



**REPUBLIC OF KENYA**

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

**HCCA NO. 256 OF 2017**

**DAVID MBUBA.....1<sup>ST</sup> APPELLANT**

**SOLOMON ITULE MBUVI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**VICTORIA MWONGELI KIMWALU &**

**ANGELINE KATEE NGWILI (*Suing as the legal representatives of the estate of*)**

**PATRICK NDILE MWOLOLO.....RESPONDENTS**

***(Being an Appeal from the Judgment of Hon. E.M Muiru (SRM) in the Senior Resident Magistrate's Court at Makindu Civil Case No. 158 of 2016, delivered on 27<sup>th</sup> July 2017).***

**JUDGEMENT**

**INTRODUCTION**

1. The Appellant filed a suit in the lower Court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *Patrick Ndile Mwololo* and his Dependants following a fatal road accident on 01/05/2015.
2. They also prayed for special damages, costs of the suit and interest.
3. On 27/05/2017, the parties recorded a consent on liability in the ratio of 80:20 in favour of the plaintiff (*Respondent*).
4. Judgment on quantum was delivered on 27/07/2017 and the Respondents were given a total award of Kshs 4,120,000/= being Kshs 20,000/= for pain and suffering, Kshs 100,000/= for loss of expectation of life and Kshs 4,000,000/= for loss of dependency. The figure was to be subjected to 20% contribution.
5. Being aggrieved by the said judgment, the Appellants filed this appeal and raised 9 grounds as follows:
  - a) *The learned Magistrate erred in law and fact by failing to observe the laid down principles of law in awarding damages, in particular, damages under the head of loss of dependency and misdirected herself when making the award under the stated head.*
  - b) *The learned magistrate erred in law and fact in using the wrong principles in awarding damages under loss of dependency.*
  - c) *The learned magistrate erred in law and fact by erroneously adopting a global sum in making the award for loss of dependency contrary to the laid down principles.*
  - d) *The learned magistrate erred in law and fact in awarding damages under the Law Reform Act as well as under the Fatal Accidents Act against the well laid down principles of Law requiring the deduction of damages awarded under the Law Reform Act from the total award.*
  - e) *The learned magistrate erred in law and fact by awarding the Respondents a global sum under loss of dependency that was excessive in the circumstances and contrary to the laid down principles.*
  - f) *The learned magistrate erred in law and fact in failing to reach a finding on all the issues placed before the Court by the*

Appellants.

g) *The learned magistrate erred in law and fact in failing to reach a finding on all the issues placed before the Court by the Appellants.*

h) *The learned magistrate erred in law and fact in failing to reach a finding that the Respondent had not proved the deceased's income and thereby adopt the minimum wage prevailing at the time in assessment of loss of dependency.*

i) *The learned magistrate erred in law and fact by giving a global sum for loss of dependency which was exorbitant and inordinately high without regard to the laid down principles and without indicating the number of years the deceased would have been in business and without giving any legal basis for the stated sum.*

6. The Respondent filed grounds of opposition on 23/05/2018. The gist of her opposition was that the trial Court did not make any error of law or fact and that it applied the correct principles in assessing the damages.

7. The parties agreed to canvass the appeal by way of written submissions. Accordingly, they filed their respective submissions.

### **THE SUBMISSIONS**

8. In their submissions, the Appellants consolidated grounds 1,2,3,8 & 9 of the appeal and argued them together.

9. They relied on **Migori HCCA No. 3 of 2014 consolidated with HCCA No. 4 of 2014 Mwita Nyamohanga & Anor –Vs- Mary Robi Moherai & Anor** which they said, gave the manner in which assessment of damages under the LAA and FAA should be done.

10. They contended that the Respondent did not discharge her burden of proving that the deceased was making Kshs 100,000/= per month and that in the absence of proof of earnings, the Trial Court should have applied the minimum wage or a reasonable sum.

11. To further support the use of the minimum wage, the Appellants submitted that because the deceased's business was still running, there was no loss of income as such.

12. That the trial Court should have arrived at a reasonable multiplicand by assessing the contribution lost due to the deceased's demise.

13. In submitting that the trial Court did not take into consideration the submissions of the parties, the Appellants contended that the Respondent had proposed the use of the multiplier approach but the trial Court applied the global format.

14. Further, they said that in the event that this Court was inclined to uphold the use of a global sum, Kshs 1,000,000/= would be reasonable and moderate in the circumstances. They relied on **Murang'a HCCA No. 225 of 2013; Put Sarajevo General Engineering Co. Ltd –Vs- Esther Njeri & others.**

15. They also cited **Nairobi HCCC No. 318 of 2012; Mary Njeri Murigi –Vs- Peter Macharia & Anor** where a global sum of Kshs 4,000,000/= was awarded. They however contended that the award in that case was justified as there was proof of earnings.

16. In opposing the appeal, the Respondent submitted that the main issue in the appeal was whether the trial Court had applied proper principles in the award of damages. It was her argument that production of certificates or pay slips was not the only way of proving occupation or earnings. She relied on *inter alia* the case of **Oyugi Judith & Anor –Vs- Fredrick Odhiambo Ongong' & 3 others (2014) eKLR.**

17. In supporting the award of a global sum, the Respondent relied on the case of Put Sarajevo (*supra*) where the Hon Judge expressed himself as follows;

***“The Law Reform Act is clear and there is no ambiguity, that any cause of action for the benefit of the deceased's estate and thus any award that may ensue there from is not in substitution of or an alternative to the right that accrues to the deceased's Dependents under the Fatal Accidents Act...”***

18. The duty of a first Appellate Court as was held in the cases of **Mwana Sokoni –Vs- Kenya Bus Service Ltd (1985) KLR 931 and Selle –Vs- Associated Motor Boat company ltd (1968) EA 123** is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

19. Having looked at the grounds of appeal, the grounds of opposition and the rival submissions, the issues for determination in my view are;

a) *Whether the use of the global approach was erroneous.*

b) *Whether the damages awarded were manifestly excessive/exorbitant thus requiring interference by this Court.*

20. I will proceed to deal with the issues under the distinct heads.

### **THE GLOBAL APPROACH**

21. PW1 was Victoria Mwongeli, the deceased's wife. She adopted her statement as evidence (*the statement in the record of appeal is incomplete*). She testified that the deceased was a business man and had a business called 'power spark' in Sultan Hamud where he sold electricals and electronics. She testified that his monthly income was about Kshs 100,000/= and produced a quotation and receipt from Makueni County Government (*exhibits 9a and b*).

22. On cross-examination, she said that she could not prove the income. She agreed that the deceased used to issue receipts in proof of sales but she had not carried the receipt books. She did not know whether the deceased used to remit tax to KRA for the business. She said that she had continued running the business and was earning Kshs 50,000/= per month.

23. In settling for the global format, the trial magistrate opined as follows;

***“Having considered the foregoing, I find that there is no dispute that the deceased operated a business upon his demise. However, no evidence has been availed to prove the sums stated as his earning. Being duly guided by the above referenced authorities, I opine that it would be prudent to opt for the principle of granting a lump sum award as it is evident that the deceased operated a business.***

***In addition, while operating a business, there is no retirement envisaged as compared to working for an institution or organization”***

24. The Appellants seem to be suggesting that the use of the multiplier method is cast on stone yet our jurisdiction is awash with authorities to the effect that where circumstances do not favour its application, the global approach should be adopted.

25. The authority relied upon by the trial magistrate is particularly relevant i.e. **Jacob Ayiga Maruja & Another –Vs- Simeane Obayo, Civil Appeal No. 107 of 2002 (2005) eKLR**. Being a Court of Appeal case, it is binding on this Court and it is imperative to reproduce some observations therein. The learned Judges upheld the reasoning in **Albert Odawa -Vs- Gichimu Githenji; Nakuru HCCA No.15 of 2003 (2007), eKLR** where Justice Ringera expressed himself 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 dependency and the expected length of the dependency 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.”***

26. The multiplier approach was not suitable in the current case for the simple reason that the deceased's earnings were not proved. It is clear that the Learned Trial Magistrate applied the correct principles and relied on relevant authorities in deciding to use the global approach.

27. Having opined that there was no error in using the global approach, it is unnecessary to delve into issues raised by the Appellants with regard to the multiplier approach. I will however comment on one or two things.

28. According to the Appellants, the Court should have used the minimum wage as the multiplicand. As observed by the trial magistrate, it is not in dispute that the deceased operated a business in Sultan Hamud and there were some exhibits to show that he was earning more than the prescribed minimum wage. It would therefore be unjust to categorize him as a minimum wage earner.

29. There was also a suggestion from the Appellants that the trial Court should have arrived at a reasonable multiplicand by assessing the contribution lost due to the deceased's demise. In my view, that would amount to application of unknown formulas and any figure arrived at would be mere speculation.

30. Further, the fact that the plaintiff proposed the use of the multiplier approach does not mean that the Court had to automatically agree with her.

#### **WHETHER THE AWARD WAS MANIFESTLY EXCESSIVE/EXORBITANT.**

31. The guiding principles in deciding whether or not to interfere with the award of damages made by the trial Court have been established in various judicial pronouncements.

32. In the celebrated case of **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727** the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge

***“it 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 a wholly erroneous estimate of the damage...”***

33. In the case of Put Sarajevo (*supra*) which was relied upon by the Appellants to propose an award of Kshs 1,000,000/= for loss of dependency, the deceased was 29 years old and supported his wife, brother and two children aged 4 and 2 years.

34. There was no proof of earnings. The Court reduced an award of Kshs 1,280,000/= which had been arrived at using the multiplier approach and gave a global award of Kshs 1,000,000/=.

35. In **Nakuru HCCA No. 182 of 2003; Joseph Njuguna Mwaura –Vs- Builders Den Ltd & Anor**, the deceased was 35 years old and was married with three children aged 18,16 & 6 years at the time of her death. The Court awarded Kshs 3,400,000/= for loss of dependency using the multiplier approach i.e. a multiplicand of Kshs 25,000/=, multiplier of 17 years and dependency ratio of  $\frac{2}{3}$ .

36. In **Kisii HCCA No. 39 of 2014; Marwanga Jeffern –Vs-Jeckton Ochieng’ & Anor** an award of Kshs 1,600,000/= for loss of dependency was awarded for a deceased who died at the age of 30 and was survived by a widower and a 10 year old son.

37. In **Kisumu HCCA 75 of 2015; Mombasa Maize Millers Ltd –Vs- WIM**; the deceased was aged 34 years at the time of death, not married but had a 4 year old son. The Court used the multiplier approach to award Kshs 1,600,000/= for loss of dependency i.e. multiplicand of Kshs 15,000/=, multiplier of 20 years and dependency ratio of  $\frac{2}{3}$ .

38. In **Machakos HCCC No. 51 of 2014 Florence Mueni Mbuva & Anor –Vs-China Wu Yi Ltd**; the deceased died at the age of 30 and was survived by a wife and two sons aged 3 & 6 years.

39. Using the multiplier approach, the Court awarded Kshs 11,944,800/= for loss of dependency i.e. multiplicand of Kshs 55,300/=, multiplier of 27 years and dependency ratio of  $\frac{2}{3}$ .

40. In our case, the deceased was survived by his wife and children aged 6 & 4 years at the time of his death. As much as comparable authorities should guide a Court is assessing damages, each case presents unique facts and circumstances which should also be taken into consideration.

41. There is no doubt that the deceased was survived by a young family with 2 minors who will be dependent on their mother for a considerable length of time.

42. From the judgment, it is clear that that the learned trial magistrate was alive to the fact that the business is still in existence under the stewardship of the Respondent.

43. As much as the Learned Trial Magistrate did not cite comparable authorities, my view is that the award for loss of dependency is within an acceptable range and I find no basis to disturb it.

44. The Court cannot shut its eyes to the fact that the deceased had a business which used to give him an income. An award of Kshs 1,000,000/= as proposed by the Appellants would be inordinately low in the circumstances.

45. The Appellants contended that the award made under the Law Reform Act should have been deducted from the award made under the Fatal Accidents Act.

46. I can give no better explanation than the one that was given by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) –Vs- Kiarie Shoe Stores Limited [2015] eKLR**. The learned Judges expressed themselves as follows;

**“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.”**

47. Back to our case, it was the evidence of PW1 that the deceased’s parents were dependent on him.

48. I have however noted from the plaint that the only persons named as Dependants of the deceased were his wife and two minor children. It is trite that parties are bound by their pleadings. Accordingly, the persons named as Dependants under the FAA were the same ones that would benefit under the LRA. Failure to deduct the award under the LRA was therefore erroneous.

49. The award should therefore be as follows:-

Damages under the Fatal Accidents Act	2,500,000
Damages under the Law Reform Act	<u>120,000</u>
Total	2,380,000
Less 20% contribution	<u>476,000</u>
Award	<b><u>1,904,000</u></b>

**CONCLUSION**

50. The court thus makes a finding that the appeal has merit and is hereby allowed on the following terms;

**i. On quantum;**

<b>Damages under the Fatal Accidents Act</b>	<b>2,500,000</b>
<b>Damages under the Law Reform Act</b>	<b>120,000</b>
<b>Total</b>	<b><u>2,380,000</u></b>
<b>Less 20% contribution</b>	<b>476,000</b>
<b>Award</b>	<b><u>1,904,000</u></b>

**ii. Half Costs are awarded to the Appellant in appeal.**

**SIGNED, DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**