REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 141 OF 2015

1. **CHARLES OMWENGA ONGIRI**
2. **JARED AMECHA ONCHIRI…….............………APPELLANTS**

-VERSUS-

DANIEL MUNIKO (Suing as legal representative

of EMMANUEL CHACHA (Deceased)..................……RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. Muriuki Nyagah, Senior Resident Magistrate in Migori Chief Magistrate's Civil Case No. 380 of 2014 delivered on 17/11/2015)

JUDGMENT

This is an appeal against the award of damages in Migori CMCC No. 380 of 2014 (hereinafter referred to as ***'the suit'***) pursuant to the judgment delivered on 17/11/2015.

Arising from a road traffic accident which occurred on 05/04/2014 at Namba Junction along the Isebania-Kisii Highway involving Motor vehicles registration number KBP 097K and KAV 327L, **EMMANUEL CHACHA** (hereinafter referred to as **'the Deceased')** who was the driver of the Motor vehicle registration number KAV 327L sustained serious physical injuries and succumbed thereto.

The deceased's brother who is the Respondent herein, **DANIEL MUNIKO** filed the suit claiming damages under the Law Reform Act and the Fatal Accidents Act. The parties recorded a consent on the liability and the suit proceeded on with the assessment of the damages.

In the rendered judgment the trial court entered judgment on quantum as follows:

- **General Damages under Law Reform Act:**

For pain and suffering Kshs. 10,000/=

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

- **General Damages under Fatal Accidents Act:**

Loss of Dependency Kshs. 2,000,000/=

Special Damages Kshs. 137,400/=

The said sums were subject to the agreed liability and the court also awarded costs and interest to the Respondent.

Pursuant to the foregone award of damages the appellants herein lodged an appeal and preferred the following six grounds thus:-

> ***1. The Learned trial magistrate erred in in law and fact in holding that the defendants was liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.***
>
> ***2. The learned magistrate erred in law and fact in awarding unreasonable Loss of Dependency of Kshs. 1,600,000/= by using a multiplicand of 25 years without taking into consideration the vagaries of life.***
>
> ***3. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 1,797,920/= against the law.***
>
> ***4. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decision, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/ conclusion, in particular relating to damages by failing to deduct the lost of Expectation of life from the general ward to avoid double compensation to the same beneficiaries.***
>
> ***5. The learned magistrate erred in law and fact in failing o appreciate as follows:***
>
> > ***(i)That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.***
>
> ***6. The learned magistrate erred in law and fat in entering judgment in favour of the plaintiff's against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on quantum."***

Upon taking directions that the appeal be disposed of by way of written submissions, the Appellants failed to file their submissions despite being granted adequate time to do so. The Respondent however filed his written submissions in urging this Court to dismiss the appeal.

Despite the fact that the Appellants failed to file their written submissions, this Court sitting as the first appellate Court, will all the same consider the appeal on its merit.

As the appeal is on the assessment of damages, I will start by saying that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277**.)

A Court when dealing with an appeal of this nature must always be reminded of the principles for consideration as enumerated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777.** The Court expressed itself clearly thus:-

> "***the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that;***

short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'

This position was restated by the Court of Appeal in the case of **Arrow Car Limited -vs- Bimomo & 2 others (2004) 2** KLR 101 and so recently in the case of **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.**

The Appellants' contention in this appeal can be summed up as four-fold:

That they are aggrieved by the **multiplier** adopted by the trial court of 25 years instead of that of 20 years which they had proposed, the issue of the**dependency ratio**, the adoption of the **monthly income** of Kshs. 10,000/= instead of their proposal of Kshs. 5,000/= and lastly that the appellants are also aggrieved by the fact that the **court did not offset the award** on loss of expectation of life from that of the loss of dependency. I say so because lookingat the submissions the appellants filed in the suit, the trial court awarded all what they had submitted on save the three items. Therefore in dealing with this appeal and without the advantage of the appellants' submissions, I will consider the said four issues.

