are to the effect that the trial magistrate erred in fact and in law by failing to apply "**legally accepted formulae**" in the assessment of damages and failing to consider relevant evidential matters. As a result of which he made an award that was too low in the circumstances.

5. On 19/9/18 the parties agreed to canvass the appeal by way of written submissions. The Appellants in their submissions argued all the grounds under one head. They submitted that there was no evidential basis for the adoption of a multiplicand of Shs.10,000/= as the deceased's income was not proved. Moreover that in making the award for lost dependency, the trial court did not take into account the award already made under the Law Reform Act. The decision of the High Court in **Nakuru HCCC No. 373 of 2008 Benedeta Wanjiku**

**Kimani** (suing as the administrator of the estate of **Samuel Njenga Ngunjiri (deceased) v Changwon Cheboi and Another [2013] e KLR** was relied on.

6. The Appellants further complain that their submissions and authorities were disregarded by the trial court, in favour of the Respondent's and applying the multiplier in the Respondent's authorities that were not relevant to the case. Thus, it was submitted that the trial court ignored the principle that comparable awards ought to be made in comparable cases. Further submissions by the Appellants regarding proof of special damages by the Respondent are clearly out of turn; the Appellants' grounds do not contain a challenge in respect of the special damage award.

7. On his part the Respondent began his submissions by restating the principles applicable in the review of damage awards by appellate courts, as stated in **Kemfro Africa Ltd t/a Meru Express Services (1976)** and **Another v Lubia and Another (no. 2) (1985) e KLR**. It was submitted that the Respondent had established dependency. The Respondent therefore defended the award in respect of lost dependency, asserting that all relevant considerations were brought to bear. The Respondent cited the decisions in **Hannah Wangaturi Moche and Another v Nelson Muya (NRB HCCC No. 4533 of 1993)**, and **Alice Alukwe v Akamba Vs and 3 Others** (incomplete citation), none of which were supplied to this court.

8. Taking issue however with both the multiplier and multiplicand applied by the trial court, the Respondent asserted that based on the relevant evidence adduced at the trial, the Respondent was entitled to KShs.6000,000/= by way of damages for lost dependency calculated as follows: KShs.50,000/= x 12 x 30 x ? = 6000,000/-. And further regarding lost expectation of life that due to inflation, the trial court ought to have awarded KShs.150,000/=. He relied on the decision in **Violet Jeptum Rahedi v Albert Kubai Mbogori NRB HCC No. 676 of 2009** (also not supplied).

9. The court has considered the evidence in the lower court and submissions on this appeal. Two broad issues fall for determination, namely, whether the awards made in respect of lost years and lost dependency were arrived at through a proper consideration of the evidence and applicable principles.

10. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**; **Peters v Sunday Post Ltd (1958) EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on a misapprehension of the evidence or on evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambusu [1982 – 1988] IKAR 278**).

11. The sole question in this appeal is the quantum of damages. As regards the award in respect of lost dependency, the tricky question at the trial was proof of the deceased's income. The Court of Appeal laid down the principles upon which an appellate court will interfere with the trial court's exercise of discretion in assessment of damages. In **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** the court held that:

**“An appellate court will not disturb an award of damages unless it is so 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”.**

See also **Kemfro Africa t/a Meru Express Service and Another [1982 – 1988] I KLR 727**.

12. The evidence of the Respondent at the trial, accepted by the court was that the deceased was aged 26 years at the time of death, held a diploma in computer studies and though unemployed ran a farm in Nyeri and in addition, assisted his parents. A witness, **Kamau Njoroge (PW2)** who purported to be a private investigator produced a report compiled by him on the possible level of salaries payable to persons holding qualifications similar to the deceased, while **Eric Otieno Mwanosongo (PW3)** confirmed that the deceased was a student at Kenya Christian Institute pursuing a diploma in computer studies.

13. In considering the evidence, the trial court correctly observed inter alia that:

**“The deceased was not working at the time of his death. Therefore it is speculative as to how much he would have earned with his academic qualification. He expected to be employed or to employ himself. The Plaintiff's counsel urges the court to adopt a multiplicand of KShs.50,000/= given the evidence adduced ... I have considered the evidence. It will be hard for the court to make a finding that the deceased would earn such high salaries for it is not guaranteed that he would have work with those high paying companies”(sic)**

14. The trial court proceeded to state that it would apply the minimum wage in absence of conclusive evidence on income, stating that:

**“The minimum wage as per Gazette Notice No.71 of 2012 (under the) Labour Institutions Act is KShs.8579.80 .. to person without skills. The wage for those with diploma qualification is between KShs.20,000/= - 25,000/=. After taxation one can earn between 1400 to 1500 per month. I will therefore find a multiplicand of KShs.10,000/=reasonable and I do adopt the same “**

15. The trial court was entitled despite the dearth of solid evidence on income to do its best in arriving at an award. The Court of Appeal in **Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR** stated inter alia:

**“But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ...**

we do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earnings 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.”

16. In **Wambua v Patel [1986] KLR 336** cited in Kimatu’s case, the Court grappled with the quantification of loss of earnings of a cattle trader who had sustained injuries in a road traffic accident. Even though the Court found the Plaintiff’s earnings rather low, and that he kept no records the Court (**Apaloo J** (as he then was) stated:

“Nevertheless. I am satisfied that he was in the cattle trade and earned his livelihood from that business, a wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method ... But a victim does not lose his remedy in damages because the quantification is difficult.”

