REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 138 OF 2012

MOSES MAIRUA MUCHIRI……APPELLANT

VERSUS

CYRUS MAINA MACHARIA (Suing as the personal

representative of the estate of Mercy Nzula Maina (deceased)
…….…....…...RESPONDENT

(Being and appeal from the judgment of Hon. Mrs W.A. Juma (Chief Magistrate) delivered on 19th November, 2012 in Nyeri Chief Magistrates Court Civil Case No. 255 of 2011)

BETWEEN

CYRUS MAINA MACHARIA (Suing as the personal representative

of the estate of Mercy Nzula Maina (deceased)……...PLAINTIFF

VERSUS

MOSES MAIRUA MUCHIRI…….....…….....DEFENDANT

JUDGMENT

The appellant was sued by the respondent in the magistrates' court for special damages, general damages under the **Fatal Accidents Act (Cap. 32, Laws of Kenya)** and the **Law Reform Act (Cap. 26, Laws of Kenya)** and interest on damages; he also sought for the costs of the suit.

The respondent's cause against the appellant arose out of a road traffic accident that occurred along Karatina-Nyeri Road on 12th December, 2010 and which involved the appellant's motor vehicle registration number KBF 571 S in which the respondent's daughter is said to have been travelling as a passenger. The respondent's daughter sustained fatal injuries from which she succumbed and died. It was the respondent's case that the appellant, his driver, servant or agent was solely to blame for the accident and therefore he sued him for damages for the benefit of the deceased's estate under the **Law Reform Act** and also for the benefit of her dependants under the **Fatal Accidents Act**.

The appellant denied the respondent's claim and filed a statement of defence in that regard; however, the record shows that despite the appellant's denial, parties recorded a consent according to which judgment

on liability was entered against the appellant at 90%. General damages for pain and suffering were agreed at Kshs 10,000/= while damages for loss of expectation of life parties were agreed at the sum of Kshs 80,000/=. As for special damages, they agreed that the sum of Kshs 86,370 was payable.

The only outstanding issue for trial was general damages under the **Fatal Accidents Act** which ordinarily is the **loss of dependency** though its assessment invariably involves reference to the loss of earnings for the years the deceased would have worked (the lost years).

Only the respondent testified in respect of damages under this head; the appellant did not call any witness.

The respondent's evidence was that his daughter was aged 30 and a form IV leaver at the time of her demise. She had trained at City Business Associates Training Institute and that prior to her death she had been employed in business promotion road shows. Apart from this engagement she also ran her own business.

The respondent testified that the deceased assisted him meet his needs, for instance, she paid for his electricity and water bills. She also used to give him Kshs 60,000/= and one John Mwangi Kshs 100,000/= per month. His five children depended solely on her. Apart according the respondent financial assistance and helping settle his utility bills, the deceased also used to bank some of her money in her account with Co-operative Bank; the witness produced a copy a bank statement showing the deposits made.

At cross-examination the respondent admitted that her daughter only studied computer and he did not have any certificate to show that she had undertaken business studies. He also admitted that whatever she was doing for a leaving was not what she trained for. Contrary to what he said in his evidence-in-chief, he stated that his daughter used to give him Kshs 20,000/-. It was also his evidence that the deceased used to earn Kshs 200,000/- per month and not Kshs 20,000/= stated in the plaint.

Based on this evidence, the learned magistrate held that the deceased earned Kshs 20,000/= per month which she adopted as the multiplicand. The learned magistrate also held that the deceased spent a third of this sum on her family and that in her view, the deceased would have actively worked for 25 years which she adopted as the multiplier. Her award for loss of dependency was therefore as follows:-

Kshs (20,000x 12 x1/3 x 25) = 2,000,000/=

In addition to this figure the learned magistrate awarded the sum of Kshs 176,370/= which parties had agreed as comprising special damages, damages for pain and suffering and loss of expectation of life. The total award made, subject to contribution, was therefore Kshs 2, 176,370/= together with costs and interest. The appellant was aggrieved by this decision and therefore appealed to this court on the following grounds:-

1. The learned magistrate erred in fact in adopting the multiplicand of Kshs 20,000/= for purposes for computing general damages for lost years when that figure was not supported by any evidence.

2. The learned magistrate erred in law and in fact in adopting a multiplier of 25 years which figure was excessive bearing in mind the deceased's age and the available comparable decisions on this issue.

3. The learned magistrate erred in fact and in law in failing to consider the High Court decision in **Julius Mokua Ongera versus Esther Njoki Gicharu (2006) eKLR** cited by the appellant's advocates in respect to the issue of the multiplier.

4. The learned magistrate erred in law and in fact in failing to take into account the vagaries and vicissitudes of life in arriving at the said multiplier.

