REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 97 OF 2015 (CONSOLIDATED WITH NO. CIVIL APPEAL 98 AND 99 OF 2015)

MUMIAS SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

HENRY OLUKOKOLO ASHUMA

(suing as the legal representative in the

estate of PATRICK KWEYU ASHUMA(Deceased).....1ST RESPONDENT

KEYA KASSIM.....2ND RESPONDENT

(Being an appeal from judgment and decree of honourable C. Kendagor, Resident Magistrate in Eldoret Chief Magistrate Court No. 515 of 2012 read and delivered on 11th November, 2015).

J U D G M E N T

1. The 1st respondent had sued the appellant and the 2nd respondent at the lower court seeking general and special damages under the Law Reform Act (cap 26 Laws of Kenya) and under the Fatal Accidents Act (cap 32 Laws of Kenya)

2. A brother to the 1st respondent was killed in a road traffic accident while traveling in a vehicle belonging to the 2nd respondent and hired to the appellant.

3. The 1st respondent was also a passenger in the vehicle at the time of the accident. He was injured. He sued the two seeking general and special damages. He was also in employment of the appellant as a cane cutter. The deceased was at the time of the accident working in employment of the appellant as a cane cutter.

4. After a full trial the trial magistrate found both the appellant and the 2nd respondent 100% jointly liable for the accident and entered judgment, jointly against the two as follows:-

General damages to the estate of the deceased:-

Under Law Reforms Act: pain and suffering – Kshs. 20,000/-

Loss of expectation of life – Kshs. 100,000/=

Under Fatal Accident Act: loss of dependency - Kshs. 1,591,200/=

Less award under law Reform Act –Kshs. 120,000/=

Award - Kshs. 1,482,495/=

Damages to the 1st respondent:-

Pain and suffering = Ksh. 180,000/=.

5. The appellant was aggrieved by the award and filed this appeal in Kakamega Civil Appeal No. 97 of 2015.. The appeal is based on the

following grounds:-

a) The learned trial magistrate erred in law and fact in failing to dismiss the 1st Respondent's suit in the lower court as he had not proved his case on a balance of probability against the Appellant.

b) The learned trial magistrate erred in law and fact in holding the Appellant 100% liable for the alleged accident when there was no sufficient evidence to that effect.t

c) The learned trial magistrate erred in law and fact in failing to hold the Respondents wholly and/or substantially liable for the accident.

d) The learned trial magistrate erred in law and fact in holding the Appellant and the 2nd Respondent 100% liable jointly and severally.

e) The learned trial magistrate erred in law and fact in failing to apportion liability between all parties to the suit.

f) The learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 11,295/- as special damages that were not proved to the required standard in law.

g) The learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum of Ksh. 20,000/- for pain and suffering while not considering that the deceased succumbed to his injuries on the spot.

h) The learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum of Kshs. 100,000/- for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount an erroneous estimate of loss or damage suffered by the estate of the deceased.

i) The learned trial magistrate erred in law and fact awarding the estate of the deceased a sum of Kshs. 1,591,200/- for loss of dependency/lost years that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

j) The learned trial magistrate erred in law and fact in applying the multiplier of 25 years while awarding loss of dependency without any legal basis or justification.

k) The learned trial magistrate erred in law and fact in applying a wage of Kshs. 7,956/- when there was no prove of earnings by the deceased.

l) The learned trial magistrate erred in law and fact applying the 2/3 ratio under lost years when the same was not applicable in the circumstances.

m) The learned trial magistrate erred in law and fact in adopting a multiplier approach as a basis for assessment of damages when the same was inappropriate and/or not applicable.

n) The learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support thereo.f

o) The learned trial magistrate erred in law and fact by overly relying on the Respondents' submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

p) The learned trial magistrate's decision albeit, a discretionary one was plainly wrong.

6. The appellant was also dissatisfied with the award made to the 1st respondent Henry Ashuma of Ksh. 180,000/=. He also filed an appeal in Kakamega civil appeal No. 98 of 2015. The ground of appeal were as in this appeal, appeal No. 97 of 2015. In addition he contended that the award of Ksh. 180,000/= was excessive.