17. In my own view the trial court was justified to revert to the minimum wage in assessing income given the lack of concrete evidence on the income level of the deceased. Earlier, the trial court had settled for a multiplier of 24 years. The court considered the authorities and submissions of the parties including the Appellants’. The range of years proposed was between 32 and 20 years multiplier. There was no serious misdirection in settling at 24 years which appears an in-between figure. However, considering the fact that the deceased was in good health, and the standard retirement age of 60 years, I think that a multiplier of 30 years as applied for a 24 year old deceased in **Alice O. Alukwe v Akamba Public Road Services Ltd and 3 Others [2013] e KLR** (in lower court submissions) was a more realistic multiplier in this case.

18. In **Chunibhai J. Patel and Another v PF Hayes & Others [1957] EA 748**, cited in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja) v Kiarie Shoe Stores Ltd [2015] e KLR** the Court of Appeal had given the following guidelines in assessing damages under the Fatal Accidents Act:

“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency which must then be capitalized by multiplying by a figure representing so many years’ purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of widow or children (dependants).... The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants.”

19. In his judgment in the **Kemfro case Chesoni Ag J A** (as he then was) discussed the inter play between Section 4(2) of the Fatal Accidents Act and Section 2(5) of the Law Reform Act. He observed:

“It has been argued in some English cases that this provision affects the right and not the benefits. Indeed the legislation can be looked at narrowly or in a wide sense. Narrowly it means rights and no more; widely it means the rights and benefits arising from those rights are in additions and not in derogations to the rights and benefits resulting from them under the Fatal Accidents Act. In my view, what Section 2(5) of the Law Reform Act means is 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.”

20. The learned judge continued:

“To be taken into account and to be deducted are two different things. The words used in Section 4(2) of the Fatal Accidents Act are “taken into account”. The Section says what should not 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 no requirement in law or otherwise for him to engage in a mathematical deductions as suggested by Mr. Barasa .... the award under the Law Reform Act, if any, is one of the factors to be taken into account ... The judge did what he was required to do and I do not agree with the English authorities that suggest or say that there should be a mathematical deduction as opposed to mere taking into account the award under the Law Reform Act. I do not find any error in the approach by the learned judge.”

21. In the more recent decision in **Hellen Waruguru Waweru (suing as legal representative of Peter Waweru Mwenja) v Kiarie Shoes Stores Ltd, [2015] e KLR**, the Court of Appeal reiterated this position, stating *inter alia* that:

“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 **Kenfro 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 Kenfro 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.”**

22. Similarly, in this case, there was no requirement for the trial magistrate to carry out a mathematical deduction of the award made under the Law Reform Act while assessing damages under the Fatal Accidents Act. Nonetheless, the trial court was obligated to consider the principles governing awards under the Fatal Accidents Acts in respect of deceased persons. The Court went on to consider awards made on this head between 1982 and 1990 before concluding that an award of KShs.100,000/= in 1990 cannot be taken to be so inordinately high that the application of a wrong principle must be inferred. The Court concluded by stating that:

23. In the circumstances, this court finds no merit with regard to the complaints that the multiplicand used was excessive, but is of the firm view that the multiplier was rather low and would instead apply a multiplier of 30 years. Thus KShs.10,000/= x 12 x 30 x ? = KShs.1200,000/=

24. As regards damages awarded for lost expectation of life, I cannot find any reason to fault the award of KShs.100,000/- which has been upheld as a conventional figure under that head for many years. There is no basis shown for interfering with this award. The burden lay with the Respondent to demonstrate that the court considered a matter that was irrelevant or failed to consider a relevant factor or that the award itself was so low as to constitute an erroneous estimate.

25. As already stated, the point of contention in this appeal was the quantum of damages awarded in the lower court, viewed as inordinately high by Appellants and low by the Respondent. The appellate court, in determining such a matter will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30**.

26. It was held in that case that:

**“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”** see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR**.

27. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that **“an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”**.

28. In the circumstances, this court has found no merit in the appeal which is dismissed in its entirety. However, the court is inclined to allow the cross-appeal but only in so far as the award for lost dependency is concerned. The court therefore sets aside the lower court judgment and substitutes therefor judgment for the Respondent as follows:

#### **Damages under the Law Reform Act**

a) Pain and suffering -KShs. 50,000/-

b) Loss of expectation of life - KShs. 100,000/-

#### **Damages under the Fatal Accidents Act**

a) Lost dependency - KShs. 1,200,000/=

b) Special damages - KShs. 111,000/=

Grand total - Kshs.1,461,000/=

Less 10% contribution

Net - KShs.1,314,900/=

[ONE MILLION THREE HUNDRED AND FOURTEEN THOUSAND NINE HUNDRED)

29. The Respondent is awarded half the costs of the cross- appeal, his appeal having only partially succeeded, and the full costs of the appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS 3<sup>RD</sup> DAY OF OCTOBER 2019**

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**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Gikenya holding brief for Mr. Muchemi for the Appellant

Respondent – No appearance