



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**HCCA NO. 1 OF 2018**

**(FORMERLY NAKURU HCCA NO. 147 OF 2015)**

DAVID KENEL.....1<sup>ST</sup> APPELLANT

JULIUS CHERETEL.....2<sup>ND</sup> APPELLANT

VERSUS

ZIPPORAH CHEPKONGA (suing as the Legal Representative of the estate of

WESLEY CHEPKONGA CHEBII – DECEASED).....RESPONDENT

**[Being an appeal from the Judgment of the Principal Magistrate’s Court at Kabarnet**

**Civil Suit. No. 2 of 2015 delivered on the 29<sup>th</sup> day of September, 2015**

**by Hon. S.O. Temu, PM]**

**JUDGMENT**

**Introduction**

1. This is an appeal from an award of damages in a personal injury claim for damages under the Law Reform Act and the Fatal Accidents Act by the Legal Representative of the deceased Wesley Chepkonga who died in a road traffic accident on 23/3/2013. Liability has been settled by the consent of the parties in the ratio of 70:30 for the plaintiff against the defendants.
2. The trial court’s Judgment of 29/9/2015 awarded damages in the sum of **Ksh.906,465/=** after apportionment of the liability and the appellant. Being dissatisfied with the award of the trial Court, the appellant plaintiff in the trial court, appealed to the High Court.

**Issue before the Court**

3. The issue for determination by the Court is the amount of quantum that should be awarded in this Case.

**Determination**

4. Of course, the test for interference with the award of damages by a trial Court is settled in **Shabani v. Nairobi City Council (1985)** KLR 516, 518 - 519 citing Law J.A in **Butt v. Khan**, as follows:

“The test as to who an appellate Court may interfere with an award of damages was stated by Law, J.A in **Butt v. Khan**, Civil Appeal no. 40 of 1977... as follows:

“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 mis-apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

This direction has since been followed frequently by this Court.”

See also *Kemfro Africa Ltd. t/a Meru Express Services (1976) & Anor. v. Lubia & Anor. No. 2* (1985) eKLR.

### Evidence

5. The customary law wife of the deceased testified as the only witness for the plaintiffs (PW1) stating that her husband was employed at Marigat and that he was earning Ksh.19,154/= per month, without providing any proof of payment by payslip or for the employment and she could not produce receipts for the special damages of Ksh.20,000/= pleaded. The defence did not adduce evidence.

6. In *Hellen Wanguru Waweru (Suing as the legal representative of Peter Waweru Mwenga (deceased) v. Kiarie Shoes Stores Limited* (2015) eKLR, the Court of Appeal (Waki, Nambuye & Kiage JJA.) explained the principle of double compensation under the Law Reform Act and the Fatal Accidents Act as follows:

“18. Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.

19. Finally on the third issue, learned counsel for KSSL, **Mr. C. K. Kiplagat** was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.

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.**”

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

23. The consequence of our intervention in the various awards boils down to the following final assessment of damages:-

Pain and suffering	10,000/-
Loss of life expectation	100,000/-
Loss of dependency (19,373 x 12 x 1 x 2/3)	154,984/-
Farming (20,000 x 12 x 5 x 2/3)	800,000/-

Total	1,064,984/-
Less	
30% contribution	319,495/-
Balance	745,489/-

*In our view, the low amounts awarded under the LRA sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate.*

**24.** *The appeal is thus allowed in the manner stated above and an order shall issue accordingly. The appellant shall have the costs of the appeal.”*

7. It is therefore clarified by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited** (supra), which binding on this Court, that that there is no requirement for the trial court to discount or reduce the damages in Fatal accidents Act with the awarded recovered under the Law Reform Act. The submission by the appellant that the trial court “the trail magistrate erred by failing to deduct the award [under the Law reform Act of Ksh.100,000 for loss of expectation of life and Ksh.50000/- for pain and suffering] and thus made a double award is therefore erroneous.”

### **Special damages**

8. In the same decision of **Hellen Wanguru Waweru**, supra, the Court cited its earlier decision in **Jacob Ayiga Maruja & Another v Simeone Obayo** CA Civil Appeal No. 167 of 2002 [2005] eKLR for the method of strict proof of damages as follows:

*“16. This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of the Court observed:-*

*“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”.*

*17. It is our view that Hellen submitted sufficient evidence, on a balance of probability, to support the assertion that the deceased at least earned half the pleaded sum of Sh. 40,000 per month. That would be Sh. 20,000 per month and we so find.”*

I would agree that the sum of the Ksh.20,000/= is reasonable figure for the special damages by way of funeral expenses for which no proof by documentary evidence was adduced. A receipt of payment of Ksh.950/= for succession proceedings was produced. These special damages which were specifically pleaded at paragraph 10 of the Plaintiff dated 20<sup>th</sup> January 2015 ought to have been granted in full.

