



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 152 OF 2015**

1. ALI SHEIKH AHMED

2. SIMON WAINAINA GATHONGO.....  
APPELLANTS

VERSUS

1. N K J

2. C K (Suing on their own behalf and in their capacity as the administrators of the estate of the late  
J M J) ..... RESPONDENTS/CROSS  
APPELANTS

BETWEEN

1. N K

J

2. C K (Suing on their own behalf and in their capacity as the administrators of the estate of the late JMJ)  
.....  
PLAINTIFFS

VERSUS

1. ALI SHEIKH AHMED

2. SIMON WAINAINA GATHONGO .....  
DEFENDANTS

(An appeal against part of the Judgment by Hon. L.T. Lewa, Resident Magistrate delivered on 28<sup>th</sup>  
August, 2015 in Mombasa RMCC No. 660 of 2013)

**JUDGMENT**

1. The appellants ALI SHEIKH AHMED and SIMON WAINAINA GATHONGO on 1<sup>st</sup> October, 2015 filed a memorandum of appeal against the judgment of the lower court raising the following grounds of appeal:-

(i) The Learned Magistrate erred in fact and in law in applying her mind to the wrong principles of law while disregarding precedent presented before her causing her to award under both Fatal Accident Act and Law Reform Act leading to a double compensation on (sic) the deceased therefore arriving at the wrong decision;

(ii) The trial Magistrate erred in law and in fact in failing to discount the award under the Law Reform Act from the ultimate award thereby making a double award to the plaintiffs who were both the personal representatives of the estate of the deceased and the dependants of the deceased;

(iii) The Learned trial Magistrate misdirected herself in both law and fact in awarding manifestly excessive and undeserved general damages under the Fatal Accidents Act of Kshs. 700,000/=;

(iv) The Learned Trial magistrate erred in fact in failing to analyse and apply the law to the evidence before her leading to adoption of a higher global award resulting to an excessive award;

(v) The Learned magistrate erred in fact and in law in her judgment by making her own assumptions, suppositions and conjecture thereby finding that the Plaintiffs were entitled to the excessive general damages hence arriving at a decision based on wrong premises;

(vi) The Learned magistrate erred in fact and in law in failing to consider the Defendants' submissions and more specifically on the quantum by completely disregarding them thereby exempting herself from arriving at a decision based on merit;

(vii) The Learned Trial Magistrate erred in law and in fact in awarding Kshs.159,150.00 without evidential proof of expenditure hence failing to discharge her duty of ensuring justice for all the parties before her.

2. The appellant prays for the appeal to be:-

(a) Allowed with costs;

(b) The judgment of the lower court as far as quantum of general damages is concerned be discharged and set aside with costs to the appellant (sic);

(c) Award the plaintiff (sic) quantum of damages commensurate with the evidence or requirements of the law;

(d) The cost of this appeal and suit in the lower court be borne by the plaintiff/respondent (sic).

3. On their part, the respondents N K J and C K filed a supplementary Record of Appeal and Cross Appeal on 2<sup>nd</sup> August, 2016. They raised the following grounds of cross-appeal:-

(i) The Learned Trial Magistrate erred in failing to note that the plaintiff/cross appellant (sic) had prayed for the award of lost years in his submissions.

4. The cross appellant prays (sic) for orders that:-

(a) The appeal be dismissed with costs; and the cross-appeal be allowed with costs;

(b) That the Judgment be rectified and the award for loss of dependency be made to read lost years; and

(c) The cross- appellant (sic) do have costs of the cross-appeal and the suit in the subordinate court.

5. Ms. Lewa for the defendants/appellants and the respondents in the cross-appeal submitted that there was an award made under the Law Reform Act and the Fatal Accidents Act, being Kshs. 200,000/= and

Kshs. 700,000/= respectively, which was double compensation as the beneficiaries are the parents of the deceased. She relied on the case of **Kemfro vs C.A. M. Lubra & Olive Lubia** [1982-1988] KAR 727.

