REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEALS NOS. 65 AND 79 OF 2016

(CONSOLIDATED)

BETWEEN

ALFRED WASHIKA LUKANDU and MARY NANGEKHE

(suing as *personal representatives and or administrators of the estate of*

STANELY SHITSESWA LUKANDU deceased).....**APPELLANT**

VERSUS

CYNTHIA NYANDUKO MAUNCHO.....**RESPONDENT**

AND

CYNTHIA NYANDUKO MAUNCHO.....**APPELLANT**

VERSUS

ALFRED WASHIKA LUKANDU and MARY NANGEKHE

(suing as *personal representatives and or administrators of the estate of*

STANELY SHITSESWA LUKANDU deceased).....**RESPONDENT**

(Appeals arising from the judgment and decree of the Hon. CAS. Mutai Senior

Principal Magistratein Butere CMCCC No. 179 of 2013 of 2nd September 2016)

JUDGMENT

1. This matter comprises of two consolidated appeals arising from the same determination. They were consolidated by an order made by consent of both sides, which was subsequently adopted by the court on 2nd July 2018.

2. The appellants in the first appeal lodged herein a memorandum of appeal on 8th September 2016, dated 5th September 2016, in which it was averred that the trial court had found that a pays lip had not been produced yet it had been produced and marked as Plaintiffs' exhibit number 7, had ignored the written submissions presented by the appellants in respect of loss of dependency, had not taken into account the evidence of the appellants, and had failed to judicially and adequately evaluate the evidence tendered. It is sought that the decree of the trial court be set aside, a fresh calculation of the loss of dependency be made after considering the payslip tendered in evidence by the appellants, and costs be awarded to the appellants with interests.

3. The appellant in the second appeal lodged her memorandum of appeal herein on 27th September 2016, dated 26th September 2016, in which it was averred that the trial court is faulted for failing to dismiss the case before it for the respondents had failed to prove it to the required standard, for holding that the appellant was 80% liable for the subject accident without sufficient evidence to support the contention, for failing to hold the respondents 20% liable for the accident, for awarding the respondents special damages at Kshs. 45, 500.00 when the

same had not been proved, for awarding a sum of Kshs. 1, 310, 000.00 general damages which was excessive so much as to amount to an erroneous estimated of loss or damage suffered by the respondents, for awarding a sum of Kshs. 960, 000.00 for loss of dependency without legal basis or justification and which figure was so excessive as to be an erroneous estimate of the loss actually suffered, using multipliers and multiplicands that had no foundation in law and which could not be justified, applying a 2/3 ratio of loss of dependency when the same was not applicable in the circumstances, failing to consider the appellant's submissions and authorities and overly relying on the submissions and authorities of the respondents, and being plainly wrong overall. It is sought that the decree of the trial court be set aside and be substituted with a proper finding, and the respondents do pay the costs of the appeal and at the trial court.

4. For the purpose of these proceedings, and for ease of reference, I shall refer to the plaintiffs before the trial court as the appellants herein, while the defendant shall be referred to as the respondent.

5. The factual background to the matter is that the deceased herein met his death on 24th February 2013 through a motor accident. He was a pillion passenger on motorcycle registration mark and number KMCY 474K which was travelling along the Bungoma-Mumias Road, when the same collided with motor vehicle registration mark and number KBS 537L at Lukoye area within Kakamega County. The suit at the trial court was by the appellants who accused the respondent of causing the said death by the negligent manner in which she handled or controlled her vehicle. They sought damages, both general and special, under the Law Reform Act Cap 26, Laws of Kenya and the Fatal Accidents Act, Cap 32, Laws of Kenya. The respondent countered the claim by attributing negligence, whether wholly or in part, to the deceased and the rider of the motorcycle on which he was a passenger. She also denied all the other allegations in the appellants' plaint.

