REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 158 OF 2011

FLORENCE MUMBUA NDOO & FRANCIS KIOKO

(suing as the Administrators of the Estate

of the Late Alfred Safari).....APPELLANTS

VERSUS

EZRA KORIR KIPNGENO.....1ST RESPONDENT

VICTORY CONSTRUCTION.....2ND RESPONDENT

(An Appeal arising out of the judgment of Hon. S. Mungai. SPM delivered on 16th September 2011in Machakos Chief Magistrate's Court Civil Case No. 973 of 2010)

JUDGMENT

The Appellants were the Plaintiffs in Civil Case No. 973 of 2010 at Machakos Chief Magistrate's Court, while the Respondents were the Defendants in the said suit. The Respondents were found 100% liable in the judgment by the trial magistrate for a fatal accident involving the late Alfred Safari (hereinafter referred to as "the Deceased"), and the trial Court awarded total damages of Kshs 384,940/= to the Appellants as administrators of the deceased's estate.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 4th October 2013, wherein they raised the following grounds:

1. THAT the Learned Magistrate erred in fact and in law in the assessment of general damages.

2. THAT Learned Magistrate erred in fact and in law in finding that the deceased could not study and at the same time be the breadwinner for his family .

3. THAT the Learned Magistrate erred in fact and in law in holding that the deceased did not die with his shamba and the survivors of the estate could easily run the businesses he used to do and continue getting the earnings.

4. THAT the Learned Magistrate erred in fact and law in finding that only the mother could qualify as the dependant of the deceased.

5. THAT the Learned Magistrate erred in law and in fact in his interpretation of the evidence

adduced as proof of income of the deceased.

6. THAT the Learned Magistrate erred in fact and in law in the assessment of special damages.

7. THAT the Learned Magistrate erred in fact and law in finding that the Appellants would not be entitled to special damages for the expenses incurred in Nairobi while meeting to organize the burial ceremony because the body of the deceased was not in Nairobi.

8. THAT the Learned Magistrate erred in law and in fact in awarding general damages for pain and suffering at Ksh. 30,000/=.

9. THAT the Learned Magistrate erred in fact and in law in awarding general damages of Ksh.150,000/= for loss of expectation of life.

10. THAT the Learned Magistrate erred in fact and in law in holding that the Appellants relied on conflicting evidence in establishing the income of the deceased .

11. THAT the Learned Magistrate erred in fact and in law awarding Ksh.350,000/= for loss of dependency.

The Appellants are praying for orders that the appeal be allowed; the judgment of the Learned Magistrate given on 16th September 2011 be set aside, varied and or reviewed; that this Court reassesses the special damages and general damages, costs of the appeal be awarded to the Appellants and any further or other relief as the justice of the case may require.

The Facts and Evidence

The brief facts of the case in the trial Court are that the Appellants instituted the suit in the lower court by filling a Plaint dated 23rd July 2010. They stated therein that on or about 2nd August 2008 along Tawa - Kalawani road the 1st Respondent drove the Roller/Grader Caterpillar Registration No. KAY 403Q in a reckless, careless and/ or negligent manner, that he caused the said Roller/Grader caterpillar to violently collide with the Deceased's bicycle causing him to suffer fatal injuries. The 1st Respondent was driver of the said vehicle while the 2nd Respondent was the registered owner of the said motor vehicle.

The Appellants gave the particulars of negligence on the part of the 1st Respondent driver, and averred that the 2nd Respondent was vicariously liable to the Deceased's estate for the negligent acts and/ or omissions of the 1st Respondent who was at all material times his authorized driver, servant and/or agent. They also gave the particulars of the Deceased and his dependants, and stated that at the time of his death, the Deceased was 20 years old and in good and vibrant health. Further, that he was active and worked as a Boda Boda cyclist in Tawa and adequately supported his family, and that his estate as well as his dependants have suffered loss and damage.

The Appellants sought general damages as a result of the death of the deceased, for loss of expectation, loss of life, pain and suffering and loss of Dependency under the Law Reform Act and the Fatal Accidents Act. They also claimed special damages of Kshs 85,020/= the particulars of which were given, and costs of the suit.

The Respondents filed a Defence in the trial Court dated 3rd September 2010, wherein they denied that the 1st Respondent was an authorized driver of the 2nd Respondent, or that the 2nd Respondent was the registered owner of Roller /grader Caterpillar Registration No. KAY 403Q . They also denied all the particulars of negligence attributed to them and averred that if the alleged incident did occur the same was purely caused by the negligence of the Deceased, and they gave particulars of the deceased's contributory negligence. Further, that they are strangers to one Alfred Safari Ndoo (the deceased) and denied that the Deceased worked as a boda boda cyclist in Tawa and that they were not liable for any such person.