6. Counsel stated that there was an award for loss of expectation of life and loss of dependency but the Magistrate erred by not considering the facts on record and the fact that the deceased was a minor. In her view, an award of Kshs. 700,000/= for loss of dependency was too high. She prayed for the same to be reduced and for the costs to be borne by the plaintiff/respondent.

7. In response to the foregoing submission, Mr. Jengo for the respondents who are the appellants in the cross appeal highlighted his submissions by stating that he opposed the appeal and referred the court to the case of **Henry Hidaya Ilanga vs Manyema Manyoka** (1961) 1 EA 705 where the court stated that in considering the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded, before an appellate court can properly intervene, it must be satisfied either that the judge in assessing damages, applied a wrong principle of law by taking into account some irrelevant factors or leaving out of account some relevant ones or that the amount awarded was inordinately low or inordinately high that it must be wholly an erroneous estimate of the damages.

8. In reference to the said decision, Counsel submitted that the appellants did not demonstrate the principles that were taken into account which should not have been considered. He added that Counsel for the appellants did not expound on her submission that an award of Kshs. 700,000/= was too high. Mr. Jengo urged the court not to interfere with the said award just because the appellants think that a different figure would be appropriate.

9. On the submission that a court cannot make an award on both the Fatal Accidents Act and the Law Reform Act, Counsel stated that was erroneous as the Kemfro case elucidated that the court can award damages under both statutes as provided in Section 2(5) of the Law Reform Act. In this regard, he cited the case of **Maina Kaniaru & Another vs Josephat M. Wango'ndu**, C.A. No. 14 of 1989 where the Court of Appeal held that the rights conferred by section 2(5) of the Law Reform Act, for the benefit of the estate of the deceased persons are stated to be in addition to and not in derogation of the rights conferred on the dependants of the deceased person by the Fatal Accidents Act.

10. Counsel submitted that an award for lost years under the Law Reform Act and loss of dependency under the Fatal Accidents Act are different but the calculations are worked out in a similar manner. The two awards however cannot be awarded at the same time. According to Mr. Jengo, the issue of duplicity does not arise in the present appeal. To this end, he cited the case of **Mwita Nyamohanga & Another vs Mary Rubi Moherai & Another**, Migori HCCA No. 3 & 4 of 2014.

## **CROSS APPEAL**

11. With regard to the cross appeal, Mr. Jengo prayed for this court to make an award under the Law Reform Act on special damages. He informed the court that they produced receipts to prove special damages and the Hon. Magistrate awarded an additional Kshs. 35,000/= towards funeral expenses. He referred to the case of **Kenneth Mungai vs Milkah Wangui Mbugua & Another** and the decision of **Premier Dairy Limited & Amarjit Singh Sagoo & Another**, C.A. No. 312 of 2009.

12. In Mr. Jengo's view, the Hon. Magistrate considered in her judgment all the issues raised by the appellants. He stated that contrary to the opinion of Counsel for the appellant, the estate of a minor can be compensated. In this regard he cited the case of **Kenya Breweries Ltd. vs Saro**, C.A No. 144 of 1990 and the case of **Rodger Dainty vs Mwinyi Omar Haji & Another**, C.A. No. 59 of 2004 which cited with approval, the case of **Gammel vs Wilson** [1981] 1 ALL ER 578, on damages for lost years under the Law Reform Act.

13. He prayed for the appeal to be dismissed with costs and for the cross - appeal to be allowed. He also prayed for costs of the cross-appeal to be awarded to them.

## ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If an award for damages can be awarded under the Fatal Accidents Act and the Law Reform Act to the same dependants;

(ii) If an award for loss of dependency can be made for the death of a minor; and

(iii) If the award for funeral expenses was justified since it was not strictly proved.