6. The trial court took evidence from the appellants on 15th the December 2014. No counter evidence was presented by the respondent, instead the two sides recorded a consent on liability on 30th June 2016 at the ratio of 80:20 in favour of the plaintiff. On the same date the respondent withdrew proceedings that she had brought against a third party. Judgment was subsequently delivered on 2nd September 2016 at Kshs. 1, 355, 500.00 consolidated general and special damages. Special damages amounted to Kshs. 45, 500.00, broken down into Kshs. 15, 000.00 for grant of representation, Kshs. 500.00 for search for particulars of the accident vehicle and Kshs. 30, 000.00 for transport. General damages were awarded under the Law Reform Act and the Fatal Accidents Act. Under the Law Reform Act the court awarded Kshs 200, 000.00 for pain and suffering and Kshs 150, 000.00 for loss of expectation of life. Under the Fatal Accidents Act the court awarded Kshs 960, 000.00 for loss of dependency.

7. Directions were given on 2nd July 2018 for disposal of the appeal by way of written submissions. The parties have complied, and have each filed their respective written submissions. I have perused through them and noted the arguments advanced.

8. In their submissions, the appellants raise several issues based on the matters flagged by both sides in their respective memorandum of appeal. Firstly, it is argued that the issue of liability does not arise as that question was resolved by consent on 30th June 2016. That ground of appeal, it is argued is misplaced and a non-issue. Secondly, it is averred that the award of special damages was proper as the sums in issue were supported by documentary proof, the supporting documents were put in evidence and marked as exhibits. Thirdly, it is argued that the award by the trial court for pain and suffering ought to be upheld as the deceased no doubt experienced a lot of pain after the accident for he died ten (10) days after the incident. Fourthly, it is urged that the court upholds the award for loss of expectation of life on the basis that the same was not excessive. Fifthly, on loss of dependency several issues arose. One, on multiplier the trial court had worked with a multiplier of six (6) and the appellate court was urged to enhance it to eight (8) years. Two, the trial court had adopted a multiplicand of Kshs. 20, 000.00, yet the appellants had provided a payslip as evidence that the deceased's gross pay was Kshs. 127, 441.00 and after deductions he took home Kshs. 64, 819.00. The contention is that the trial court disregarded the payslip and the appellate court is urged to take it into account, and to use the net pay of Kshs. 64, 819.00 as the multiplicand. It is argued that the payslip was erroneously marked for identification instead of being marked as an exhibit. Three, on dependency, it is argued that the deceased was married with children, and therefore the ratio of dependency that ought to be employed should be 2/3. The appellants have cited several decisions to support their contentions.

9. The respondent on her part raises a number of issues in response. Firstly, on pain and suffering, it her case that the deceased was hospitalized for four (4) and not ten (10) days. It is urged that the award made of Kshs. 200, 000.00 under this head was excessive. She proposes an award of Kshs. 50, 000.00. Secondly, on loss of expectation of life, it is urged that the award by the trial court was excessive and it is prayed that the same be reduced to Kshs. 60, 000.00. Thirdly, on loss of dependency, she advances serveral arguments. One, on multiplicand, she urges that the income of the deceased was sufficiently proved, and more crucially that the payslip relied on was not properly on record. She proposes that the figure arrived at by the court of Kshs. 20, 000.00 be reviewed downwards to Kshs 3, 000.00. Two, on the multiplier, she proposes that the same be reduced to five (5) years. Three, she supports the dependency ratio of 2/3 that the court worked with. Thirdly, on special damages, she supports only the amount of Kshs. 500.00 for conduct of search on ownership of the accident vehicle. It is argued that the costs of obtaining grant *ad litem* were costs in due course, while stamp duty had not been paid on the receipt for transportation. Finally, it was urged that there was double compensation as the damages awarded under the Law Reform Act were not taken into account when arriving at the final figure under the Fatal Accidents Act. Several decisions were cited to support these contentions.

10. On the question of liability, I note from the record that the same was resolved by consent of the parties, recorded before the trial court on 30th June 2016 at the ratio of 80:20 in favour of the plaintiff. Nothing turns on this ground. In any event, the respondent abandoned the same in her written submissions.