7. The 2nd respondent, Keya Kassim was also dissatisfied by the decision of the trial magistrate. He filed an appeal in Kakamega Civil Appeal No. 99 of 2015 against the appellant and the 1st respondent. I have not located his grounds of appeal in the court file.

8. As the three appeals were over the same subject matter, they were consolidated with the file No. 97 of 2015 being the lead file.

Case for 1st Respondent:-

9. The deceased was a brother to the 1st respondent. The 1st respondent testified in the case as PW1. His evidence was him and the deceased were working for the appellant as cane cutters. That on the material day they were heading to work in the appellant's nuclear estate. The appellant sent a lorry to pick workers. He and the deceased boarded the lorry and sat at the front cabin on a seat located behind the driver. They picked other workers on the way. The lorry got over loaded with workers. On getting to the main Mumias – Kakamega highway he saw the driver struggling to apply breaks to the vehicle. He did not manage to do so. The lorry hit a matatu vehicle that was on the highway. The lorry overturned. He and the deceased were injured. They were taken to Kakamega Provincial General Hospital. The deceased succumbed to

the injuries. He reported the accident at Mumias Police Station. He and his mother subsequently sued the appellant and the 2nd respondent claiming for damages for the death of the deceased. He, the 1st respondent sued the appellant and the 2nd respondent to recover damages for its injuries suffered. They blamed the appellant for breach of statutory duty of care owed to the deceased by the appellant. They held themliable occasioning the accident. They also blamed the 2nd respondent and his driver for occasioning the accident due to careless driving.

Case for appellant:-

10. The appellant called four witness among them an administrator in the harvesting and transport section Dw1. The evidence of the witness was that the company had contracted the business of transporting of cane workers to the 2nd respondent, Keya Kassim vide an agreement dated 3/10/2011, DEX3 . That the contractor was not under the control of the appellant. However that there was a field assistant, Nicholas Shiundu DW 3, whose duty was supervising the cane workers at the entry point.

11. The witness further said that the 2nd respondent's lorry had carried cane cutters for quite some time. He said that the lorry was suitable for carrying passengers. That it is the 2nd respondent's driver who was liable for occasioning the accident. The witness said that the deceased in this case was their contracted worker. He however said that Henry the 1st respondent was not in the lorry at the time of the accident.

12. A field supervisor for the appellant DW2 stated that he and the field assistant, Nicholas Shiundu Dw3 prepared a hit of casualties. That Henry the 1st respondent was not in their list.

13. The appellant also called a private investigator DW4 who stated that he obtained a list of casualties at Mumias Police station that indicated that 75 people had been injured in the accident.

Case for 2nd respondent:-

14. The 2nd respondent stated in his evidence that he had entered into a contract with the appellant for transportation of fertilizer and cane seed as per contracts that produced in court as DEX 7 and DEX8. He denied that he had entered into a contract with the appellant to transport workers as indicated in DEX3. He said that DEX3 is forged. He said in cross examination that the appellant's cane had burnt down and he was to give the lorry to help then take cane cutters to cut cane.

15. The 2nd respondent called two witnesses, the driver of the vehicle DW7 and a brother DW8. The driver of the vehicle stated that his employer had a contract with the appellant for transporting fertilizer and seed cane in a lorry. The said lorry had a capacity of 3 passengers. It did not have seats at the back. That on the material day to go for fertilizer department who is an employee of the appellant told him and other lorry transporters that he had a report that cane allocated duties to transport workers to the scene of the burnt cane. He set of to pick workers with a group leader from the company. The group leader would show him the states where to pick workers. He did not count the number of people who boarded the lorry. On reaching Mumias- Kakamega road, he wanted to cross the road. He found a matatu blocking the road at a cross junction. His vehicle rammed into it. He denied the evidence that it is breaks that failed. He blamed the matatu for blocking the road. He said that that was the first day that the lorry was carrying passengers.

16. A brother to the 2nd respondent DW8 testified that he was a witness for the 1st respondent in the agreement DEX 8. He denied that DEX3 was signed by them.