14. This being a first appeal, this court is under an obligation to reconsider and re-evaluate the evidence tendered before the lower court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and assessing the demeanour of witnesses, **See Selle & Another vs Associated Motor Boat Company Ltd. & Others** [1968] EA 123.

15. The evidence before the lower court by PW1, N K J, was to the effect that the deceased was his son. His wife C was the deceased's mother. Their son aged 6 years died on 25<sup>th</sup> October, 2012 through a road traffic accident at Bahati along the Mombasa Nairobi highway. PW1 testified that they obtained letters of administration that enabled them to sue the 1<sup>st</sup> appellant as the owner of motor vehicle registration No. KBH 911S and the 2<sup>nd</sup> appellant as the Driver of the said vehicle. He did not witness the accident as he found his son in hospital. PW1 informed the lower court that he was aware that the 2<sup>nd</sup> appellant was charged with the offence of dangerous driving for which he was convicted. He was fined Kshs. 30,000/=. PW1 further stated that his son was a pupil at [particulars withheld] Primary School where he was a good student. He used to assist them in different household chores. PW1 stated that he had great expectations of his deceased son and they hoped that he would assist the family in future as he was very hardworking and was in a good state of health.

16. PW1 produced various exhibits in support of their case. Plf. exh. 1 were letters of administration, plf. exh. 2 was a receipt issued to him by their Advocate for payment of Kshs. 20,000/=, plf. exh. 3 was another receipt for payment made to his Advocate for the sum of Kshs.15,000/=, the deceased's clinic card to show that he was 6 years old was produced as plf. exh. 4, a certified copy of the death certificate was produce as plf. exh. 5. PW1 also produced the deceased's school papers and records as plf. exh. 7, a receipt for expenses of Ksh. 15,600/= for Coast General Hospital was produced as plf. exh. 8, a receipt for expenses of Kshs. 50 to obtain a death certificate was produced as plf exh. 9, a receipt for Kshs. 65,000/= for transportation of the deceased's body to Kitui was produced as plf. exh. 10, plf. exh. 11 was a receipt for purchase of a coffin at Kshs.4,000/= and a receipt for charges of Kshs. 4,500/= for transportation of mourners was produced as plf. exh. 12. PW1 indicated that he incurred funeral expenses of Kshs. 35,000/= but he did not have receipts for the same. He identified the police abstract as MFI 6.

17. On cross-examination, PW1 informed the lower court that the deceased was knocked down at a bus stage when he was off the road when the motor vehicle left the road and hit the deceased near some stalls. It was his view that the 2<sup>nd</sup> appellant should have been keen when approaching the place.

18. On re-examination, PW1 stated that he got to know that the 2<sup>nd</sup> appellant was charged by referring to the police abstract.

19. PW2, No. 72341 PC Geoffrey Aranda of Changamwe Police Station, gave evidence on behalf of the Investigating Officer who had since the accident, been transferred to Nairobi. His account was that on 25<sup>th</sup> October, 2012 at about 6:20 p.m., the 2<sup>nd</sup> appellant knocked down a juvenile pedestrian who was crossing the road from the left to right. He dragged the minor under the motor vehicle for 8 meters who sustained serious injuries. He was rushed to Coast General hospital where he was pronounced dead on arrival. The Investigating Officer found that the 2<sup>nd</sup> appellant was to blame for the accident. He was charged with the offence of causing death by dangerous driving and was fined Kshs. 30,000/= and in default to serve 1 year imprisonment. PW2 produced a copy of the charge sheet as plf. exh. 7 (sic) and

the police abstract report as plf. exh. 6. He stated that according the 2<sup>nd</sup> appellant's statement he did not realize that he had hit a kid until his conductor and passengers told him so. In PW2's view, that was an indication that the 2<sup>nd</sup> appellant was not careful and alert as had he been, he would have realized that the he had knocked down the kid.

20. On re-examination, PW2 indicated that by the time the vehicle was passing, the kids had crossed and one can only conclude that the kid was hit after he had finished crossing the road, hence the inference that the kid was hit off the road.