On the issue of the **multiplier** the court took into account the fact that the deceased was aged 32 years at the time of his death and followed the High Court decision in the case of **Mwita Nyamohanga & Ano. vs. Mary Robi (suing on behalf of the Estate of Joseph Tagare Mwita (deceased) & Ano. (2015) eKLR** in settling for the multiplier of 25 years. I have also seen the persuasive decisions of **Rachel Ivasha Igunza vs. Nyenjeri Kamau** where the Court adopted a multiplier of 22 years when the deceased was aged 31 years old and that of **Mary Awino Adunga vs. John Wambua & Another** where the Court adopted a multiplier of 23 years and the deceased was aged 32 years old. These two decisions were referred to by the Court of Appeal in the case of the **Board of Governors of Kangubiri Girls High School vs. Jane Wanjiku Muriithi & Another (2014) eKLR.**

I therefore find that the multiplier of 25 years for a 32 year-old is a fair assessment and is comparable to the previous decisions and I find no reason to disturb the same.

On the issue of the **dependency ratio** the appellants before the trial court contended that the court was to adopt one-third of the income. The court instead adopted two-thirds of the income based on the fact that it was satisfied that the deceased was married to one wife and had 4 children who fully depended on him. The deceased's mother was also a dependant. I have seen the Birth Certificates for the deceased children and I am satisfied that the deceased was a family man. There was no contrary evidence thereto. In such circumstances a dependency ratio of two-thirds of the income is generally adopted and I do not see how the court erred. That finding is upheld.

On the **deceased's income** it is on record that the deceased was a driver and although there were no official and formal records of his income the court settled for a monthly income of Kshs. 10,000/=. the appellants had proposed an income of Kshs. 5,000/= instead. There remain no contestation that the deceased was employed as a driver and that he used to earn a living therefrom. I have previously held that in such instances the safest way to approach the issue of the income is to revert to the **Regulation of Wages Order** and I am still of that position. As rightly submitted by the Respondent's Counsel the minimal wage set for a driver is **Kshs. 15,559/35** under the current **Regulation of Wages (General Amendment Order 2013)**. The award of Kshs. 10,000/- is hence lower than what is legally prescribed but since the Respondent preferred not to disturb that finding I so rest it at that by dismissing the appellants' argument.

As to whether the court erred in **not offsetting the award** on loss of expectation of life from that of the loss of dependency, I think the appellants are right. That is the general practice in law and its purpose is to avoid instances where a litigant benefits twice from both the Law Reform Act as well as the Fatal Accidents Act. (See holding 3 in the case of **Kemfro Africa Limited t/aMeru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777** and also the case of ***Maina Kaniaru & Another vs Josephat Muriuki Wang'ondu, Court of Appeal, Civil Appeal No. 14 of 1989 (unreported)***.

I am aware of the argument by ***Chesoni, Ag. JA*** (as he then was) in the **Kemfro Africa Limited** case (supra) that as long as the court takes into account the benefits derived from the Law Reform Act and the Fatal Accidents Act there is no need to venture into a mathematical expedition in attempting to offset the award on loss of expectation of life from that of the loss of dependency, In as much as I fully respect that argument, I find the same distinguishable for two reasons. One, it was overruled by the two other Learned Judges of the Court and two, the argument can only hold if the court just gives a global award but not in a case where the awards are made in respective and distinct heads.

In this case the awards were made in respect to distinct heads and it was imperative that the award on loss of expectation of life was offset from that of the loss of dependency, I hence find that the trial court erred in not taking into account a very relevant factor in the assessment of damages. This ground of appeal therefore succeeds.

The upshot is that save that the sum of Kshs. 100,000/= awarded on the head of loss of expectation of life shall be deducted from the sum of Kshs. 2,000,000/= awarded on the head of loss of loss of dependency, the rest of the appeal lacks merit. Since the appeal has partly succeeded each party shall bear its own costs of the appeal.   Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of January 2017.

A. C. MRIMA

JUDGE

In the presence

.... for the Appellants

..........................for the Respondent

.... Court Assistant