Submissions:-

17. The advocates for the appellant Omwenga & Co. Advocates, submitted that the agreement DEx. 8 dated 18/7/2017 between the appellant and the 2nd respondent required the respondent to employ qualified drivers for the tractors. That the appellant had no control over the kind of employees employed by the 2nd respondent. That the 2nd respondent failed to honour his obligation of providing a motor vehicle that was not defective. Therefore that it is the 2nd respondent who ought to have been held 100% liable for the accident. That the trial magistrate had not laid basis for holding the appellant 100% liable for the accident. That it is the 2nd appellant who should have been found vicariously liable for the negligence of his driver.

18. The advocates further submitted that the 1st respondent put himself in the line of danger by voluntarily boarding the subject lorry while knowing that it was not fit for carrying of passengers. That the 2nd respondent also knew that the lorry paused a danger to his safety and a such he breached his own duty of care and as such he should be held liable for the accident. That the deceased had the knowledge and was aware of the risk but he proceeded to board the said motor vehicle.

19. On quantum, the advocates submitted that the award of kshs. 20,000/= for pain and suffering was in order high as there was no evidence that the deceased died later on.

20. Further that the award of Kshs. 100,000/- for loss of expectation of life was excessive. The advocates urged the court to award Kshs. 70,000/=.

21. That the award for loss of dependency was excessive as to amount to erroneous estimate of loss or damage suffered by the estate of the deceased. That the deceased died at the age of 28 years. The kind of work he was involved in cutting cane required energetic people. The deceased could not have engaged in the said work beyond the age of 40. The advocates urged that a multiplier of 11 years be adopted.

22. That the monthly income of Ksh. 7,956/= adopted by the court was without any basis. That the payslip produced by PW3 belonged to

Pw3 and not to the deceased. In the absence of proof of wages for the deceased a multiplicand of Kshs. 2000/= was in order.

23. It was submitted that PW3 testified that the deceased had 3 children. No birth certificates were produced to prove so. Therefore that a dependency ratio of 1/3 was more appropriate.

24. In view of the foregoing the advocates asked the court to allow the appeal and dismiss the 1st respondent's case with costs.

25. The advocates for the 1st respondent, **Geoffrey .O. Okoth & Co. Advocates** , submitted that the appellants' witnesses proved that the appellant had contracted the 2nd respondent to ferry cane from various picking points to sugarcane farms to harvest cane workers. The 2nd respondent was therefore an agent for the appellant and was vicariously liable for the negligent acts of his driver who was in control of the vehicle at the time of the accidental. Further that the 2nd respondent failed to maintain the motor vehicle in good condition thereby making it to be involved in an accident.

26. Further that it was the responsibility of the appellant to transport its workers to their place of work or to contract it. It was not the employees who decided which transport to use to work. If it assigned that responsibility to another person, then that other person become their agent. Liability would then attach to them for any negligence of their agent despite their contract of service on who would be liable in the event of an accident or injury to the workers. The appellant is thereby wholly liable for the accident. It is for the appellant to pursue any indemnity from the 2nd respondent under their terms of engagement.

27. The advocates for the 2nd respondent, **K.N. Wesutsa & Co. Advocates**, submitted that the agreement between the appellant and the 2nd respondent, DEX7 was for distribution of fertilizer to farmer contracted by the appellant. That clause 6(v) of the agreement provided that any employee provided by the 2nd respondent in connection with the services of distribution of fertilizer would be placed under the control and management of the appellant's personnel who would issue instructions to such an employee. That the 2nd respondent's driver DW7 testified that on the date of the accident there was a supervisor for the appellant in the motor vehicle who was instructing DW7 on the persons to board the motor vehicle. Therefore that at the time that the accident took place the driver of the 2nd respondent was engaged in the scope of his employment under the total control of his temporary master, the appellant and vicarious liability for any tortious act attributable to him rests with the appellant.

28. Further that the 2nd respondent denied that there was an agreement for carriage of passengers as indicated by DEX3. That the insurance cover of the motor vehicle, DEX 10 shows that at the time of the accident the motor vehicle was insured in respect of carriage of goods and not transportation of passengers. The advocates consequently submitted that on a balance of probabilities the contractual relationship between the parties was for the motor vehicle to transport goods and not passengers. That it has to be concluded that the appellant in breach of the contractual obligation converted the motor vehicle into one of ferrying of passengers and therefore the 2nd respondent cannot be liable for any tort taking place as a result of that.