From the record of the trial court proceedings, the trial commenced on 8th July 2011 when the Appellants

called 3 witnesses to give evidence before they closed their case. The Respondents did not call any witnesses during the trial and also closed the Defence case on the same date.

The Issues and Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.** The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. Kilonzo & Company Advocates for the Appellants filed two sets of submissions dated 28th October 2015 and 27th January 2017. It was argued therein that the award of Kshs. 30,000 for pain and suffering was inordinately low that it ought to be found wholly erroneous and reviewed upwards, for reasons that according to the post mortem report dated 8th August 2008 produced by PW1 who was Dr. Kibuyu Judith, the Deceased suffered the following injuries:

a) All twelve ribs on his right side were fractured;

b) Macerated right lung;

c) Hemothrorax;

d) Shattered liver;

e) Ruptured spleen;

f) Fracture of the mandible, maxilla, facial bones including the frontal bone of the occipital;

g) Intracranial hemorrhage;

h) Massive intra peritoneal and intra cranial hemorrhage.

Therefore that due to the impact of the collision and the extent of the injuries of the deceased, the estate of the Deceased deserved a higher quantum for pain and suffering than Kshs. 30,000/=.

Reliance was also placed on Section 6 of the Fatal Accidents Act to argue that the type of funeral expenses that the Learned Magistrate rejected were not excluded. In addition, that the costs claimed arose as a consequence of the demise of the deceased after the accident and therefore were awardable as special damages, and were proved by production of receipts.

Lastly, it was argued that the Respondents did not challenge the evidence of PW3, Francis Ndoo, that the deceased was working as a boda boda operator and was also engaged in farming activities. Further, that the Learned Magistrate did not give reasons why it was impossible for the deceased to engage in studies and income earning activities. In addition that in reaching the awards for loss of expectation of life, loss of dependency and loss of earnings the Learned Magistrate did not take into account any of the relevant factors to determine a reasonable multiplier.

Reliance was placed on the decisions in **Ngure Edward Karega vs Yusuf Doran Nassir (2014) e KLR** that the retirement age of an employee in government is 60 years, and in **Dainty vs Haji and Another, (2004) 2 KLR 125** that the multiplier to be used is a question of fact to be determined from the peculiar circumstances of each case.

Further, that the trial Magistrate ought not to have subtracted the award under the Law Reform Act for loss of expectation of life from the award for loss of dependency, and that in making the mathematical deductions the learned Magistrate did not consider that the beneficiaries of the award under the Law Reform Act were different from the beneficiary under the Fatal Accidents Act.

The Appellants submitted that the awards for Kshs. 350,000/= for loss of earnings and Kshs. 120,000/= for loss of expectation of life were therefore so inordinately low as to render them wholly erroneous, and that in reaching these two awards the trial Magistrate failed to take into account the relevant facts, and or took into account irrelevant facts.

The Respondent's Advocates, Morara Apiemi & Nyangito Advocates, filed submissions dated 1st April 2017, in which it was argued on the award of pain and suffering that the deceased passed on the same day. Further, that the evidence on record indicates that the deceased died on the spot and did not therefore suffer any pain and suffering. Reliance was placed on the decision in **Put Sarajevo Gen Eng Co. Ltd vs Esther W. Njeri & Johnson Mwangi Edwin & 2 Others , Muranga HCCA No. 225 of 2013**.

The Respondents also submitted that the learned Magistrate did express doubts about the genuineness of some of the records produced on the special damages incurred, and rightly held that the succession cause by the Plaintiffs was not limited to the current proceedings and thus the costs incurred therein could not qualify as special damages . Further, that the trial Magistrate equally correctly held that the expenses allegedly incurred in Nairobi in meetings to organize the burial ceremony could not be justified as the body of the deceased was not in Nairobi.

Lastly, it was submitted by the Respondents that the trial Magistrate properly exercised his discretion in the award for loss of expectation of life. On the award for loss of dependency, it was argued that the evidence adduced by the Appellants was contradictory for the reasons that the letter from Uvaani Secondary School indicated that the deceased was a student at the said school at the time of his demise, while the handwritten note from Jawa Jua Kali Boda Boda Group stated that the deceased was an active member before he died. Further that the 2nd Appellant who alleged to have relied on the deceased contradicted himself by stating that he bought the deceased a phone and assisted him financially.

I have considered the evidence given in the trial Court and the arguments made by the parties. From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the issue of quantum of damages. It is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The issue therefore is whether the awards of damages by the trial court under the different heads were based on any known factors or principles of law. The awards of damages for pain and suffering and for loss of expectation of life with respect to a deceased person are awarded under the Law Reform Act as they are not provided for under the Fatal Accidents Act. As regards damages for pain and suffering, the principle is that this head of damages is recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life.

