REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 128 OF 2008

MIRRIAM JEPTOO SAINA.....1ST APPELLANT

BARNABAS KIMUTAI NG'ETICH.....2ND APPELLANT

(Both suing as the administratix and administrator of the estate of

THEOPHILUS KIPKIRUI KIPYAGAN (DECEASED)

-VERSUS-

SPENCER KIPRUTO KIMELI.....1ST RESPONDENT

PHILIP KIPYEGON.....2ND RESPONDENT

JUDGMENT

1. The instant appeal arose from the decision of the court in Eldoret CMCC No.645 of 2007 on 14th November 2008 by the Chief Magistrate Hon. S.N. Riechi. Being aggrieved by the decision, the Appellants lodged the appeal alleging that the learned trial magistrate erred in law and in fact in:

i) failing to award damages under the Law Reform Act, funeral expenses and loss of consortium.

ii) reaching a wrong conclusion and against weight of evidence regarding an award of damages under the Law Reform Act, funeral expenses and loss of consortium.

iii) failing to assess damages and or failing to correctly assess damages and or failing to assess damages under the Law Reform Act, funeral expenses and loss of consortium.

iv) awarding damages in reduction from as opposed to reduction of vis a vis an award of damages under the Law Reform Act.

2. The Appellants, in view of the above, pray that part of the judgment in Eldoret CMCC No. 645 of 2007 be set aside. They call upon the court to assess damages for the same and make necessary orders.

3. This being a first appeal, the court is reminded of its primary role as a first appellate court namely, to re-evaluate and re-assess the evidence on the record to determine whether the conclusions reached by the learned trial magistrate will stand or not and give reasons either way. See **Selle Vs. Associated Motor Boat Company Ltd. [1968] EA 123 at Pg. 126.**

4. The 1st Appellant, Miriam Cheptoo Saina, testified as PW1. She told the court that the deceased was her husband, and he died in a road traffic accident on 11th December 2004. He left behind four (4) children aged between 5 and 15 years. She produced their birth certificates as Exhibit 1.

5. The 1st Appellant told the trial court that before she filed the suit, she had filed for letters of administration and obtained a grant in Nairobi HCCC Succession No. 3392 of 2005. She produced the receipts of payment made to Kipchirchir Advocate with regard to the succession cause. The Appellant further produced the deceased's pay-slip, death certificate, motor vehicle hire receipts and receipts for food purchased in relation to the burial ceremony.

6. She also produced a demand letter and a police abstract. She testified that her husband was aged 30 years at the time of his death while she

was aged 27 years at the time. She prayed for general damages for loss of dependency.

7. In his judgment, the learned trial magistrate adopted a multiplicand of 30 years as the expectation of the deceased's working life. It was his view that the deceased who was aged 30 years at the time of his death and earned a basic salary of Kshs. 14,940/- would be expected to work until retirement which, at the time, was capped at 55 years of age.

8. The learned trial magistrate awarded damages under the Fatal Accidents Act at Kshs. 4,200,000/-. The dependency ratio which was agreed by consent as 2/3 reduced the amount to Ksh. 2,800,000/-. The Appellants were to bear 20% liability, making the damages under the Fatal Accidents Act a total of Ksh. 2,240,000/-. Special damages amounted to Ksh. 15,500/-. The learned trial magistrate did not make any award under the Law Reform Act, stating that this would amount to the Plaintiff benefiting twice for the same accident.

Multiplier

9. M/s Magare, counsel for the Appellants, submitted that the trial court adopted a multiplicand of 30 years but instead used a multiplicand of 25 years in calculating the award. That if this was rectified, they would be satisfied with the trial court's judgment. Counsel urged that the trial court failed to make a finding on either loss of consortium or loss of life, yet they had pleaded and submitted on both issues.

10. M/s Kayla for the Respondent submitted that it is clear that the trial court used a multiplier of 25 years as tabulated in its ruling. That the deceased was aged 30 years at the time of death and was projected to retire at the age of 55 years.

11. In determining the correct multiplier, I find guidance in the case of **Hannah Wangaturi Moche & Another vs. Nelson Muya (Nairobi HCCC No. 4533 of 1993)** where the court rendered itself thus:

> **"In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lumpsum."**

12. Applying the above approach and considering that the deceased was aged 30 years at the time of his death, the court finds the multiplier of 25 years adopted by the trial magistrate reasonable. At the time of the deceased's death, the retirement age was 55 years. The balance of the deceased's earning life was therefore 25 years. For this reason, I find no basis for interfering with the learned magistrate's decision on the issue of the multiplier.