29. It was further submitted that the appellant's witness PW1 told the court that investigations concluded that the motor vehicle was overloaded leading to the accident. That this was corroborated by Henry PW3 and DW7. That liability therefore rests at 100% against the appellant whose employees were responsible for overloading of the motor vehicle.

30. That Henry and the deceased also bear liability for their respective injuries as they willingly and voluntarily boarded the motor vehicle that was overloaded with passengers but was not equipped for ferrying passengers and had not worn safety belts.

Determination:

31. This is a first appeal. It is the duty of a first appellate court to re-evaluate the evidence gendered before the trial court and draw its own conclusions while bearing in mind that the trial court had the advantage to see and hear the witnesses testify – ***See Selle & Another vs. Associated Motor Board Co. Ltd & Another*** 1968 (EA) 123.

The questions for determination are:-

i. Whether Henry (PW3) was in the motor vehicle at the time of the accident.

ii. Who between the appellant and the 2nd respondent was liable for the accident and

iii. Whether both were jointly and severally liable for the accident

iv. Whether the trial magistrate erred in the award of quantum of damages.

32. It was not disputed that the deceased Patrick Kweyu Ashuma was in the accident vehicle. The dispute was whether Henry Ashuma was in the accident vehicle. The appellant contended that Henry was not in the vehicle because he did not appear in the list prepared by the police Dexhibit 4 of the accident victims and the list of those who were taken to hospital Dexhibit 5. The appellant's field supervisor DW2 (Henry Shamala) testified that he was given the list of the injured victims by Nicholas Shiundu. He said that the name of Henry Olukololo Ashuma was in the list. That he and Nicholas are the ones who prepared the list if then the name of Henry Ashuma is not in the list presented to the court the said list is not a genuine one as DW3 has confirmed that Henry was in the list of those injured. Besides that the list DEX 5 contains a name Henry L. Ashuma. When Henry PW3 testified in court he produced his pay slips DEX 5 (a) & (b) that are in the name of Henry L. Ashuma. It is then apparent that the person appearing in DEX5 prepared by DW3 is the same person as Henry O. Ashuma. I therefore find that Henry Ashuma was in the motor vehicle at the time of the accident.

33. The appellant contends that there was a service of transport contract between it and the 2nd respondent as exhibited in DEX3. The 2nd respondent says that Dex3 was forged. The 2nd respondent never tendered evidence to prove that DEX3 was forged. Forgery is a crime. There is no evidence that he reported the crime to the police. In his evidence he stated that " cane had been burnt and I was to give the lorry to help them take cane cutters to cut cane". I do not believe that the 2nd respondent was only offering help after the appellant's cane was burnt. He was performing his part of the contract, in pursuance of the service contract. DEX 3. His allegations that the document was forged does not hold water.

34. The next question is whether the 2nd respondent was an agent for the appellant in pursuance of the service agreement. In **Selle & Another Vs Associated Motor Boat Company Ltd and Other s, Civil Application No. 31/1967,** the Court of Appeal for East Africa considered whether an independent contractor can be deemed to be an agent of the defendant. The court held:-

> ***"Where a person delegates a task or duty to another, not a servant to do something for his benefit, or for the joint benefit of himself and the other, whether that other person be called agent or independent contractor, the employer will be liable for negligence of that other in performance of the task, duty or act."***

35. It was the duty of the appellant to transport workers to their working places. It contracted that responsibility to the 2nd respondent. In so doing the 2nd respondent became an agent for the appellant. The appellant was vicariously liable for any negligence committed by his agent, the 2nd appellant. The 2nd respondent was therefore an agent for the appellant.

36. Next is to consider whether the appellant and the 2nd respondent were jointly and severally liable for the accident. The 2nd respondent urgued that at the time of the accident the driver of the vehicle was under the total control of the appellant through the appellant's supervisor who was instructing the driver on the persons who were to board the motor vehicle. That therefore that vicarious liability for any tortious acts attributable to the driver rested with in the appellant.