21. PW3, Kefa Onyancha, the In-charge of Traffic registry produced Traffic case file No. 7115 of 2012 to prove that the 2<sup>nd</sup> appellant was charged with the offence of causing death by dangerous driving that occurred on 25<sup>th</sup> October, 2012 wherein he pleaded guilty to the charge and was fined Kshs. 30,000/= in default to serve 1 year imprisonment. PW3 produced the Traffic case file as plf. exh. 14.

22. The appellants did not call any witness in support of their case. Arising from the foregoing evidence and after due consideration of the submissions of Counsel, the Hon. Magistrate made the following award to the respondents;

- (i) Pain and suffering – Kshs. 80,000/=;
- (ii) Loss of expectancy (sic) of life – Kshs. 200,000/=;
- (iii) Loss of dependency – Kshs. 700,000/=;
- (iv) Special damages – Kshs. 159,150.00/=; and
- (vi) Costs and interest of the suit.

23. In the plaint filed on 5<sup>th</sup> April, 2013, the respondents' claim was for:-

- (i) Special damages at the sum of Kshs. 161,750/=;
- (ii) Damages under the Fatal Accidents Act and the Law Reform Act;
- (iii) General damages for pain, suffering and loss of amenities; and
- (iv) Costs and interest.

**The award of damages under the Fatal Accidents Act and the Law Reform Act to the same dependants.**

24. Mr. Jengo cited the provisions of Section 2(5) of the Law Reform Act which state that the rights conferred by this part 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.*** The foregoing issue has been considered and courts have rendered themselves on the same. The position of the law has been set out by the Court of Appeal in the case of **Asal vs Muge & Another (2001) KLR 202** where the Court, sitting at Kisumu cited its earlier decision in **Maina Kaniaru & Another versus Josephat Muriuki Wang'ondy, Civil Appeal No. 14 of 1989** (unreported) where it held thus:-

***"The rights conferred by section 2(5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of the deceased persons are stated to 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 does not mean that damages can be recovered twice over but that if damages recovered under the Law Reform devolve on the dependants the same must be taken***

*into account in reduction of the damages under the Fatal Accidents Act...*"

25. In fatal accidents, damages are recoverable under the distinct heads of the **Law Reform Act** (under **section 2(1)(5)** thereof) and the **Fatal Accidents Act** (under **section 4(1)** thereof). **Section 2(1) (5)** of the **Law Reform Act** provides as follows:-

*"2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:*

*Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.*

(2).....

(3).....

(4).....

*(5) The rights conferred by this Part 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 or the carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of the deceased's persons shall apply in relation to causes under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1). (emphasis added).*

26. The Law Reform Act is therefore clear that any cause of action for the benefit of the deceased's estate is not in substitution of or an alternative to the right that accrues to the deceased's dependants under the **Fatal Accidents Act**. **The latter Act** makes provisions of the persons who should benefit from any action taken under it; **section 4(1)** thereof states:-

*"Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:*

*Provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within three years after the death of the deceased person.*

(2) *In assessing damages, under the provisions of subsection (1), the court shall not take into account-*

(a) *any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after passing of this Act;*

(b) *any widow's or orphans pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.*

27. A trial court exercises its discretion in assessing the damages by considering the circumstances of

individual cases and the circumstances of the same. In the present case, while considering the award to make for loss of expectation of life, the Hon. Magistrate stated that in her view, the accident has not only dimmed a bright future for the boy, but it has aggravatingly nipped off the future expectations of the parents of the boy and as such, a compensation of Kshs.200,000/- to his estate shall suffice under the said head.

28. Although those who are likely to benefit from the deceased's estate are the same persons who will benefit from the claim under the **Fatal Accidents Act**, this factor is normally considered in the extent of damages to be awarded but it is not a reason to reject a claim for an award under this head. I therefore hold that the Hon. Magistrate did not err in making the award of Kshs. 200,000/- for loss of expectation of life.

