



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 33 OF 2017**

**ELIUD MUSANGI.....APPELLANT**

**VERSUS**

**GILBERT**

**OMEDO**

**(suing as a legal representative/administrator**

**of the estate of Nancy Andeyo Amedo).....RESPONDENT**

***(Being an Appeal from the Judgment and Decree in Maseno PMCC No. 185 of 2014***

***Delivered by Hon. S. R. Kipngeno (SRM) on 29th March, 2017)***

**JUDGMENT**

- 1. GILBERT OMEDO (*hereinafter referred to as respondent*) sued ELIUD MUSANGI (*hereinafter referred to as appellant*) in the lower court claiming damages for fatal injuries suffered by his wife, Nancy Andeyo Amedo, who suffered fatal injuries on 16.12.12 when M/cycle KMCV 123E that he was riding with the deceased as a pillion passenger collided with appellant's M/V KAA 3588Q allegedly due to the negligence of the appellant and/or his agent.**
- 2. The defendant/appellant filed a statement of Defence and denied the claim.**
- 3. In a judgment delivered on 29th March, 2017 the trial court apportioned liability at 50:50% as between appellant and respondent and awarded damages in the sum of Kshs.2,207,992/- after deducting 50% contribution.**

**The Appeal**

**4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 7.4.17 filed the Memorandum of Appeal dated 30.3.17 which sets out 9 grounds of appeal that may be summarized into the following 8 grounds that:-**

- 1) The Learned trial Magistrate grossly misdirected himself in treating the evidence on liability and quantum superficially and consequently coming to a wrong conclusion on the same**

- 2) The Learned trial Magistrate did not sufficiently consider the demand of contributory negligence
- 3) The Learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities cited in the written submissions presented and filed by the appellant
- 4) The Learned trial Magistrate failed to sufficiently consider evidence presented by appellant
- 5) The Learned trial Magistrate erred in holding that appellant did not prove negligence on the part of the deceased
- 6) The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable
- 7) The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the respondent's claim
- 8) The Learned trial Magistrate failed to apply himself judicially and to adequately evaluate evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law

#### **SUBMISSIONS BY THE PARTIES**

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

#### **Appellant's submissions**

6. Appellant holds the view that respondent authored the death of his wife by not stopping before joining the road where appellant's vehicle was lawfully being driven and for failing to provide a helmet and a reflective jacket to the deceased as required by Section 103(B) of the Traffic Act Amendment Rules 2012. Appellant also holds the view that if liability is to be apportioned, respondent should bear 90% for negligently riding onto the lawful lane of appellant's vehicle. Appellant also proposes a multiplier of 10 years, Kshs. 80,000/- for loss of expectation of life and Kshs. 30,000/- for pain and suffering. Additionally, appellant submitted that the award to respondent on both the Law Reform Act and the Fatal Accidents Act amounts to double compensation. Finally, appellant submitted that the special damages awarded were not specifically pleaded and proved.

7. Appellant relied on the following authorities.

1. **DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] ECLR**
2. **IN THE RE ESTATE OF SUSAN MBOGA MANDU (DECEASED) [2011]ECLR**
3. **HELLEN WARUGURU WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF PETER WAWERU MENJA (DECEASED VS. KIARIE SHOE STORES LIMITED NYERI CIVIL APPEAL 22 OF 2014**
4. **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI .V. A.M. LUBIA AND OLIVE LUBIA (1985) 1KAR 727**
5. **AGROLINE HAULIERS LIMITED & ANOTHER V MICHAEL ABONGO KISEMBA**

[2015]EKLR

**6. COAST BUS SERVICE LTD V SISCO MURUNGA NDANYI & 2 OTHERS, NRB CA CIVIL APPEAL NO. 192 OF 92 (UR)**

**Respondent's submissions**

8. It was submitted for the respondent that evidence by respondent and PW3 was to the effect that respondent's motor cycle was knocked from behind and that the trial court correctly apportioned liability at 50:50% since the deceased who was a pillion passenger had no duty of care.

9. It was further submitted that the trial court correctly applied a multiplier of 26 years and the gross salary as the multiplicand and awarded Kshs. 30,000/- for pain and suffering, Kshs. 150,000/- for loss of expectation of life. In conclusion, respondent submitted that the award on special damages though not pleaded and proved was reasonably awarded.