37. Paragraph 4(i) (ii) of the agreement required the contractor to employ suitable, qualified and licenced drivers for his lorries, The driver was therefore under the employment of the 2nd appellant. The fact that there was a supervisor for the company when he was carrying the workers did not put him under the control of the appellant company. The driver also said that he had a conductor. The driver was under the control of his employer, the 2nd respondent. There is no truth that he was an agent for the appellant.

38. The driver blamed the matatu that was stationary on the road for occasioning the accident. In his statement contained in the report of the investigator DW4 he stated that it is breaks of the vehicle that had failed. The 2nd respondent did not enjoin the driver of the matatu to the suit if it is the said driver who was to blame for the accident. The driver was joining the main road from a feeder road. It is then either that he failed to stop at the junction and hit the matatu or that the breaks of the vehicle failed. If he failed to stop at the junction then he was guilty of careless driving. The 2nd respondent would in that case be vicariously liable for the negligent acts of his driver. If the breaks failed, the 2nd respondent was guilty of failing to maintain the vehicle in good condition. Either way then the 2nd respondent was liable for the accident.

39. The driver said that it is a supervisor for the appellant who was in charge of the workers who were boarding the lorry. This evidence was corroborated by Henry PW3. Though Nicholas Shiundu DW2 denied that he was in charge of the workers boarding the lorry, the appellant's administrator in charge of harvesting and transportation DW1 stated that Nicholas Shiundu was supervising the cane cutters at the entry point. Nicholas was then lying that he was not doing so. It was evident that the lorry was overloaded. The list prepared by the police contained 77 names of victim. It is the appellant who was liable for overloading of the lorry.

40. The agreement DEX3 in clause 4(i) (iii) specified the type of vehicle that the 2nd respondent was to provide for the transportation of workers. It said that:

> "The lorries should be open from top, be of 7 to 20 tonnes net weight, closed on the sides and high raised the tyres conditions should be good and the vehicle should have an up to date insurance."

41. It was the duty of the appellant to provide its worker with a safe transport vehicle. DW1 said that the lorry had no seats at the back. He said that the workers were holding onto bars. An open lorry with no seats cannot be said to be a proper mode of transport of human beings. The workers were not safe in the lorry in case of an accident. The appellant was liable for failing to provide safe transport for its workers.

42. Henry PW1 testified that he and the deceased were seated at the front cabin. He was not questioned on whether or not they were wearing safety belts. Though the witness said that the lorry was overloaded and that the weight made the driver to loose control this was all speculation. The driver himself DW7 only blamed the matatu for occasioning the accident. He did not say that the vehicle was overloaded. The traffic policeman who testified in its case PW1 also speculated that the accident could have occurred due to overloading. There was no evidence as to the capacity of passengers that the lorry could carry. There was no concrete evidence that the cause of the accident was due to overloading. I thereby find no evidence that the deceased and Henry contributed to the accident by boarding an overloaded lorry.

43. Both the appellant and the 2nd respondent were jointly and severally liable for the death of the deceased herein and the injuries occasioned to Henry Ashuma. The appellant failed to provide its workers with a safe transport to work while the 2nd respondent was either guilty of the negligent acts of its driver or for failing to maintain the vehicle in good mechanical condition. The appellant and the 2nd respondent were jointly 100% liable for the accident. The claimants herein were not parties to the indemnity agreement between the appellant and 2nd respondent. The agreement cannot restrict the claimants on to whom to execute the judgment against between the appellant and the 2nd respondent. There is then no basis for apportioning liability between the appellant and the 2nd respondent. The indemnity agreement did not bind the claimants against the appellant and the 2nd respondent. The trial court did not err by holding the appellant and the 2nd respondent to be 100% jointly and severally liable for the accident. The was no basis for the court to apportion liability between the appellant

and the 2nd respondent as there was no counter-claim against the 2nd respondent. The appeal on liability is thereby dismissed.

