REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO.24 OF 2015

ANTONY NYAGA NJAGI.....APPELLANT

VERSUS

MOHAMED IBRAHIM ABDIRAHMED.....RESPONDENT

JUDGEMENT

The late Mohamed Hassan Ibrahim died in a road traffic accident involving motor vehicle registration number KBJ 987B on 8th May, 2011. His uncle, Mohamed Ibrahim Abdirahmed filed civil suit number 239 of 2013 before the Embu Court. The trial Court awarded Ksh.3,578,688 as damages. This led to the filing of the appeal and cross Appeal.

The grounds of appeal for the main appeal are that:-

1. The learned Magistrate erred in law in failing to consider the Provisions of the Insurance (Motor Vehicle Third Party Risks(Amendment) Act 2013 Cap. 405, which clearly provides the formulae for calculating awards for fatal claims.

2. The learned Magistrate erred in fact and in law in adopting a multiplicand of 33,136/= when it was clear that the deceased was earning a net salary of Kshs.17,634/= per month which amount was the one accessible to the dependants and the deceased's own use.

3. The learned Magistrate erred in fact and in law in awarding the respondent the income the deceased was earning as opposed to the amount he was getting from the deceased as dependency ratio.

4. The learned Magistrate erred in fact and in law in adopting a multiplier of 27 years being the balance of the working years the deceased had left instead of the number of years the deceased would have supported the respondent.

5. The learned Magistrate erred in fact and in law in failing to appreciate that the deceased would have married and thereby the dependency by the respondent would have diminished and take this into account in determining the issue of the multiplier.

6. The learned Magistrate erred in fact and in law in failing to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act and therefore made a double award as both awards were made for the benefit of the same person, the respondent herein.

7. The learned Magistrate erred in fact and in law in failing to apply the jurisprudence of double awards as was developed in Kemfro Africa Ltd Vs A.M. Lubia (1982-88)

8. The learned Magistrate erred in fact and in law in failing to consider conventional awards for general damages in fatal claims.

The respondent filed a cross appeal which is based on the following grounds:-

1. The learned trial Magistrate erred in failing to appreciate that the deceased being a professional medical person would have been active up to the age of 70 and therefore used a wrong multiplicand of 27 years instead of 38 years.

2. The learned trial Magistrate erred in failing to appreciate the plaintiff's evidence that the deceased supported his mother and his other five siblings who were all in school here in Kenya and Uganda and therefore used a wrong ratio of dependency of ?

instead of ½.

3. The learned trial Magistrate erred in failing to appreciate the Plaintiff's evidence that the deceased was the sole breadwinner in their family their father having passed away and left behind young children and only the Plaintiff was employed.

M/S Kairu & Mccourt appeared for the appellant. Counsels submit that the deceased was earning a net income of Ksh.17,654. This was the amount accessible to the dependants and the deceased's own use. Further, the trial court adopted a multiplier of 27 years being the remaining working period for the deceased instead of the number of years the deceased would have supported the respondent. The deceased was not married. He would have married in future and the support to the dependants would have decreased. Further the trial court failed to deduct the award made under the Law Reform Act from the final award. The deceased was actually earning Ksh.17,654 instead of Ksh.33,136 adopted by the trial court. Counsels for the appellant rely on the case of **F.M.M. & Another V JOSEPH NJUGUNA KURIA & ANOTHER (2016) eKLR** where the court stated as follows:-

"in determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependent, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum."

It is submitted for the appellant that the trial Court awarded Ksh 150,000 for loss of expectation of life and Ksh.50,000 for pain and suffering. Counsels have no problem with the award but are of the view that the same be deducted from the final award. Counsels rely on the case of **KEMFRO V A.M. LUBIA & ANOTHER (1982-1988) KAR 727** where the court of Appel held:

"The net benefit will be inherited b the same dependants under the Law Reform act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act."

On the cross appeal, it is submitted by the appellant that the trial court ought to have used the net earnings as a multiplicand instead of the income of Ksh.33,136. The respondent was 55 years old and a multiplier of 10 years could have been ideal. It is the respondent who proposed a multiplier of 27 years and the proposal in the cross appeal of enhancing it to 38 years is an afterthought.

M/S K. Macharia & Co. Advocates appeared for the respondent. It is submitted that the appellant did not tender any evidence. A payslip was produced in court and was the basis of the trial court adopting a multiplier of 27 years. According to the respondent, most of the issues being raised in the appeal ought to have been raised before the trial court.