In **Rose vs Ford, (1937) AC 826** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in **Benham vs Gambling, (1941) AC 157** it was further held that only moderate awards should be granted under this head for the following reasons:

> **"In assessing damages for this purpose, the question is not whether the deceased had the**

capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not f loss of future pecuniary prospects."

The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/' to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

In the present appeal PW2 testified that the deceased died instantly, and the Appellants did not bring any other evidence to support their assertion that he was alive after the accident and did suffer due to the serious injuries he sustained. In any event the deceased did die on the same day and at the scene of the accident. The awards of Kshs 50,000/= for pain and suffering and Kshs 120,000/- for loss of expectation of life were therefore reasonable and in order, and are upheld.

As regards the special damages awarded, the Appellants had pleaded the following special damages:

a) Burial Expenses - Kshs. 53, 040

b) Storage of the body and postmortem -Kshs. 6, 500

c) Transport-Kshs. 4,630

d) Police Abstract -Kshs. 200

e) Death Certificate - Kshs. 150

f) Costs of conducting a search- Kshs. 500

g) Succession cause for letters of Administration- Kshs. 20,000

Of these expenses the Appellants produced receipts for the following expenses:

a) Kshs. 5,135 for obtaining grant of letters of administration,

b) Kshs. 4,000 for mortuary expenses,

c) Kshs. 2,500 for post mortem costs,

d) Kshs. 200 for police abstract,

e) Kshs. 4,000 for the cost of the mobile phone of the deceased that was lost on the date of the accident,

f) Kshs. 13,910 for costs of burial meetings,

g) Kshs. 18,600 for the costs of the casket and clothes for the deceased,

h) Kshs. 3,070 for costs of transport,

i) Kshs. 5,640 for costs of food and cooking items at the burial

j) Kshs. 6,740 for costs of digging and grave construction,

k) Kshs. 13,000 for costs of transporting the body,

l) Kshs. 12,000, for cost of tents and chairs at the burial

m) Kshs. 150 for cost of the death certificate, and

n) Kshs. 500 for cost of search of the motor vehicle records,

Of these costs, the trial magistrate found that only items (b) (c) (d) (g) (k), (i), (j) (m) and (n) were justified. The reasoning by the trial magistrate was that the filing of the succession cause was necessary to clothe the Appellants with capacity to institute the proceedings in the trial Court and was not confined to only filing of the suit. Further, that the costs of meetings held in Nairobi was excluded because the deceased was not in Nairobi but at home.

It is trite law that for special damages to be awarded, they must be specifically pleaded and also strictly proved. It was held as follows in **Maritim & Another –v- Anjere (1990-1994) EA 312** at 316 in this regard:

> **"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."**

There were costs that were not pleaded by the Appellants that cannot be awarded namely the cost of Kshs 4,000/= for the mobile phone of the deceased that was lost on the date of the accident. This cost cannot also fall under the general rubric of burial costs. In addition the only transport costs that can be awarded are the ones pleaded of Kshs 4,630/=, even if the receipts produced were for a greater amount of transport costs. Likewise for the succession cause the amount proved for obtaining grant of letters of administration was Kshs. 5,135/= even though Kshs 20,000/= was pleaded. The rest of the costs were specifically pleaded and proved.

The only outstanding issues therefore is whether the costs of the funeral meetings in Nairobi and for obtaining grants of letters of administration were rightly excluded by the trial Magistrate. Damages in respect of the funeral expenses of the deceased person, are allowed to be recovered by section 6 of the Fatal Accidents Act. An expense incurred in relation to the funeral of a deceased is recoverable if it was reasonably incurred. In the Kenyan society it is normal and sometimes necessary for relatives and friends of a deceased person to meet and make arrangements as regards a funeral. This is a reasonable cost and the location of such meetings is an irrelevant factor in this regard, as the key relatives and friends may not necessarily be located at the place where the deceased died.

I also find that the costs of obtaining letters of administration are relevant and reasonable costs, as they directly arise as a result of the death of a deceased person, which in this appeal was found to have been caused by the Respondents who were found 100% reliable, and who thereby consequently caused the filing of the suit in the trial Court by the Appellants.

I therefore find that the special damages that were pleaded and proved were for the amount of Kshs 74, 005/=.

Lastly, on the award of loss of dependency, section 4 of the Fatal Accidents Act stipulates that every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the deceased. A parent and child is further defined in section 2 of the Act as follows:

> **(1) In this Act, except where the context otherwise requires—**
>
> **"child" means a son, daughter, grandson, granddaughter, stepson or stepdaughter;**

"parent" means a father, mother, grandfather, grandmother, stepfather or stepmother.