5. The learned magistrate erred in fact and in law by failing to deduct the award of damages for loss

of expectation of life from that of lost years.

6. The amount awarded to the respondent as damages for lost years was manifestly excessive and erroneous and thus warrant variation by this Court.

Parties chose to have the appeal disposed of by way of written submissions; directions were given to that effect and they accordingly filed and exchanged the submissions. I have had occasion to consider those submissions in coming to this determination.

As noted the only evidence proffered at the trial was that of the respondent and the only issue that the magistrates' court was concerned with, which is also the concern of this court, was the assessment of general damages for loss of dependency.

In considering this question at this level, this Court is minded that assessment of damages is a discretionary exercise and it is not the business of an appellate court to substitute its opinion for that of the trial court (see **Picket versus British Rail Engineering Ltd (1980) AC 136, per Lord Scarman).** Yet in deserving cases, the appellate court may venture to disturb the trial court's assessment of damages not out of its own whims but based on well settled and age-old principles. The court in **Davies versus Powell Duffryn Associated Collieries Ltd** referred to these principles where it stated:-

> ***In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere on the ground of excess or insufficiency. (Per Lord Wright at page 617).***

As far as I understand the appellant, the learned magistrate ought not to have adopted and applied the multiplicand of Kshs 20,000/= and a multiplier of 25 years. In his view, the multiplicand was not supported by any evidence while the multiplier was excessive.

Going back to the evidence on these twin issues, the respondent pleaded that his daughter earned Kshs 20,000/= per month but in his evidence in court he testified that the monthly income of his daughter was Kshs 200,000/= and that the figure of Kshs 20,000/= pleaded in his plaint was erroneous. There was, however, no amendment to his plaint to correct what he regarded as an error and, therefore, I take it that the working figure for purposes of determination of his suit was the Kshs 20,000/=; it is trite that a party is bound by his own pleadings.

The next question that logically follows is whether there was proof on a balance of probability that the deceased earned the sum of Kshs 20,000/= per month and if so whether she spent a third of her income on her family.

The starting point in answering this question is that much as the respondent testified that the deceased had been employed and was engaged in business promotions on road shows, there was no proof that the deceased was in any formal employment or was earning a regular and ascertained income from such employment.

The learned magistrate adopted the figure of Kshs 20,000/= but in narrowing down to this figure she relied heavily on a bank statement submitted to court in proof of the fact that the deceased used to make some deposits in a bank account. In the words of the learned magistrate, the deposits were at times 'high' and were 'low' at other times and in the face of these 'high' and 'low' deposits a figure of Kshs 20,000/= would appear to more acceptable as the multiplicand in the circumstances.

The bank account whose statement the learned magistrate relied upon to arrive at the figure of Kshs 20,000/= is described in the statement itself as "Young Enovators A/C". The statement addressed and apparently sent to the deceased ran from 3rd July, 2010 to 8th December, 2010. It shows that on 8th

November, 2010 a cash deposit of Kshs 100,000/= was made to the account; on 22nd November, 2010 another cash deposit of Kshs 5,000/= was made; Kshs 3,000/= cash was paid on 3rd December, 2010 and finally on 8th December, 2010, a cash deposit of Kshs 5,000/= was made in this account. In between these deposits there were withdrawals and the credit balance as of 8th December, 2010 was Kshs 228/= only.

My assessment of the entries in this statement is that the deceased was earning some sort of income. She had made cash deposits of Kshs 113,000/= in a period of about five months bringing the average monthly deposit to Kshs 22,600/=. It is not apparent, however, from the bank statement whether these deposits constituted the deceased's net income or was the gross income and thus it would be speculative in my view to adopt this figure or its approximate as the multiplicand.

It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case. In **Gammel versus Wilson (1981) 1 ALL ER 578 Lord Scarman** spoke of the assessment of damages in such circumstances; he said:-

> ***The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.(see page 593).***

And back home, while referring to this question in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was quoted with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** Justice Ringera was of the following view:-

> "***The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."***

The same reasoning was adopted in the earlier decision in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., stated that:-

> "***As regards the income of the deceased there are no bank statements showing his earnings. Both***

counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."

In the instant case a bank statement was produced but as noted, it is not clear how much of the deposits made were the deceased's net income; what is clear is that the deceased was relatively educated and that she had not only the capacity to earn but that she was also earning an income, however irregular or uncertain it may have been, before her obviously untimely death.

If I was to go the multiplier way, I would not have had any problem with the multiplier of 25 years which the learned magistrate adopted considering that the deceased was only thirty; a multiplier of 25, even taking into account the vicissitudes and imponderables of life would not have been at all unreasonable, or as the appellant argued, excessive.