Loss of Consortium

13. On the issue of loss of Consortium, the 1st Appellant states that at the time of the appeal, she had not remarried and would not remarry because it is against Keiyo customs by which she is bound. The Respondents however asserted that the Appellants only pleaded loss of consortium but failed to provide proof thereof. That there was no evidence ten years later, that the widow remained unmarried.

14. Following the case of ***Best vs. Samuel Fox & Co. Ltd*** **[1951] 2 KB 639,** the Court of Appeal in ***Chege Kimotho & Others vs. Maria Vesters & Another*** **[1988] KLR 48, in** defining consortium stated that *companionship, love, affection, comfort, mutual services, and sexual-intercourse all belong to the married state.*

15. The court held that this claim can only be made by a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A plaintiff, who has suffered injuries and as a result is unable to perform their conjugal duties, would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium.

16. From the foregoing, the award of general damages subsumes any claim for loss of consortium. Consequently, the learned trial magistrate cannot be said to have failed to consider the loss of consortium in issuing general damages. The learned trial magistrate considered the loss of consortium in awarding general damages.

Award under the Law Reform Act

17. On this issue, M/s Magare for the Appellants submitted that the trial court misapprehended the law in declining to make an award under the **Law Reform Act**. Counsel urged that damages under the Act are awarded in addition to damages under the **Fatal Accidents Act**. M/s Kayla for the Respondents contended that an award under the **Law Reform Act** would amount to double compensation and urged the court to dismiss the appeal for lack of merit.

18. In answering the question as to whether the trial court erred in failing to award damages under the Law Reform Act, Mativo, J in **David Kahuruka Gitau & Another vs. Nancy Ann Wathithi Gitau & Another Civil Appeal No. 43 of 2013 (Nyeri)** cited **P. S. Atiyah** on *'**Accidents Compensation and the Law**'* **2nd Edition at page 88** which states that:-

> ***"... hard reality enters this extraordinary legal stage, the law will not allow double recovery. In practice, this means the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from an award under the Fatal Accidents Act on the legal justification on pretext that the inheritance is a "gain" from the death which must be set off against the loss."***

19. In the case, Mativo, J. further cited the decision of **Anyara Emukule,** J. in **Benedeta *Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR*** *in which the learned judge stated thus:*

> ***"In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering …..... .....The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident..... It is of course correct if both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estate. These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act."***

20. Section 2(5) of the **Law Reform Act (Cap 26)** provides that the rights conferred by or for the benefit of 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. A party entitled to sue under the Fatal Accidents Act therefore still has the right to sue under the Law Reform Act in respect of the same death.

21. 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. – See **Richard Omeyo Omino vs. Christine A. Onyango, Kisumu Civil Appeal No. 61 of 2007.**

Funeral Expenses

22. M/s Magare for the Appellants submitted that the learned trial magistrate was silent on the award for funeral expenses. Counsel urged that courts have awarded damages for funeral expenses even where the same have not been proved by receipts. M/s Kayla, for the Respondents, observed that funeral expenses are special damages which must be pleaded and proved, and that the Appellant failed so to do.

23. The law in regard to funeral expenses is provided under **section 6** of the **Fatal Accidents Act** which states thus:

> **"Funeral expenses may be awarded by way of damages in certain cases. In an action brought by virtue of the provisions of this Act, the court may award, in addition to any damages awarded under the provisions of sub-section (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought".**

24. Funeral expenses ought to be awarded under special damages, which means, they must be specifically pleaded and proved. However, as stated in the case of **KJB vs. Antonella Cantalluppi Civil Appeal No. 23 of 2015**, referred to by the Appellant, and in the case of **RKO & Another vs. Kenya Power & Lighting Company Ltd, Civil Suit No. 159 of 2009 (Eldoret),** precedent prescribes that funeral expenses may be awarded as a matter of course. The rationale is that a deceased person must be buried and expenses must be incurred in burial preparations. For this reason, the court awards a global sum of Kshs. 30,000 under this head.

In the premise, the Appellants' appeal is allowed but only in so far as the compensation for funeral expenses is concerned. Each party to bear their own costs.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 1ST DAY OF OCTOBER 2018.

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H. A. OMONDI

HIGH COURT JUDGE