11. On special damages, the respondent is unhappy that the trial court awarded damages for items that were supported by documentation that, in her view was inadequate. Her concern being primarily with the expenses for obtaining limited representation to the estate of the deceased and on transportation. The cardinal legal principle is that special damages must not only be specifically pleaded, they must also be specifically proved. See *Mary Mukiri vs. Njoroge Kiania* civil appeal number 48 of 1996 and *Total Kenya Limited vs. Juanco Investments Limited* civil appeal number 146 of 1999. What is pleaded in the plaint are claims for expenses for procuring a coffin put at Kshs. 20, 000.00, cost of obtaining limited representation to the estate of the deceased Kshs. 15, 000.00, cost of obtaining copy of records from the Registrar of Motor Vehicles Kshs. 500.00, medical expenses of Kshs. 45, 118.00 and transport costs of Kshs. 30, 000.00; all totaling to Kshs. 110, 618.00. Out of the four items, three were supported by receipts: the process of obtaining representation to deceased's estate, copy of records and transportation. The respondent concedes only the expense for obtaining copy of records on the motorcycle. She argues that the cost of obtaining representation was an expense in that cause. I understand the submission to mean that that expense arose in probate proceedings

and ought to be settled in the probate cause. That could be so, however, I do note that in most cases in this country grants *as litem* tend to be obtained in a petition separate from that for full grant, and such a succession cause is exhausted or spent once the grant is made. The grant *ad litem* would be sought for the sole purpose of a particular litigation. That appears to me to have been the case here. The grant *ad litem* made in Mumias SPMCSC No. 23 of 2013 was for filing suit, the intended suit appears to be the one the subject of this appeal, Mumias SPMCCC No. 179 of 2013. It was an expense for the purpose of the said suit and it should be recoverable. Had the deceased not died in that accident, it would probably have been unnecessary for the appellants to obtain the limited representation. Stamp duty was paid on the said receipt. In any event a succession cause of that nature is not contentious and is brought at the instance of a single party, the issue of costs being in that cause does not arise. On the receipt for transport, put in evidence as exhibit P 5, I do note that stamp duty was not paid for it. I agree with the respondent that special damages ought not to be awarded on it. It was up to the party wishing to rely on a document in respect of which stamp duty was payable to take such steps as are appropriate to comply with the requirements of the Stamp Duty Act, Cap 480, Laws of Kenya, in order to be able to rely on it. See *Leonard Nyongesa vs. Derrick Ngula Righa* (2013) eKLR.

12. Regarding the awards under the Law Reform Act and the Fatal Accidents Act, the law is quite notorious. Under the Law Reform Act the damages awarded are for the benefit of the estate of the deceased, while the Fatal Accidents Act is for the defendants of the deceased. Under the Law Reform Act the heads include loss of expectation of life or lost years, and pain and suffering. It was said in *Sheikh Mustaqh Hassan vs. Nathan Mwangi Kamau Transporters and others* (1986) KLR 457, that under the Law Reform Act damages for the lost years are recoverable for the estate of the deceased where he dies in or as a result of the accident. See also *William Juma vs. Kenya Breweries Ltd* Nairobi High Court civil suit number 3514 of 1985 (unreported). Under the Fatal Accidents Act falls the item on loss of dependency. Where the trial court awards damages under both Acts the amount awarded for loss of expectation of life is usually subtracted or deducted from the amount awarded for loss of dependency, the argument being, see *Dainty vs. Haji & another* (2004) 2 KLR 125, that a deceased person's living expenses cannot constitute part of his estate. See also *Kemfro Africa Limited t/a Meru Express Services (1976) and another vs. Lubia and another (number 2)* (1987) KLR 30 and *South Nyanza Sugar Company Ltd vs. James Martin Matoke* civil appeal number 91 of 1997 (unreported).

13. On pain and suffering, the respondent argues that the award of Kshs. 200, 000.00 was excessive. The appellants urge me not to disturb it. Their case is that the deceased died ten (10) days after the accident and must have suffered a lot of pain in the circumstances. The respondent counters by asserting that the deceased died after four days and not the ten days alleged by the appellants. She cites the records put in evidence to support her assertion. I have had a chance to peruse through the document certifying the death of the deceased. It is serial number 335935 and was put in evidence as exhibit P. 2. It indicates that the death occurred on 28th February 2013. The grant *ad litem* also refers to 28th February 2013 as the date of death. The accident had happened on 24th February 2013 according to the police abstract dated 22nd April 2013, produced as exhibit P 1. That would mean that he died four days after the accident, and not the ten days pleaded by the appellants.