### **Multiplicand**

9. The use of Ksh.19,154/= minimum government wage by Legal Notice (L.N) No. 117 of 2015 which therefore came into effect after the death of the deceased on 23/3/2013 could not be the basis of the plaintiffs claim in the absence of employer’s pay-slip. The applicable Legal Notice is the 2012 amendment as the 2013 increase took effect by 1<sup>st</sup> May 2013 while deceased died on 23<sup>rd</sup> March 2013. Under the 2012 Minimum Wage Regulations, which s a matter the court may take judicial notice under section 60 (1) (a) of the Evidence Act, the minimum wage was Ksh.8579/-. The deceased was semi-skilled trained in masonry as shown in Certificate Ex.7.

10. The use by the trial of a multiplicand, which is required to be net of deductions, of Ksh.8000/= which is less than half the 2015 minimum wage is reasonable and proper, and it cannot be taken to have been plucked from the air in the blue sky, in view of the evidence that; *“the deceased was a mason. He was trained at Marigat Polytechnic since 1/1/1995- 1996. The certificate is produced as exhibit no. p 7”.*

11. There was sufficient material for the calculation of the dependency using the multiplier approach and this is not the situation contemplated by Ringera, J. (as he then was) in **Mwanzia v. Ngalali**, quoted by Koome, J. (as she then was) cited in **Albert Odawa v. Gichimu Gichenji NKU HCCA No. 15 of 2003 [2007] eKLR** and relied on by the appellant, as follows:

*‘The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.’*

12. The multiplier, that is the number of years the dependants would reasonably have expected for receive financial support from their husband father aged 39 years (certificate of death ex.1) is against the regular age of retirement at 60 years. A multiplier of 20 is reasonable having regard to the trade in masonry which the deceased may have carried out as a business venture well past the official retirement age.

### Dependency ratio

13. The parties were agreed at a ratio of  $\frac{2}{3}$  as deceased was a family man with a wife and 4 children, the 1<sup>st</sup> born at 13 years at time of his father's death and last born 10 months. Accordingly the General damages for loss of Dependency would be  $8,000 \times 12 \times 20 \times \frac{2}{3} = 1,280,000/=$ .

14. Loss of consortium at the conventional sum of Ksh.100,000/= is awarded.

15. Under the Law Reform Act, the dependants would receive conventional Ksh.100,000/= for loss of expectation of life and Ksh.10,000/= for pain and suffering, as it was not clear whether the deceased died on the spot of accident, and must have suffered some pain before death. For loss of consortium, I agree with the judicial opinion about the time of the accident, which set the amount as Ksh.100,000/- in **Benjami K. Koech v. Robert T Ngetich & Another** (2013) KLR and cases cited therein by Ochieng, J. - *Monica Jerop Langat v. Kiplangat Arap Ngeno & 2 Ors.* HCCC No. 88 of 2004 and *Benjamin Mwilole v. Geoffrey Said & Anor.*, Mombasa HCCC No. 4 of 1995.

### Award by this Court

16. I would, therefore, find the appropriate award of damages as:

1. Pain and suffering – 10,000/=
2. Loss of expectation of life – 100,000/=
3. Loss of dependency –  $(8,000 \times 12 \times 20 \times \frac{2}{3}) = 1,280,000/=$
4. Special damages – 20950/=
5. Loss of consortium – 100,000/=

Total - 1,510,950/-

Less 30% contribution - 453,285/=

Balance

Plaintiff's 70% in favour = 1,057,665/=.

### Award by the trial Court

17. The trial Court awarded a total sum of **Ksh.1,294,950/=** with 30% contribution by the defence to make it **Ksh.906,465/-** in favour of the plaintiff as 70% of the award.

### Appellate interference justified?

18. On the test in **Butt v. Khan**, supra, I do not find that the amount awarded by the trial Court at Ksh.906,465/= is inordinately high as to call for interference by the appellate Court, or that it was based upon a wrong principle, as urged by the appellant. The Respondent did not cross-appeal and, even though this Court finds the appropriate award should have been higher, the award by the trial Court was not inordinately low as to justify appellate interference.

### Order

19. Accordingly, for the reasons set out above, the appeal is without merit and the same is dismissed.

20. As the generally accepted view of the law before the Court of Appeal's decision **Hellen Waruguru Waweru** had been that the rule against double compensation required the deduction of damages awarded under the Law Reform Act from the damages under the Fatal Accidents Act, the appellant cannot be blamed for seeking *bona fide*, and it has not been shown otherwise, the correction of the apparent error by the trial Court. There shall, therefore, be no order as to costs in the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF NOVEMBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Kairu & MCCourt & Co. Advocates for the Appellants.

M/S Mutonyi, Mbiyu & Co. Advocates for the Respondent.