I would not also have ignored the fact that the deceased was still living with her father and her siblings and that she spared part of their income for their upkeep and maintenance. It has been acknowledged that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. (See **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters & 4 Others (1986) KLR 457).**

Doing the best I can and taking into account the particular circumstances of this case, a global award of Kshs 1,700,000/= is to me a just award under the head of loss of dependency.

The appellant took issue with the learned magistrate's decision to award both damages under the head of lost years and damages under the for loss of expectation of life. in the appellant's view, damages under the head of loss of expectation of life should have been deducted from damages awarded under the head lost years and in this regard counsel for the appellant relied on the decision in **Machakos High Court Civil Case No 76 of 2000, James Okoth Nyarero versus Mohamed Sheikh Omar Bin Dahman T/A Malindi Bus Services** where the Court is said to have held that where the same applicant gets awards both under the Law Reform Act and under the Fatal Accidents Act, the award under the Law Reform Act must be borne in mind when working out the award under the head of the Fatal Accidents Act to avoid double payment to the same applicant.

This question has been asked and answered in several decisions before and the position of the law has been set out by the Court of Appeal in **Asal versus Muge & Another (2001) KLR 202** where the Court, sitting at Kisumu cited its earlier decision in **Maina Kaniaru & Another versus Josephat Muriuki Wangondu, Civil Appeal No. 14 of 1989** (unreported) where it held:-

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…"

My understanding of the Court of Appeal's reasoning and which, no doubt, is the proper interpretation of the law, is that, 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). It is appropriate to reproduce these provisions here to appreciate their import as far as awards under these heads are concerned: - S**ection 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 <u>in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act</u> 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).(underlining mine).

The Law Reform Act is clear, and there is no ambiguity, that any cause of action for the benefit of the deceased's estate and thus any award that may ensue therefrom is not in substitution of or an alternative to the right that accrues to the deceased's dependants under the **Fatal Accidents Act.**

The **Fatal Accidents Act** itself makes it clear as to who should benefit from any action taken under it; **section 4(1)** thereof states:-

4.(1) 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.

That an action is maintainable under the **Fatal Accidents Act** for the benefit a deceased person's wife, husband, parent or child is beyond dispute; where such an action is viable, the trial court has the discretion, as is always, to determine the amount of damages payable; in exercising this discretion, the Act under **subsection (2)** provides a guide of what ought not to be considered in assessment of damages under this head. The Act does not, however, provide any general or specific guidelines of what should be considered; I suppose this omission is deliberate mainly to leave it to the trial court with sufficient latitude within which it can exercise its discretion in assessing the damages considering the peculiarity of the cases that come before it.

It is upon this understanding that while an award under this head may be "reduced" as was suggested by

the **Court of Appeal** in **Maina Kaniaru & Another versus Josephat Muriuki Wangondu (ibid)** because an award has been made under the **Law Reform Act** it cannot be done away with altogether. The fact that those who are likely to benefit from the deceased's estate are the same persons who will benefit from any claim under the **Fatal Accidents Act** is only a factor to be considered in the extent of damages to be made; it is not a reason to reject a claim for an award under this head.

In my humble opinion, if the damages under this head have to be reduced, the extent to which they will be reduced will depend on the circumstances of each particular case because; for purposes of determination of this appeal, all I can say is that no circumstances have been shown to exist why the damages under the head of lost years should have been deducted from the award made under the head of loss of dependency.

In Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88) 1KLR 727 the Judges of Appeal said that though an award under the Fatal Accidents Act should take into consideration any award made under the Law Reform Act, the arithmetical deduction *'need not be set out as for an examination answer'*. The learned judges proceeded to uphold the distinct awards under the Law Reform Act and the Fatal Accidents Act as assessed by the trial judge; they agreed with him that the claims under the two heads neither overlap nor do they result in the plaintiff being compensated twice in respect of one claim.

Ultimately, except for damages under the Law Reform Act to which parties agreed and subject to contribution, I would substitute the lower court's award under the head of Loss of Dependency with the award of Kshs 1,700,000/=. In the final analysis the total award is made out as follows (subject to contribution):-

General Damages under the Law Reform Act:

a) Pain and Suffering……Kshs 10,000.00

b) Special damages……Kshs 86,370.00

c) Loss of expectation of life……Kshs 80,000.00

General Damages under the Fatal

Accidents Act:

a) Damages for loss of dependency…….Kshs 1,700,000.00

Total **1,876,370.00**

The respondent shall have costs of the suit in the lower court but each of them will bear their own costs of appeal, the appeal having partly succeeded. Interest shall accrue from the date of the judgment in the lower court. It is so ordered.

Signed, dated and delivered in open court this 1st day of April, 2016

Ngaah Jairus

JUDGE