REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.73 OF 2017

ESTON MWIRIGI NDEGE.....1ST APPELLANT

PAUL KIRIMI KITHINJI.....2ND APPELLANT

-V-

DAMARIS KAIRIARI (Suing as the Legal Representative

of the Estate of FELIX KIBITI (Deceased).....RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment and decision of the Senior Resident Magistrate's Court at Githongo **Hon C.A Mayamba (SRM)** on 10th March 2017, in Githongo SRMCC NO. 43 of 2016. In that decision, the Learned trial Magistrate awarded the respondent Kshs.426,720/= as special and general damages resulting from an accident that occurred on 19th March 2015, along Meru-Nkubu road near Ng'onyi area in which the deceased was fatally injured.

2. Aggrieved by that decision, the appellants lodged the current appeal whereby they put forth nine grounds of appeal which were collapsed into 3 as follows:-

> ***a) that the trial court erred in adopting a multiplicand of Kshs.9,024/15 with a multiplier of 3 years thereby awarding the respondent Kshs.426,723/- which was inordinately high;***
>
> ***b) that the trial court erred in failing to consider the submissions of the appellants and the principles of stare-decisis and ratio decidendi; and***
>
> ***c) that the trial court erred in failing to consider the award under the Law Reform Act while awarding damages under the Fatal Accidents Act.***

3. The appeal was canvassed by way of written submissions. This appeal is only on the issue of quantum since liability had been apportioned in the ratio of 85:15 between the 1st and 2nd appellant in a test case, **Githongo Civil Case No. 28 of 2015**.

4. It was submitted for the appellants that the trial court adopted a multiplicand of Kshs.9,024/15, a dependency ratio of 2/3 and a multiplier of 3 years and arrived at an award of Kshs.216,576/= for loss of dependency. That the 3 years adopted was on the higher side as the court failed to consider several vicissitudes and uncertainties of life. That since the deceased was 69 at the time of his death, the circumstances of the case did not favour the application of a multiplier.

5. On the multiplicand of Kshs.9,024/15 adopted by the court, it was submitted that it was a serious error as the deceased had already retired from active service. That if a multiplicand was to be used, it should have been Kshs.5,436/90 since the deceased was a farmer which category fell under the agricultural industry. It was therefore submitted that since the amount of income and the deceased's profession was unknown, the proper mode of assessment would have been to settle on a global/lump sum submitted at Kshs 210,000/- as loss of dependency.

6. Lastly, it was submitted that the trial court should have deducted the award under the Law Reform Act from the Fatal Accidents Act to ensure that there was no case of double benefit. The cases of **Edner Gesare Ogega vs. Aiko Kebiba [2015] Eklr** and **John Wamae & 2 Others vs. Jane Kituku Nziva & Anor [2017] eKLR** were relied on in support of those submissions.

7. On the other hand, it was submitted for the respondent that the multiplier of 3 years was fair as the deceased died at the age of 69 years and

was in good health and would have lived for many more years. That the multiplicand of Kshs.9,024/15 adopted by the court as the minimum wage was correct as the deceased was in active farming for both domestic and commercial purposes and that there was no need to adopt a lumpsome/global award as the same is adopted where the profession and income of the subject matter is unknown which was not the case in the instant case. The respondent urged that the appeal be dismissed.

8. This being a first appeal, the court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. See ***Selle v Associated Motor Boat Co.*** **[1968] EA 123** and ***Kiruga v Kiruga & Another [1988] KLR 348***.

9. Further, this being an appeal on quantum alone, the jurisdiction of this court is well known. In **Butt vs. Khan [1977] 1 KLR,** it was held:-

> ***"An appellate court will not disturb an award for damages unless it is 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".***

10. The uncontroverted evidence was that, at the time of his demise, the deceased was 69 years married with children. He was in active farming and was a breadwinner of the family. When making the award, the trial court held that it was common knowledge that most rural folks do farming for both domestic and commercial purposes. It therefore adopted the multiplicand of Kshs.9,024/15 being the minimum wage applicable in the year 2015 under **Legal Notice No. 196**. It also adopted a multiplier of 3 years considering that the deceased was aged 69 years and could have lived many more years. The court therefore awarded loss of dependency thus; 9,024/15x12x3x2/3= Kshs.216,576/-.

11. It is not in dispute that the deceased was a farmer. It was however, not clear how much income the deceased was making from his said economic activity. I agree with the appellants that in circumstances where the amount of income and profession of a deceased cannot be accurately ascertained, the best approach would be to *adopt a global award.*

12. *In* **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR,** Ngaah J. held:-

> ***"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."***

See also **Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR**

13. In this regard, since it was established that the deceased had already left active service and his income from farming could not be accurately ascertained, the best approach should have been to use the global/lump sum rather than applying the multiplicand of Kshs.9,024/15.

14. I have noted that the appellants had proposed a global award of Kshs.210,000/-. The award arrived at by the trial court using the multiplicand of KSh.9,024/15 amounted to Kshs.216,576/- a difference of merely Kshs.6,576/-. Although the trial court used a multiplicand rather than a global award approach, I find that the amount was reasonable. In my view, considering the age of the deceased and the economic activity he was undertaking, an award of between Kshs.200,000/- to Kshs.300,000/- would have been adequate.

15. Accordingly, I find that the award of Kshs.216,576/- made by the trial court was reasonable and not inordinately high as to amount to an erroneous estimate.

16. The second ground was that the trial court failed to consider the submissions of the appellant. I have considered the judgment of the trial court. It is not correct that the trial court did not consider those submissions. It clear that that court exhaustively considered the submissions of the parties but declined to agree with those of the appellants. In this regard, I find no basis for that complaint and I reject that ground.

17. The third and last ground was that, the trial court erred in failing to consider the award under the Law Reform Act while awarding damages under the Fatal Accidents Act. Counsel for the appellants submitted that the award under the Law Reform Act should have been deducted from the award under the Fatal Accidents Act to avoid double benefit.

18. In my view, the requirement in the Law Reform Act is to "take into account" the award under that statute when making an award under the fatal accidents Act. It does not provide that sums awarded to the estate of a deceased under the Law Reform Act be deducted from damages awarded for lost dependency.

19. This view was expressed in **James Ntwiga Kanake & Another vs. Aileen Mukwanjeru Jediel (suing as the Administrator of the Estate of the late Jediel Ntwiga) [2016] eKLR** wherein the court held:-

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20. In a more recent decision of **Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eklr**, the Court of Appeal held:-

"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. 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 t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio 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 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. 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." The deduction of the entire amounts made under the LRA in this case was erroneous and 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 life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. 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 FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

21. In view of the foregoing, I find that the trial court did not fall into any error by failing to deduct the award under the Law Reform Act from the Fatal Accidents Act.

22. In the end result, I find the appeal to be without merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 15th day of October, 2018.

A. MABEYA

JUDGE