Quantum

44. The grounds under which a court can interfere with award for damages made by a lower court were stated by the Court of Appeal in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan*** (1982-88) KAR 5 where it held that:-

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or law as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles of that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or law."***

45. In their submissions the advocates for the appellant had submitted that the deceased had died immediately after the accident. They proposed a conventional sum of Kshs. 10,000/= for pain and suffering. The advocates for the 1st respondent had proposed Kshs. 20,000/=. The trial court awarded Kshs. 20,000/=. The brother to the deceased, Henry (PW1) was not clear in his evidence whether the deceased died on the spot or in hospital. The award for pain and suffering was justified. It was not proved that the award of Kshs. 20,000/= was excessive or inordinately high.

46. For loss of expectation of life the advocates for the appellant had proposed Kshs. 70,000/= while those of the 1st respondent had proponed Kshs. 140,000/=. The trial court awarded Kshs. 100,000/=. The Kenyan courts have at most times awarded between Kshs. 80,000/- and Kshs. 100,000/= under this head I do not consider the award to have been excessive.

47. For the claim under the Fatal Accidents Act the advocates for the 1st respondent had asked the court to adopt a multiplier of 25 years in consideration of the fact that the deceased had died at the age of 25 years. On the multiplicand the advocates had submitted that since there was no evidence adduced to show the amount the deceased was earning they asked the court to adopt the minimum wage for a general labourer under legal notice No. 187 of 2013 which was Kshs. 9,024.15/-. They urged the court to adopt a dependency ratio of 2/3. The advocates for the 1st respondent had on the other had submitted that since there was no evidence of earnings a multiplicand of Kshs. 2000/= was sufficient.

48. The trial magistrate in his judgment adopted a multiplier of 25 years. He considered the evidence of Henry who produced pay slips indicating that the payment varied according to amount of work done per day. The magistrate held that.

> 'The rates also varied in PEX 5A and B. I calculated an average of Ksh. 331/- per day. I adopt the sum of Kshs. 7,956/ as wages for 6 days a week.

However in calculating the final award the magistrate awarded

> 7956 X 12 X 25 X 2/3 = 1,591,200/=.

It means that he considered the monthly earnings as KSHS. 7956/= and not Kshs. 7956/- per week.

49. The advocates for the appellant submitted that the trial magistrate did not have any basis for adopting multiplicand of Kshs 7956/=.

The pay slip; PEX5 (b) contained payments for 4 days between the 11/6/2013 and 18/6/2013. The average earning per day for those 4 days is what the magistrate calculated at Kshs. 331/= per day. However the said pay slip indicated that cane workers were not working on a daily basis. In the above said dates PW1 worked for 4 days in 8 days. The trial magistrate in his calculations implied that the deceased worked for 24 days in a month. The pay slip indicates that cane workers would work for less days than that in a month. I would take an average of 20 days in a month. This times 331/- per day is Kshs. 6620/= in a month. I will take that as a reasonable monthly earning for a cane cutter.

50. The multiplier of 25 and dependency ratio of 2/3 years used by the trial court were reasonable. The deceased had 3 children. The multiplier and the dependency ratio used were reasonable. The award for loss of dependency comes to

> 6620 x 12 x 25 x 2/3 = 1,324,000/=

51. The award for loss of dependency of Kshs. 1,591,200/= is therefore set aside and replaced with one of Kshs. 1,324,000/=.

52. The trial magistrate deducted the award for pain and suffering and loss of expectation of life made under the Law Reform Act from the award for loss of dependency made under the Law Reform Act on so as to avoid double compensation made under the two Acts.

53. The concept of double taxation was considered by the Court of appeal in in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja (deceased) Vs Kiarie Shoe Stores Limited, Nyeri Civil Appeal No. 22 of 2014** where the Court of Appeal stated that :-

> '.. **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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act , hence the issue of duplication does not arise''.**

The court re- stated what was held in **Kenfro Africa Limited t/a Meru Express Services 1976 & Another Vs Lubia & Another (1987) eKLR 30** 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 of the 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 non – pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.**

54. Going by this judgment of the Court of Appeal, the trial magistrate erred in deducting the award made under the Law Reform Act from the award made under that Fatal Accidents Act as there is no duplication in the two awards.