On the cross appeal, it is submitted that the deceased was a professional and could have worked up to the ages of 70 years. Therefore, a multiplicand of 38 years ought to have been used instead of 27 years. The deceased was not married but took care of his mother and siblings after the death of his father. The deceased was a government employee earning Ksh.38,684 monthly as per his April 2011 payslip.

This is a first appeal. This court is duty bound to evaluate the evidence adduced before the trial court afresh and make its own conclusion. Two witnesses testified for the respondent. **PW1 MOHAMED HUSSEIN** testified that the deceased died in a road accident. He used to work at Chuka hospital. He was travelling in a matatu as a passenger. The deceased was not married. He was survived by his mother and sisters who are marred. The respondent is the deceased's uncle. The deceased's mother was sick and that is why the uncle became the administrator.

PW2 Corporal KOSKEI KIBOSU was stationed at Chuka Police station. The accident occurred on 8.5.2011 involving motor vehicle registration No. KBJ 987B Toyota matatu. The accident occurred at Chogoria. The vehicle had a tyre burst. The driver lost control, rolled several times before landing in a ditch. Other passengers also died out of the accident.

The defence closed its case without calling any witness.

The trial court found the appellant 100% liable. There is no issue in the appeal on that finding. The appeal and cross appeal are therefore based on the issue of quantum. The main issue raised in both appeals is whether the trial court's assessment of damages is proper. The legal principles under which this court can disturb an award of damages made by a trial court are quite clear. In the case ***HELLEN WARUGURU WAWERU (suing as the legal representative of PETER WAWERU MWENJA (deceased) V KIARIE SHOE STORES LTD, Nyeri Civil Appeal No.22 of 2014*** where the Court of Appeal stated at para 10 as follows: -

As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court 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 wholly erroneous estimate of the damages. See *Kemfro Africa ltd t/a Meru express & another V A.M. Lubia and another [1982-88] 1 KAR 727, Peter M. Kariuki V Attorney General CA Civil Appeal No.79 of 2012 {2014} eKLR* and *Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88)KAR 5*

The appellant's main contention is the multiplicand of Ksh.33,136 and the multiplier of 27 years. There is the issue of deduction of award made under the Law Reform Act from the final award. It is submitted that the payslip produced in support of the claim for loss of dependency shows that the deceased's net income was ksh.17,654. The trial Court therefore ought to have adopted this amount instead of Ksh33,136.

On this issue, the trial Court observed as follows:-

> "***I make the following findings. Firstly, I find that the ratio of dependency is 1/3 because the deceased would most likely have married and supported his own family with his earnings. Secondly, I find that he would most likely have been promoted and earned more as he progressed in his career. Life however is not straight line. It has imponderables and vicissitudes. Thirdly, on the earning, I find that deceased earned Ksh.33,136 which is the gross earnings of Ksh.38,684 less PAYE of Ksh.5548. I will use this as the multiplicand.***
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> ***Finally, I find that multiplier of 27 years is reasonable as the deceased being a civil servant would have retired at the age of 60.***

The death certificate dated 10th May 2011 shows that the deceased was 33 years old. According to the payslip for April, 2011, the deceased was 32 years old and was to retire on 30th June 2038. He was employed by the ministry of Medical services. He was a Pharmaceutical Technologist. The payslip gives the gross income as Ksh38,684. The basic salary was Ksh.27,639. There is house allowance of Ksh.6,000. Other income include health risk allowance (Ksh.2000), commuter risk allowance (ksh.1800) and medical allowance (Ksh.1,245). The deceased had a Bank loan balance of Ksh130,581. He was paying Ksh.14,509. The payslip gives the net pay for April, 2011 is ksh17,654/20.

The trial Court adopted a multiplicand of Ksh.33,136. This is roughly a total of the basic salary and the house allowance. Counsel for the respondent in his written submissions adopted a multiplicand of Ksh.27,639. This is the basic salary. The contentions by the appellant that the net salary ought to have been utilized is not supported by the facts of the case. The net sum of Ksh.17,654/20 is not a permanent income for the deceased, The sum of Ksh.14,000 was being deducted because of the bank loan. The loan balance of Ksh.130,581 was going to be cleared within one year and the sum of Ksh.14,000 was going to be available to the deceased and the dependents. Therefore, although it is the net income which is utilised as a multiplicand, other factors should be considered in picking the net income. The trial court also considered that the deceased could have been promoted and his income could have increased.

From the status of the payslip, I do find that the proper multiplicand is the gross pay less the taxes. This leads to the following.