### **Award of loss of dependency for the death of a minor**

29. The deceased was 6 years old at the time he met his death. He had the whole life ahead of him had it not been for his untimely death. The evidence of his father PW1 was to the effect that he was hard working, used to do household chores and they expected that he would assist them in future had he lived long enough to reach the age of majority. This was however not to be. In the Kenyan society in which we live, parents do have expectations that once their children mature and gain employment, they will in one way or another assist them financially or materially to get along in life, as they advance in age. The evidence of PW1 was right on point with regard to what they expected of their son.

30. In the case of **Kenya Breweries Ltd. vs Saro** CA No. 144 of 1990, the Court of Appeal while addressing a similar issue made the following observation:-

*".....But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare".*

The Court went further to state thus:

*"In our view damages are clearly payable to the parents of a deceased child, irrespective of age of the child, irrespective of whether or not there is evidence of pecuniary contribution."*

31. The appellants' counsel did not show the manner in which the Magistrate applied the wrong principles of law in arriving at her decision in awarding damages for loss of dependency other than stating that the said damages were high, for the reason that the deceased was a minor hence his future earnings could not be established. On the above issue, I am in agreement with Counsel for the respondents that the award of Kshs. 700,000/= as a global sum for loss of dependency was well merited. I therefore uphold the said award.

### **Special damages**

32. The respondents in their plaint pleaded special damages of Kshs. 161,750/=. Although no receipts were produced for funeral expenses amounting to Kshs. 35,000/= the said award cannot be said to be outside the Kenyan context as regards the interment of deceased persons, who more often than not are buried.

33. The Court of Appeal in the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005]**

eKLR, held *inter alia*:

*"We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case."*

34. My understanding of the above decision is that an award for funeral expenses can be made even in the absence of receipts to support the fact that such expenses were incurred, as long as the amount awarded is reasonable.

35. In the case cited by Mr. Jengo of **Premier Dairy Limited vs Amrjit Singh Sago & Another**, C.A. No. 312 of 2009, the Court of Appeal took Judicial notice of the fact that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved.

36. Taking cue from the foregoing judgment, I hold that the award of Kshs. 35,000/= as special damages for funeral expenses, even in the absence of receipts, was merited. The said amount was modest and I therefore decline to interfere with the same. The said award is upheld.

37. In his submissions, Mr. Jengo sought enhancement of the award of special damages from Kshs. 159,150/= to Kshs. 164,230/=. I decline to do so as the said prayer is not well founded on facts. PW1 produced various receipts to show the expenses he incurred as special damages. Although he stated that he incurred costs of Kshs. 7,100/= to pay for transport for people to travel for his late son's funeral, he only produced a receipt for the sum of Ksh. 4,500/= in proof of the said expenditure. The Hon. Magistrate therefore arrived at the correct amount of Kshs. 159,150/= as special damages.

38. In the cross appeal, Mr. Jengo prays for the award of "**loss of dependency**" to be corrected to read "**lost years**". I see no harm in making the said amendment. The said prayer is hereby granted.

39. In conclusion, I uphold the award made by the Hon. Magistrate as follows:-

(i) Pain and suffering	– Kshs. 80,000/=
(ii) Loss of expectancy of life	– Kshs. 200,000/=
(iii) Lost years	– Kshs. 700,000/=
(iv) Special damages	– <u>Kshs. 159,150/=</u>
Gross amount	Kshs. 1,139,150/=

40. The upshot of the foregoing is that I hereby dismiss the appeal and award the costs of the case in the lower court and this appeal to the plaintiffs/respondents. Interest is awarded to the plaintiffs/respondents.

**DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of March, 2017.**

**NJOKI MWANGI**

## **JUDGE**

### **In the presence of:-**

Mr. Monari for the appellants

Mr. Jengo for the respondents

Oliver Musundi - Court Assistant