



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 36B OF 2017**

**STEVE ONGINGO ..... 1ST APPELLANT**

**ROSEMARY AKINYI ONGINGO ..... 2ND APPELLANT**

**VERSUS**

**SUSAN ADONGO OTIENO aka Susan Adongo Obara .....1ST RESPONDENT**

**GRACE CONNICE KOLA OTIENO ..... 2ND RESPONDENT**

**(suing as a legal representatives/administrator of the estate of Rose Ann Okelo Otieno)**

*(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 221 of 2014 Delivered by Hon. T. Obutu (PM) on 24th March, 2017)*

**JUDGMENT**

1. **SUSAN ADONGO OTIENO aka SUSAN ADONGO OBARA and GRACE CONNICE KOLA OTIENO (hereinafter referred to as respondents)** sued **STEVE ONGINGO and ROSEMARY AKINYI ONGINGO (hereinafter referred to as appellants)** in the lower court claiming damages for fatal injuries suffered by **Rose Ann Okelo Otieno**, their daughter and sister respectively, on 8.2.13 when motor vehicle KBF 701D that she was travelling in collided with appellants' motor vehicle KBN 945P allegedly due to the negligence of the 1st appellant.

2. The defendants/appellants filed a joint statement of Defence and denied the claim.

3. Liability was agreed by consent at 75:25% in favor of respondents against the appellants. In a judgment delivered on **24th March, 2017**, the trial awarded damages in the sum of Kshs. 1,462,895/- less 25% contributory negligence.

**The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 18.4.17 filed the Memorandum of Appeal dated 17.4.17 which sets out 9 grounds of appeal that may be summarized into the following 4 grounds that:-

- 1) The quantum on loss of dependency is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice**
- 2) The Learned trial Magistrate erred in law and in fact awarding Kshs. 800,000/- for loss of dependency**
- 3) The Learned trial Magistrate erred in awarding special damages that were not pleaded**
- 4) The Learned trial Magistrate erred in awarding damages both under the Law Reform Act and Fatal Accidents Act**

**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. On loss of dependency, appellants submitted that the sum of Kshs. 800,000/- was excessive and urged court to award Kshs. 400,000. To

this end, appellants relied on decisions among them Sammy Kipruto Rop & another v Francis Cheruiyot Barbelio sued as the legal representative of Penina Jeptoo (Deceased) [2016] eKLR where Kshs. 600,000/- was awarded for a 21 year old; Daniel Kiamba Kimithi & 62 Others v David Mutiso Kiilu & 4 Others [2016] eKLR where court awarded Kshs. 300,000/- for 14 to 19 year olds; M N (suing on behalf of a minor, L K, Deceased) v Paul Kiptoo [2016] eKLR where the court awarded Kshs. 400,000/- for a 10 year old. David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School, Nairobi, High Court [2001] eKLR where Kshs. 400,000/- was awarded for a student; Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR where Kshs. 120,000/- and 700,000/- was awarded for students and JGW & EWW v James Muriithi Muruga [2014] eKLR where Kshs. 160,000/- was awarded for a 15-year-old.

7. On pain and suffering, appellants urged the court to reduce it to Kshs. 50,000/-. They also urged court to award Kshs. 35,000/- for coffin; Kshs. 40,000/- for funeral expenses and set aside the sum of Kshs. 5,900/- for motor vehicle assessment which they claim was not proved.

#### **Respondent's submissions**

8. It was submitted for the respondents that the trial court correctly awarded Kshs. 800,000/- for loss of dependency. Respondents placed reliance on among other cases D M M (Suing as the Administrator and Legal Representative of the Estate of L K M v Stephen Johana Njue & another [2016] eKLR where the sum of 700,000/- was on appeal enhanced to Kshs. 1,200,000/- for a 16 year old student.

#### **Analysis and Determination**

9. 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.

10. 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 Kemfro Africa Ltd v/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR) and Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004).

11. 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 the pain and suffering, loss of dependency, special damages and whether the court should make awards both under the Fatal Accidents Act and Law Reform Act.

#### **a. Dependency**

12. The authorities cited by both parties clearly demonstrate that the sum awarded for the death of students varies from case to case. The sum as shown by the cited cases ranges from as low as Kshs. 160,000/- to Kshs. 1,200,000/-. The fact that the trial court did not award the sum proposed by the appellants cannot in itself be a justification for interference with the award. The appellants have a duty to demonstrate that the trial court in awarding the sum of Kshs. 800,000/- took into consideration an irrelevant fact or that the sum awarded is inordinately too high that it must be a wholly erroneous estimate of the damage, or that a wrong principle of law was applied. This, the appellants have failed to establish and I therefore decline the invitation to interfere with the award under this heading.

#### **b. Pain and suffering**

13. Deceased died 5 days after the accident. As rightfully observed by the learned trial magistrate, the deceased no doubt endured pain during that period and I see no basis for interfering with the award under this heading.

#### **c. Special damages**

14. It is now trite law that special damages must first be pleaded and then strictly proved. (See Coast Bus Service Limited v Murunga & others Nairobi CA No. 192 of 1992 (ur) and Jivanji v Sanyo Electrical Company Limited [2003] 1 EA 98).

15. Respondents proved Kshs. 70,000/- for 2 coffins and so, the sum is substituted with Kshs. 35,000/- for one coffin. Kshs. 5,900/- for motor vehicle was not proved and is set aside. 1st respondent testified that she had spent about Kshs. 250,000/- to feed mourners that attended the funeral of her husband and daughter. The trial court in its discretion and relying on the decision in Jacob Ayiga Maruja & Anor v Simeon Obayo [2005] eKLR where the court awarded Kshs. 60,000/- in respect of a funeral for one person awarded Kshs. 100,000/-. I am not persuaded that Kshs. 40,000/- proposed by the appellants would not be adequate funeral expenses in respect of two deceased persons. I therefore find no justification to interfere with the award under this heading.

#### **d. Award under the Fatal Accidents Act and Law Reform Act**

16. In Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased vs. Kiarie Shoe Stores Limited (Supra)) 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.

17. 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.”***

18. The judge cited Richard Omeyo Omino vs 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.”***

19. 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**

20. In view of the finding I have made, the appeal partially succeeds. I set aside the award for Kshs. 5,900/- for motor vehicle assessment fees and uphold the other awards as made by the trial court. Each party shall bear its own costs of the appeal.

**DATED, DELIVERED AND SIGNED THIS.....19th.....DAY OF.....July..... 2018**

**T. W. CHERERE**

**JUDGE**

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

**Court Assistant - Felix**

**For Appellants -N/A**

**For Respondents - N/A**