14. The issue I should be considering is whether I should interfere with the award of Kshs 200, 000.00 made under this head. I have perused through the authorities that are on record, both suit at the lower court and in the appeal. In *Maurice Odiwour Ogada (suing as personal representative of Jane Dorothy Onyango) vs. John Juma Obungu and another* Kisumu HCCC No. 375 of 1999 (unreported), the court, on 10th February 2006, awarded Kshs. 100, 000.00 for pain and suffering in respect of the deceased who had not died instantly, the judgment though does not indicate the duration between the date of the accident and the date of death. In *John Jembe Mumba vs. Seif Mbaruku t/a Takrim Bus and others* Mombasa HCCC No. 523 of 2001 (unreported) the deceased had died instantly and the court awarded Kshs. 5,000.00, on 17th March 2005, for pain and suffering. In *David Ngunje Mwangi vs. The Chairman of the Board of Governors of Njiri High School* (2001) eKLR, there was no indication as to whether the deceased died instantly or not, the court, on 25th January 2001, awarded a sum of Kshs. 10, 000.00, which was considered to be conventional then for instant death. In *DMM vs. (suing as the Administrator and Legal Representative of the Estate of LKM) vs. Stephen Johana Njue & another* (2016) eKLR, an award of Kshs. 50, 000.00 was made, on 17th March 2016, in a case where the deceased died four days after the accident. After taking into account the decisions that were placed before me, it would appear that an award of Kshs. 200, 000.00 for pain and suffering is excessive, and I hereby reduce it to Kshs. 100, 000.00.

15. The other bone of contention is on the award on loss of expectation of life. The respondent urges that the same is excessive while the appellants say that it is adequate and I should retain it. The trial court had awarded Kshs. 150, 000.00. I have sought guidance from the authorities placed before me, both in the appeal and at the lower court. In *DMM vs. (suing as the Administrator and Legal Representative of the Estate of LKM) vs. Stephen Johana Njue & another* the court awarded Kshs. 1,200, 000.00 for a 16 year old schoolgirl. In *David Ngunje Mwangi vs. The Chairman of the Board of Governors of Njiri High School* it was said that the conventional figure for loss of expectation of life in the period around 2001 was Kshs. 60, 000.00 where inadequate material was placed before the court. In *Kamau Mwangi & another vs. Grace Wangui Macharia* (2006) eKLR, the court reduced an award from Kshs. 120, 000.00 to Kshs. 70, 000.00, while in *Maurice Odiwour Ogada (suing as personal representative of Jane Dorothy Onyango) vs. John Juma Obungu and another* an award of Kshs 140, 000.00 was made in 2006. In *John Jembe Mumba vs. Seif Mbaruku t/a Takrim Bus and others* (2005) an award of Kshs 150, 000.00 was made. I note that in the period 2001-2006 the conventional award seems to have been somewhere between Kshs. 60, 000.00 and 150, 000.00. The trial court herein was assessing damages in 2016, ten years after the period alluded to above. Inflationary trends must be taken into account in these awards. I do not consider the award made with regard to this head excessive or disproportionate. Indeed, the same ought to be enhanced. However, as the appellants have not invited me to do so I shall not disturb it.

16. The other aspect of the appeal turns on loss of dependency. There are two dimensions to it; the multiplier and the multiplicand. The trial court used a multiplier of six (6), which the appellants urge me to enhance to eight (8), while the respondent pleads for a reduction to five (5). The multiplier is determined from an evaluation of the period of time within which the deceased person is estimated to have had continued working had he not died. This is by usually considering the nature of employment that he was engaged in, his age and the general age of retirement in Kenya. Of course, in cases where the deceased is a minor the same may be abandoned as it would be in appropriate in the circumstances to work out loss of dependency. See *DMM (suing as the Administrator and Legal Representative of the Estate of LKM) vs. Stephen Johana Njue & another*. In this case the deceased was an adult in gainful employment and therefore the multiplier approach would be relevant for the purpose of assessing loss of dependency. In *Joseph Wachira Maina & another vs. Mohammed Hassan* (2006) eKLR, the

