REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.72 OF 2017

ESTON MWIRIGI NDEGE.....1ST APPELLANT

PAUL KIRIMI KITHINJI .....2ND APPELLANT

VERSUS

PATRICK GITONGA MBAYA (Suing as the

Legal Representative of the Estate of JOSEPH

MUTHONI MAKINYI (Deceased).....RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decision of the Senior Resident Magistrate's court at Githongo **Hon C.A Mayamba (SRM)** made on 10th March 2017, in Githongo **SRMCC NO. 42 of 2016**. In that decision, the trial court entered judgment for the respondent for Kshs.2,256,248/= as damages resulting from a road traffic accident that occurred on 19th March 2015, along Meru-Nkubu road 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. 2,093,568/- 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 liability having been apportioned in the ratio of 85:15 between the 1st and 2nd appellant in a test suit, **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 29 years and arrived at an award of Kshs.2,256,248/= for loss of dependency. That the multiplier of 29 years was on the higher side as the court failed to consider the several vicissitudes and uncertainties of life. It was submitted that a multiplier of 12 years would have sufficed.

5. On the multiplicand adopted of Kshs.9,024/15, it was submitted that it was without basis. That the trial court should have adopted Kshs.5,436/90 as the multiplicand since the deceased was a farmer which falls under unskilled labour.

6. The appellants further submitted that where the amount earned by a deceased and his/her profession is unsettled, the courts should adopt a lump sum/global sum approach instead of delving into estimating incomes and professions. Consequently, the appellants urged the court to adopt a global sum of Kshs 400,000/= as loss of dependency.

7. Finally, it was submitted that the trial court erred in failing to deduct 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.

8. On the other hand, it was submitted for the respondent that the deceased was aged 31 years, a mother of 2 children and working as a farmer. That as per the ***Regulation of Wages (Agricultural Industry), 2013***, the minimum wage for a farmer was Kshs.8,200/=. That the trial court was therefore correct in awarding Kshs.9,024/= as the minimum wage as the deceased was a commercial farmer. That since the deceased died at the age of 31, a multiplier of 29 years was appropriate. Finally, it was submitted that there was no provision of law, express or implied that stated that the awards under the Law Reform Act should be deducted from the Fatal Accident Act whenever damages are awarded under both statutes.

9. 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***.

10. Further, this being an appeal being on quantum only, this court is aware the extent of its jurisdiction. 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".***

11. The record shows that it is the respondent alone who testified at the trial. He told the court that the deceased died at the scene of the accident; that she was a house wife and farmer aged 31 years at the time of her demise. That she had two children with him having been married under customary law. The respondent remained firm in his testimony even in cross-examination.

12. While making an award for loss of dependency, the trial court held, inter alia, that it was common knowledge that most rural folks do farming for both domestic and commercial purposes and consequently adopted the multiplicand of Kshs.9,024/15 which was the minimum wage applicable in the year 2015 under ***Legal Notice No. 196***.

13. The respondent's testimony that the deceased was undertaking commercial farming was not displaced. She was farming on the family farm and carrying on dairy farming. However, it was not stated what amount of income she used to get from the said economic exercise.

14. *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."***

15. The same reasoning was adopted in an earlier decision of ***Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR*** where Nambuye J., as she then was, stated that:-

> *"**As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books**".*

16. In the present case, it is not in dispute that the deceased was involved in farming on family land. That she was rearing cows for daily products. However, her earnings could not be ascertained. The trial court fixed the sum of Kshs.9,024/15 as her minimum wage per month. This was on the basis that it was the then minimum wage for unskilled labour at the time under the ***Regulation of Wages (Agricultural Industry), 2013***.

17. In this court's opinion, the process of assessment of damages should not be based on assumptions and speculation. It should be based on concrete evidence that is predictable. There is no rule of law that where the profession and/or earning of a deceased person is unknown, the minimum wage should be applied. It becomes speculative in that, different professions will attract different hazards. The multiplicand cannot be the same. It is therefore in my view safe to adopt the approach of global/lump sum award as in the case of **Moses Mairua Muchiri (supra) and Mary Khayesi Awalo (supra)** aforesaid.

18. In the present case, the trial court did not state why it resorted to the minimum wage instead of the global award approach that had been submitted. In my opinion, a court of law should always give reasons for its decision. There was case law before that court to show that, in similar circumstances, courts have adopted the global awards approach. It is also clear that the trial court did not consider the submissions of the appellants before it on that point. That in my opinion amounts to an error on its part. In the circumstances, the trial court should have made an assessment by way of a global award.

19. In the cases cited by the appellants, the awards were Kshs.400,000/-. In those cases, the deceased were of advanced age. Their sources of income was not as specific as in the present case. In this case, the deceased was aged 31 years, a very young age, and was married with 2 kids. She was actively involved in dairy farming on family land. She was in the prime of her life and her estate must have undergone immense loss and anguish as a result of her death. Taking in totality all the circumstances of this case, I find and hold that a global sum of Kshs.1,500,000/- would be adequate compensation for loss of dependency and I would award the same.

20. Accordingly, the sum of Kshs 2,093,568/= awarded by the trial court for loss of dependency is hereby substituted with a sum of Kshs.1,500,000/-.

21. The other ground raised was that the trial court failed to consider the appellants submissions. I have carefully considered the judgment of the trial court. It is clear that the submissions of all the parties were well considered by the court The fact that the trial courts failed to agree with the submissions of the appellants does not mean that it did not consider them. Its only on the aspect of global award and I have already made a finding on it. I reject that complaint as lacking any basis.

22. The 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 appellant submitted that awards under the Law Reform Act is deductible from the award under the Fatal Accidents Act to ensure that there is no case of double benefit. The case of **Edner Gesare Ogega vs. Aiko Kebiba [2015] Eklr** was cited in support of those submissions.

23. On the other hand, the respondent submitted that there was no provision of law that requires awards under the Law Reform Act to be deducted from the Fatal Accidents Act whenever damages are awarded under both statutes.

24. In my view, the requirement under the Law Reform Act is for the court ***"take into account"*** and not "to deduct" awards made under that Act from awards under fatal Accidents Act. That does not make it mandatory that sums awarded to the estate of a deceased under the Law Reform Act should be deducted from damages awarded for loss of dependency.

25. In **Peres Wambui Kinuthia and Another –vs- S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 of 2010 (UR),** the court held:-

> ***"In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words "to be taken into account" and "to be deducted" are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are "taken into account." That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction"***

26. In **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:-***
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> ***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."***

27. In view of the foregoing, I find that the trial court did not err in failing to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act. Consequently, nothing turns on this point.

28. In the end result and in view of the fact that the other awards were not contested, I accordingly enter judgment for the Respondent in the sum of Kshs.1,662,000/= made up as follows:-

a) **General damages for pain and suffering ..... Kshs 30,000/=;**

b) **Loss of Expectation of Life ……... Kshs 100,000/=;**

c) Loss of Dependency ……..…….. Kshs 1,500,000/=;

d) Special Damages ……..…… Kshs 32,680/=;

TOTAL …… Kshs 1,662,600/=

29. As the appeal has partially succeeded, there will be no order as to costs on the appeal. However, the respondent will have the costs in the lower court.

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

A. MABEYA

JUDGE