Award made to Henry Ashuma

55. The trial magistrate awarded Ksh, 180,000/= to the 1st respondent in general damages for pain and suffering. The appellant contended that the award was so excessive as to amount to an erroneous estimate of the damage suffered by the claimant.

56. In the case the 1st respondent had sustained the following injuries.

(a) Head injury.

(b) Facial injury.

(c) Chest pain.

(d) Swelling and painful right lower limb.

(e) Pain on the pelvic region.

(f) Pain on the rib cage.

57. The advocates for the appellant had in the lower court submitted that a sum of Ksh. 20,000/= was sufficient for the injuries. He relied on the award in the case of **Loice Nyambeki Oyugi vs. Omar Haji Hassan (2001) e KLR** where Ang'awa J (as she then was) awarded Ksh.20,000/= for traumatic osteothesis of the elbow multiple limbs of right elbow (/), stiffness and pain of left elbow and trauma shock.

58. The advocates for the respondent had on the other hand submitted in support of an award of Ksh. 200,000/=. They had relied on the case of **Leah Nyaguthii Kamunya vs. Kenya Board Casting Corporation Nairobi HCCC No. 1128 of 1993** where Sitati - J awarded a sum of Ksh. 200,000/= in the year 2009 for scalp cut wound, cut would left calf region, multiple hand bruises and blunt trauma right shin. In the case the judge had considered that the injuries over the right lower limb were still tender and swollen 6 years later after the accident. The doctor's report had also indicated that the plaintiff suffered from recurrent headaches and forgetfulness and occasional pains on the right leg.

59. In my view the injuries sustained by the 1st respondent were severe that a sum of Ksh. 20,000/= as proposed by the advocates for the appellant was not adequate compensation. On the other hand the injuries in the authority relied on by the advocates for the 1st respondent were more severe than those sustained by the 1st respondent. In that case the plaintiff experienced pains and headache 6 years later after the accident. In the case of the 1st respondent there were no complains. It is therefore my view that the award of Ksh. 180,000/= was inordinately high.

60. I have considered two other cases where awards of general damages were made. In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] e KLR Ngugi J**. awarded Ksh. 100,000/= for a blunt injury to the head, head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. In the case of **Simon Muchemi Ateko & Another vs. Gordon Osore (2013) eKLR** the Court of Appeal awarded each of the appellants Ksh. 120,000/= in general damages where the 1st appellant had sustained injury to the nose with nose bleeding, blunt injury to the chest, blunt injury to the right hip, cut wound on the base of the left thumb with partial loss of the nail and bruise wound on the right knee while the 2nd appellant had sustained blunt chest injury, cut wound on the left leg, bruise wound on the right knee, blunt injury to the left shoulder, cut would above right elbow, cut wound over the occipital part of the head and cut wound on the palmas aspect of the left thumb.

61. In this appeal, I ward the 1st respondent a sum of Ksh. 120,000/= in general damages. The award of Ksh. 180,000/= is hereby set aside and substituted with one of Ksh. 120,000/=.

62. The trial magistrate awarded Ksh. 11,295/= in special damages. Receipts were produced in PEX. 9 to prove the said damages. The award is thereby upheld.

63. In the foregoing the award is as follows.

Civil Appeal No. 97 and 99 of 2015:-

Pain and suffering	-	Ksh. 20,000/=
Loss of expectation of life	-	Ksh. 100,000/=
Loss of dependency	-	Ksh. 1,324,000/=
Special damages	-	Ksh. 11,295/=
Total	-	Ksh. 1,455,295.

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Civil Appeal No. 98 of 2015.

General damages - Ksh. 120,000/=.

64. Judgment is accordingly entered, jointly and severally, for the estate of the late Patrick Kweyu Ashuma and for Henry Olukololo Ashuma as stated above against Mumias Sugar Company Limited and Keya Kassim with costs and interest at court rates. The two, Mumias Sugar Limited and Keya Kassim to bear the costs of the appeal.

Delivered, dated and signed at Kakamega this 7th day of December, 2018.

J. NJAGI.

JUDGE.

In the presence of:-

N/A.....for appellant

N/A.....for 1st respondent.

Malala holding brief for Kundu.....for 2nd respondent

George.....Court Assistant.

30 days right of appeal.