Total earnings	38,684.00
Less WCPS Contribution	552.80
Union dues	100.
PAYE	5,548.
NHIF	320.
	6,520.80
Net Income	Ksh.32,163.20

The bank loan can be taken as an advance payment to the deceased. It should not be taken that the loan affected the deceased's income and was not available to the deceased. If that is the case, then the same would have even been available to him one year later after paying off the loan. Therefore I find that the proper multiplicand would be Ksh.32,163.20.

The other issue is the multiplier of 27 years. Counsel for the respondent proposed a multiplier of Ksh.37. The deceased was 32 years old as per the payslip. He was to retire in 2038. The trial court seems to have taken 27 years being the remaining period of his working life. That is reasonable but there is no guarantee that he would have lived upto 2038. Further, the multiplier becomes relevant when computing damages under the Fatal Accident Act for loss of dependency. That dependency cannot be stretched to 37 years or even 27 years. The respondent testified that the deceased's sisters were married. They could not have been the deceased's dependents. The fact that the respondent educated the deceased does not mean that he is the deceased's dependant. The main dependant for the deceased is his mother. There is no evidence that the deceased's siblings were in school or relied on the deceased for their livelihood. For this reason, I do find that the 1/3 dependency ratio adopted by the trial court is reasonable.

Given the evidence on record, I do find that the multiplier of 27 years is quite on the higher side. The age of the deceased's mother was not given. The deceased's mother also had other children who could have assisted her even if they are daughters. From the circumstances of the case, I do find that 15 years multiplier would be ideal. I do agree with the findings of the trial court that the deceased would have decided to marry and start his own family. What is important is the expected period of dependency and not how long the deceased would have worked.

The contention by the respondent in the cross appeal that the deceased was a professional and could have worked upto 70 years is not grounded in law. In the memorandum of cross appeal, it is stated that the deceased used to take care of his siblings who are in school in Kenya and Uganda (ground 2 of appeal). This contention is not supported by the pleadings in the plaint as well as the evidence on record. Nowhere in the proceedings it is stated that the deceased's siblings were in school. Indeed the plaint listed the respondent as the only dependent under the Fatal Accident Act. At paragraph 7 of the plaint, the deceased's parents and siblings are mentioned but no names are given. I do find that the 1/3 dependency ratio is sufficient.

The other issue involves the deduction of Ksh.200,000 from the final award. It is not mandatory for the Court to deduct what has been awarded under the Law Reform Act for loss of expectation of life and for pain and suffering from the award made under the Fatal Accidents

Act. All what the court is expected to do is to take into account what has been awarded under the Fatal Accident Act when making awards under the Law Reform Act. Much reliance has always been placed on the Kemfro case (supra). In the case of **Hellen Waruguru Waweru (Supra).**

The Court of Appeal stated as follows:-

> ***This Court has explained the concept of double compensation in several decisions and it is 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.***
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> ***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 via Meru express Services 1976 & another –vs- Lubia & another (No.2) and the ration decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia that:-***
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> ***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.***
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> ***The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estate of deceased persons shall be in addition to and not 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 inrespect of the same death.***
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> ***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 judgement 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."***
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> ***The deduction of the entire amounts made under the LRA in this case was erroneous 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 the expectations to sh.70,000 despite confirmation in the judgment that there was no dispute on the ward. 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 Fatal Accidents Act award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.***

In the end, I do find that the cross appeal lacks merit and is hereby dismissed. The main appeal partly succeeds. The award on loss of dependency under the Fatal Accidents Act made by the trial court is hereby set aside and replaced with the following.

Ksh.32,163/20 x15x12x? = 1,929,792.

The award of loss of expectation of life and pain and suffering by the trial Court is hereby retained. The trial court did not award any special damages. Although the plaint pleaded for Ksh.126,700 as funeral expenses and Ksh.15,000 for the letters of administration, no basis was laid to prove that claim. The appeals have not raised any issue on the findings of the trial court on special damages and I will not dwell on it.

The final award is as follows:-

1. Damages under the Fatal Accident Act - Ksh. 1,929,792
2. Loss of expectation of life - Ksh. 150,000
3. Pain and suffering -Ksh. 50,000

Total Ksh. 2, 129,792

I see no good reason as to why I should reduce the award made under the Law Reform Act in view of the award made under the Fatal Accidents Act. Counsel for the appellant has no issue with the assessment of that award. His only issue is that it be deducted from the final award. That contention is not backed by the law. I will leave the award under the Law Reform Act intact and it shall be part of the final award.

Having allowed the appeal, I do order that parties meet their own respective costs of the appeal. The respondent shall have the cost awarded by the trial Court.

Dated and signed at Marsabit this ..... Day of May, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 15th day of May, 2018

F. MUCHEMI

JUDGE