10. Respondent relied on the following authorities.

**1. BERKELEY STEWARD LTD, DAVID COLTEL & JEAN SUSAN COLTEN - VS – LEWIS KIMANI WAIYAKI [1982-88] 1 KAR 101-108**

**2. BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD: WALLACE V RICHARDS (LEICESTER) LTD (1953) 1 ALL E R 1472, 1478, 1479 (CA).**

**3. OLDONYO FARM LIMITED v MARGARET WANGECHINDONGA & ANOTHER [2010] eKLR**

**4. MARWA R RWEBI V BAT KENYA LIMITED KISII HCCC NO. 11 OF 1992**

**5. JANE KATUMBU MWANZIA –VS- REPUBLIC HCCC NO. 3177 OF 1977**

**6. MOHAMED MAHMOUD JABANE v HIGHSTONE BUTTY TONGOI OLENJA [1986] eKLR**

**Analysis and Determination**

11. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **DAVID KAHURUKA GITAU & ANOTHER V NANCY ANN WATHITHI GITAU & ANOTHER [2016] eKLR**). It then behooves this court to summarize the evidence that was tendered before the trial court.

12. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (See **MOHAMED MAHMOUD JABANE v HIGHSTONE BUTTY TONGOI OLENJA [1986] eKLR**).

13. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of liability, multiplier, multiplicand, special damages and whether the court should make awards both under the Fatal Accidents Act and Law Reform Act.

a. **Liability**

14. In apportioning liability at 50:50%, the learned trial magistrate rightfully considered that the respondent was riding from a feeder road and that respondent who was on the main road, though having seen the approaching motor cycle, failed to take any action to avoid the collision.

b. **Multiplicand**

15. It is on record that deceased was a teacher. **Charlesworth on Negligence (3rd Edition), pp 560 & 561, para. 909** provides as follows as regards the method of calculating damages:-

*“When the income of the deceased is derived from his own earnings, ‘it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have been available to the benefit of the individual claiming compensation.’ The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependents.....*

16. From the foregoing, I find that in calculating damages for loss of dependency, the trial court ought to have applied the net salary of Kshs. 13,532/- and not the gross salary of Kshs. 22,482/-.

c. **Multiplier**

17. Deceased was in the formal sector which is governed by the normal retirement age of 60 years. She died at the age of 32 and I therefore find no cause to interfere with the trial court’s finding on the multiplier of 26 years.

d. **Pain and suffering and loss of expectation of life**

18. There is no evidence that the award for Pain and suffering and loss of expectation of life were based on no evidence or on misapprehension of the evidence or that the trial court applied the wrong principles or failed to take into account previously decided cases in reaching its findings.

e. **Special damages**

19. The trial court awarded special damages in the sum of Kshs. 45,150/-. I am not persuaded that proved special damages ought to be allowed where they are not specifically pleaded. I therefore find and hold that the sum of Kshs. 45,150/- ought not to have been allowed.

**Award under the Fatal Accidents Act and Law Reform Act**

20. In **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited NYERI CIVIL APPEAL22 OF 2014)**, the Court of Appeal (Waki, Nambuye and Kiage JJA) stated that:

*“...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.*

21. In the case of **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**, Mativo J, had this to say about Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the Law Reform Act

*“I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2*

***(5) of the Law Reform Act. My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.***

22. The judge cited in ***Richard Omeyo Ominovs Christine A. Onyango Kisumu Civil Appeal No. 61 of 2007*** with approval, where **Karanja Jin** discussing the provisions of Section 2 (5) of the Law Reform Act stated:-

***"The Law Reform Act Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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.***

***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". This 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."***

23. I fully associate myself with the findings in the above cited cases and therefore find that the trial magistrate appropriately awarded damages both under the Fatal Accidents Act and Law Reform Act.

### **Disposition**

24. In view of the finding I have made, the appeal partially succeeds. I substitute the judgment of the trial court **on multiplicand with Kshs. 13,532/- and set aside the award on special damages.** The award on liability, multiplier, pain and suffering and loss of expectation of life remain as awarded by the trial court.

25. Since appellant has partially succeeded, each party shall bear its own costs of the appeal.

**DATED, DELIVERED AND SIGNED THIS 10TH DAY OF MAY 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**Appellant - N/A**

**1st Respondent - N/A**