(2) For the purposes of this section a person shall be deemed to be the child or parent of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption; and accordingly in deducing any relationship which under the provisions of this section is included within the meaning of the expressions "child" and "parent", any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

(3) In this section "adopted person" means a person who has been adopted under the provisions of any law for the time being in force in the country in which the adoption took place.

(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.

The dependants named in the Plaint filed in the trial Court where Florence Mumbua Ndoo, the deceased's mother, Francis Kioko Ndoo, the deceased's uncle, and Virginia Nthoki Ndoo, the deceased's sister. The finding by the trial Court in this regard that it was only the deceased's mother who could qualify to as the deceased's dependant was therefore not erroneous.

As to whether the amount awarded of Kshs 350,000/= as loss of dependency was inordinately low, this Court is guided by the manner of assessment of damages for loss of dependency under the Fatal Accidents Act. The applicable method was aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows;

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

It was argued by the Appellants that there was evidence produced in the trial Court of income earned by the deceased. However the exhibits produced by PW3 which were a letter of the deceased's membership in Tawa Jua Kali Group of Boda Bodas, receipts of seeds bought by the deceased for farming, and a list of foodstuffs the deceased is alleged to have harvested from his farming was not evidence of any income actually earned by the deceased. It was evidence of activities the deceased is alleged to have engaged in, not of any income therefrom.

It is thus my finding the deceased in the present appeal had not earned any income that would have guided the Court in determining a multiplicand and resultant multiplier, and the best the trial Court could do in the circumstances is award a global amount. I note in this regard that in a comparable judicial authority being **John Njenga Njoroge vs Alex Mureithi, Nakuru H.C.C. No 252 of 1999,** a global figure of Kshs 300,000/= was awarded for lost years with respect to an accident that occurred in August 1998, when the deceased therein who was aged 17 years died. The accident in the present appeal took

place on 2nd August 2008, ten years later, and an award of Kshs 700,000/= for loss of dependency is in my view reasonable taking into account inflationary trends.

While on the award of loss of dependency , it was also argued that the trial magistrate erroneously deducted the damages for loss of expectation of life awarded under the Law Reform Act. The applicable legal position is that there are other beneficiaries other than dependants who are entitled to damages arising from a death of a deceased under sections 2 and 5 of the Law Reform Act as follows:

> **2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—**
>
> **(a) shall not include any exemplary damages;**
>
> **(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and**
>
> **(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.**
>
> **(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 deceased persons by the Fatal Accidents Act (Cap. 32) 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 deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).**

The law and practice where a claimant get awards for loss of life both under the Law Reform Act and the Fatal Accidents Act was explained by the Court of Appeal as follows in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR:**

> **"20. 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 under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act,* hence the issue of duplication does not arise.**
>
> ***21.* The confusion appears to have arisen because of different reporting of the Kenfro case**
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> **(supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the *ratio decidendi* is extracted from the unanimous decision of all three Judges. It was held, *inter alia,* that:-**
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> ***"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***

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 the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

The trial Court in this regard found that the deceased's uncle who was PW3 contradicted himself as to whether he was being supported by the deceased, when he stated in his testimony that he used to provide financial assistance to the deceased. After a perusal of the trial Court I do find that this was indeed the position, and may have been a valid reason to exclude the deceased's uncle as a beneficiary of the deceased.

No valid reason was however given for excluding the deceased's sister, as siblings are recognized beneficiaries in a deceased estate. Therefore there was no coincidence between the beneficiaries entitled to share in the estate of the deceased, in this instance being the deceased's sister, and those who were dependants under the Fatal Accidents Act, who was the deceased's mother. In other words the beneficiary under the law Reform Act was a different person from the dependant under the Fatal Accidents Act.

The trial magistrate therefore to this extent erred in holding that the damages under the Law Reform Act should be deducted from the ones awarded under the Fatal Accidents Act as the deceased sister was entitled to the damages under the Law Reform Act as a beneficiary.

I therefore set aside the said award of damages in the trial court of Kshs 384,940/=, and substitute it with a total award of Kshs 924,005/= to the Appellants as against the Respondents, which has been computed as follows arising from the findings in the foregoing:

	Kshs
(a) Pain and suffering	30,000.00
(b) Loss of expectation of life	120,000.00
(c) Loss of Dependancy	700,000. 00
(d) Special Damages	74,005.00
Total	**924,005. 00**

The Appellants shall have the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 4TH DAY OF MAY 2017.

P. NYAMWEYA

JUDGE