age of the deceased was not indicated, but the deceased was said to have been young and unmarried, and supported his parents and siblings. The court settled on a multiplier of 18. In *John Jembe Mumba vs. Seif Mbaruku t/a Takrim Bus and others* the deceased was a 38 year old, carpenter, the court adopted a multiplier of 17. In *Maurice Odiwour Ogada (suing as personal representative of Jane Dorothy Onyango) vs. John Juma Obungu and another*, the court settled on a multiplier of 12 after noting that the deceased was 41 years old at the time of his death. The court had identified 15 years as the period that the deceased would have continued working, but took into account imponderables before reducing the period to 12 years. The deceased in the instant case was aged 53 at the time of his death, the trial court came up with a multiplier of 6, and no reasons were given as how the court came up by that figure. I do note though that the retirement age in Kenya for civil servants has been enhanced to 60 years. I trust that that shall also apply to those in private sector. That would mean that the deceased would have retired after seven (7) years. The multiplier adopted by the court of 6 is within the range, and I see no point of interfering with it, either by way of reducing it to 5 or enhancing it to 8.

17. On the multiplicand, the court settled on an income of Kshs. 20, 000.00 per month, without assigning any reasons therefor. The trial court was perhaps guided by the evidence placed before it on 15th September 2014, by PW2, that the deceased worked for Mumias Sugar Company as a security officer and a driver. What he earned from those engagements was not stated, but a payslip for the month of February 2013 was placed before the court, perhaps as evidence of his income. The same was marked by the court for identification, but there in nothing on record to indicate whether it was eventually marked as an exhibit. It would appear that the court did not give much regard to it, hence the urging herein by the appellants that I should consider it and enhance the multiplicand to Kshs. 64, 819.00. I am urged that the document was marked for identification by mistake instead of being marked as an exhibit. I have perused through the list of exhibits prepared by the court assistant, and I note that the payslip is listed in there an exhibit. There could be credence to the argument that the marking in the notes of the trial court could have been by error, given that the record does not indicate at all whether there was an objection to the production of the pay slip as an exhibit. The copy of the pay slip on record itself is marked as an exhibit. I will give benefit of doubt to the appellants and adjudge that the payslip was erroneously indicated in the trial court's notes as having been marked for identification instead of being instead of being marked as an exhibit. In any event, in the judgment the court appears to have treated the pay slip as having been produced as an exhibit. Should I interfere with the multiplicand of Kshs. 20, 000.00? According to the payslip on record, the deceased earned a basic salary of Kshs. 46, 000.00. It was boosted in the month in question to Kshs. 64, 000.00 by overtime. The figure of Kshs. 46, 000.00 is what we should be working with as it represents the deceased's steady monthly take away. The trial court ought to have adopted the same as its multiplicand. Both sides appear to be on all fours so far as the ratio of dependency is concerned. So the same should work out as follows – 6 x 12 x 2/3 x 46000 = 2, 208, 000.00.

18. The respondent faults the trial court for failing to take into account the amount awarded under the Law Reform Act when assessing damages under the Fatal Accidents Act. There is ample authority, stated in such cases as *Maina Kamau & Anor vs. Josephat Muriuki Wangondu & Anor* CA No. 148 of 1989, *Humphrey Muigana & another vs. Robert Kibibiri Gichuki & another* Nakuru HCCC No. 85 of 1996 (unreported) and *Joseph Wachira Maina & another vs. Mohamed Hassan* (2006) eKLR, that the rights conferred by the Law Reform Act for the benefit of the estate of a dead person are in addition to and not in derogation of any rights conferred on dependants by the Fatal Accidents Act. It was stated that damages recovered under the Law Reform Act which devolve to the dependants must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. It follows therefore that the trial court ought to have deducted the damages it awarded under the Law Reform Act and not to add it to the damages awarded under the Fatal Accidents Act.

19. In the end I shall allow the appeal substantially. I uphold the consent recorded before the trial court on liability. I shall interfere with the rest of the awards in terms of the proposals made in the body of the judgement. That means that there shall be judgment for the appellant in the sum of Kshs. 100, 000.00 for pain and suffering, Kshs. 150, 000.00 loss of expectation of life, Kshs. 2, 208, 000.00 for loss of dependency and Kshs. 15, 500.00 special damages. The same totals to Kshs. 2, 473, 500.00. After deducting the award for loss of expectation of life, the total comes down to Kshs. 2,323, 500.00. The appellants shall have costs of the suit at the lower court. Interest on the amount of damages here above shall be charged from the date of delivery of the judgment at the lower court. Each party shall bear their own costs on the appeal.

20. Should any party be dissatisfied with the outcome of these proceedings, there is a right to appeal against the same at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE