REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO.12 OF 2016

ERASTUS MURIITHI..... APPELLANT

VERSUS

ALICE GATURI NJIRU.....1ST RESPONDENT

DAVID NJERU NJIRU..... 2ND RESPONDENT

JUDGEMENT

The late Samuel Njiru Njeru was involved in a road traffic accident on 4th November, 2013. The deceased was riding motorcycle registration number KMCK 494A when it collided with motor vehicle registration numbers KBU 247F. The deceased's widow and son filed a suit before the Magistrate's Court seeking damages both under the Fatal Accidents Act and the Law Reform Act. Parties agreed on liability whereby the deceased was held 30% liable while the appellant conceded 70% liability.

The trial court awarded the respondents Ksh.843,850 as damages after deducting the 30% liability. This led to the filling of this appeal.

The appeal is based on the following grounds: -

> ***1. The trial court erred in law and fact in adopting a multiplicand of Ksh.15,000 in the absence of any evidence thus arriving at a manifestly excessive award.***
>
> ***2. That the trial court erred by basing damages awarded under the Fatal Accidents Act on the wrong principles thus arriving at a manifestly excessive award.***
>
> ***3. That the trial Court failed to deduct sums awarded under the Law Reform Act from the final award thus double compensating the deceased's estate.***

M/S Muthoga Gaturu & Co. Advocates appeared for the appellant. Counsels submit that the trial court erred by adopting a multiplicand of Ksh.15,000. The Court took irrelevant factors into account and misapprehended the evidence thereby making an excessive award. The averment in the plaint that the deceased was a driver earning Ksh.15,000 monthly was not proved. The plaintiff's evidence was that the deceased was earning Ksh.5000 monthly. It is not clear how the trial court arrived at Ksh.15,000. No evidence was tendered to prove that the deceased was a driver. According to PW1, the deceased was a motor cycle rider. A driver and a rider are totally different persons by training and by the machines they operate. The contention that the deceased was a farmer and was in the miraa business was not pleaded. Counsels urge the Court to adopt a multiplicand of Ksh.4000. Counsels rely on the case of ***MESHACK NJEMA ODONGO V WEST KENYA SUGAR COMPANY LTD(2009)eKLR***

Counsels for the appellant further contend that the trial court ought to have deducted sums awarded under the Law Reform Act from the final award. The two awards amount to double compensation as awards for loss of expectation of life and for pain and suffering go to benefit the deceased's estate. The trial court therefore erred by failing to deduct Ksh.110,000 from the final award. Counsels rely on the case of ***KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES V LUBIA & ANOTHER [1987] KLR 30*** where the court stated as follows: -

> ***"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damage 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."***

M/S Khan & Associates for the respondents opposed the appeal. It is submitted that the trial court deducted the sum of Ksh.100,000 from

the final award. There was no double compensation. It is further submitted that it is the appellant who proposed a dependency ration of ½. This proposal was adopted by the court. The appellant proposed a multiplicand of 10 years while the trial court adopted 13 years. This cannot be held to be excessive. The appellant also proposed Ksh.10,000 for pain and suffering and this was adopted by the trial court. Ksh.25,000 was awarded as special damages and the same was proposed by the parties.

Counsels for the respondents maintain that the evidence adduced by the respondents was not controverted or challenged. The deceased owned his own motor cycle. He was knocked down while riding his motor cycle. He was also a miraa trader earning Ksh.30,000 monthly. The adoption of Ksh.15,000 monthly by the trial court is fair.

This is a first appeal and the court is duty bound to evaluate the evidence and record of the trial court afresh and make its own conclusion. Only one witness testified. PW1 is the deceased's widow. It is her evidence that the deceased was 45 years old. He was a peasant farmer and a miraa broker. He was a boda boda rider. He owned a motor cycle. Her husband was earning about ksh.5000 monthly. They were also earing Ksh.30,000 monthly from harvesting miraa. The deceased had three children. Two are adults aged 24 and 21 years respectively one was aged 11 years and was still in school. That was the main evidence before the court.

The issue for determination is whether the trial court made some errors in assessing the amount of damages awarded to the respondents. Both counsels reiterated the normal applicable principles in dealing with appeals based on the award of damages. I will refer to the case of ***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 appeal is grounded on two major grounds: -

1. *The multiplicand of Ksh.15,000 is manifestly excessive and not support by the evidence.*

2. *The trial court ought to have deducted the sum of Ksh.10,000 for pain and suffering and Ksh.100,000 for loss of expectation of life from the final award.*

Regarding the first issue, it is clear that the respondents based their claim on two limbs. The first limb is income from the boda boda business while the second limb is from the mirra (muguka) farming. It was the respondents evidence that they had ¾ acre farm where they planted miraa. There was no documentary evidence on that allegation. However, it is part of the pleadings and evidence that the deceased was riding a motor cycle when the accident occurred. It can be safely concluded that the deceased either owned a motor cycle or was a boda boda rider. He kept himself busy by riding a motor cycle as his source of livelihood. The deceased was not an idler.

Counsel for the appellant maintain that the issue of miraa business was not pleaded. The plaintiff states that the deceased was in good health and the sole bread winner of his dependants. The pleadings did not include the contention that the deceased was a driver, miraa broker or miraa farmer. The evidence of PW1 is that they had ¾ acre farm where they plant miraa. I do find that that evidence cannot be an exaggeration by PW1. It is common knowledge that Kenyans engage themselves in farming. The fact that that aspect of livelihood was not pleaded cannot rule out the possibility that the deceased and his wife used to plant miraa on their piece of land.

I do agree with the appellant's contention that the evidence of PW1 was that the deceased earned Ksh.5000 monthly. The trial court adopted Ksh.15,000 as the monthly income. That is the basis of the appeal. In my view Ksh.5000 is below the current lowest monthly pay for any form of employment. The trial court seems to have been guided by the claim of Ksh.30,000 monthly from the miraa farming. That amount would translate to Ksh.360,000 from a ¾ acre plot yearly. In my view, I do find that the sum of Ksh.15,000 is quite on the higher side. There is the discretionary element exercised by the Court in awarding damages. The trial court felt that Ksh.15,000 monthly for someone who was 45 years and in the boda boda business was fair compensation.

Since PW1 testified that the deceased earned Ksh.5,000 from the boda boda business which amount I find to be an estimate, it would have been difficult for him to earn Ksh.10,000 more from his other sources of income. He spent most of his time in the boda boda business. I do find that an award of Ksh.10,000 monthly as the deceased's income is a fair estimate. I do set aside the award by the trial court of Ksh.15,000 monthly and replace it with Ksh.10,000 monthly. Apart from the boda boda business, the deceased had a ¾ acre farm where he used to plant miraa. This was another source of income.

The other issue involves the deduction of Ksh.110,000 from the final award. This issue has been settled by the Court of Appeal. There is no requirement that deductions be made in the final award. All what the court has to do is to take into account the award made under the Law Reform Act when making an award under the Fatal Accidents Act. In the case of **HELLEN WARUGURU WAWERU (supra), the Court of Appeal** explained this issue 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.

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:-

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.

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.

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.

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.

I am of the same view that there is no mandatory requirement in law that awards made under the Law Reform Act must be deducted from the awards made under the Fatal Accidents Act. A lost life cannot be computed to its very last penny worth. All what the award in form of damages do is to try and compensate the deceased's dependants in some form so that they do not fall into complete desperation soon after the death of their breadwinner. There is no error committed by the trial court by failing to deduct Ksh.110,000 from the final award. If any deduction was made, then that was erroneous. All what was required was to take into account the award made under the Law Reform Act when making the award under the Fatal Accidents Act.

In the end, the appeal partly succeeds. The final award shall be as follows: -

Special damages - Ksh.25,000

Pain and suffering Ksh.10,000

Loss of expectation of life - Ksh100,000

Loss of dependency (ksh10,000x½x13x12) – Ksh 780.000

Total award - Ksh.915,500

Less 30% contribution Ksh.274,650

Ksh.640,000

The respondents shall have costs for the subordinate case. Parties shall meet their own respective costs of the appeal.

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