



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 83 OF 2013

BETWEEN

RICHARD MATHEKA MUSYOKA1ST APPELLANT

AKAMBA PUBLIC ROAD SERVICES LIMITED2ND APPELLANT

AND

SUSAN AOKO & REGINA KASUKARI WAMBUA suing

as the administrators ad litem of

JOSEPH ONYANGO OWITI (deceased) RESPONDENTS

(Being an appeal from the Judgment and Decree of Hon.L. Gitari, CM in the Chief Magistrates Court at Kisumu in Civil Case No. 103 of 2012 dated 30th August 2013)

JUDGMENT

1. The deceased was riding motor cycle registration number KMCG 801R TVS as a pillion passenger when he was hit by the 2nd appellant's bus registration number KAL 174A, being driven by the 1st appellant. After his death, his estate and dependants filed suit claiming damages under the ***Fatal Accident Act (Chapter 32 of the Laws of Kenya)*** and the ***Law Reform Act (Chapter 26 of the Laws of Kenya)***. After hearing the matter, the trial magistrate found the appellant fully liable and made the following award in favour of the respondents;

Pain and Suffering	Kshs.	10,000.00
Loss of Expectation of life	Kshs.	100,000.00
Loss of Dependency		
(Kshs. 10,000 X 12 X 2/3 X 20)	Kshs.	1,600,000.00
TOTAL	Kshs.	1,710,000.00

2. The appellant appealed against the assessment of damages. Mr Nyamweya submitted that the challenge against the judgment was three-fold. First, that the trial magistrate did not take into account the award made under the ***Law Reform Act*** in making the final award therefore resulting in double compensation for the respondents. Second, that the multiplicand of Kshs. 10,000/- applied had no basis and was not

proved by any evidence. Counsel submitted that the court could not rely on the minimum wage guidelines as these were neither presented nor submitted by the respondents. Third, that the respondents did not prove that the deceased had a wife and children as there ought to have been proof of marriage or some form of birth certificates for the children. He submitted that for this reason the dependency ratio should be reduced.

3. Mr Omollo, counsel for the respondents, opposed the appeal on the ground that there was sufficient proof from the witnesses that the deceased was earning income as a welder. He submitted that the income of a welder could be assessed by reference to the **Regulation of Wages (General)(Amendment) Order, 2012** which provides that the minimum wage of an artisan working in Kisumu is between Kshs. 11,580/- and Kshs. 19,360/-. Counsel also submitted that the fact that the deceased had a wife and children was borne out by the Chief's letter which was not contested.

4. According to the plaint, the deceased was aged 26 years old at the time of his death and was working as a welder earning Kshs. 10,000/- per month to support his mother, widow and three children. The deceased's wife, Susan Aoko (PW 1) testified that the deceased was employed as a welder earning Kshs. 10,000/- monthly and that he used to support his family by giving her about Kshs. 5,000/- per month. The deceased's mother, Regina Kasukari Wambua (PW 2), also testified that the deceased used to support her by giving her Kshs. 2,000/- to Kshs. 3,000/- monthly.

5. The manner of assessment of damages under the **Fatal Accidents Act** was **succinctly put by Ringera J., in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where he stated 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.

6. Although the appellant disputed the PW 1 and the children were dependants of the deceased, there is sufficient evidence to show that PW 1 and PW 2 were the deceased's wife and mother respectively. Apart from their testimony on oath which was not challenged in that respect, PW 1 also produced a letter from the Chief of North Central Seme to buttress this fact. I am therefore satisfied that on the balance of probabilities the respondents proved that the persons named and pleaded were dependants within the meaning of **section 4(a)** of the **Fatal Accidents Act**. Since the deceased was supporting a young family comprising a widow, three young children and his mother, I cannot say the dependency ratio of 2/3 adopted by the trial magistrate was unreasonable or erroneous.

7. Apart from the testimony of PW 1 and PW 2 that the deceased was a welder, James Duncan (PW 3), a boda boda rider who knew the deceased, testified that he was a welder at Otonglo. These witnesses were sufficient to establish that the deceased was a welder and that he had an income. PW 1 told the court that he was earning Kshs. 10,000/-. As his wife, such matter was within her knowledge and although documentary evidence was not produced, it has been said time and again that it would be wrong to insist on documentary evidence in every case to show that he was doing such work (see **Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR**). Where there is sufficient evidence to prove income, there was no need to fall back to the **Regulation of Wages Order**. I find support for this proposition in **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J., stated, "In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005 ..." [Emphasis mine]. I therefore find and hold that the deceased was earning

Kshs. 10,000/- as welder.

8. The third issue concerns the so-called duplication of awards under the **Law Reform Act** and the **Fatal Accidents Act** leading to double compensation. Damages for lost years under the **Law Reform Act** are recoverable for the estate of the deceased where the deceased died before he could institute an action. Under **section 2(5)** of the **Act** such damages are recoverable for the benefit of the estate and are in addition to any rights conferred on dependants of the deceased by the **Fatal Accidents Act**. A claim under the **Fatal Accidents Act** is made by the dependants of the deceased who claim for loss of the support the deceased during his lifetime.

9. Although the principles of assessment are similar, the court cannot make an award for lost years and loss of dependency as the benefits would ultimately devolve to the same parties under both Acts and this would amount to double compensation. This principal was explained by the Court of Appeal in **Kemfro v A. M. Lubia & Another [1982-1988] KAR 727** as follows;

[T]he net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

10. The principal 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 regarding that aspect of the award. At the risk of repeating myself, I would do no better than quote the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR** that;

[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.

11. As this an appeal on the issue of quantum, the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another (Supra)**).

12. As I have demonstrated there was no error in principle in assessing damages for loss of dependency under the **Fatal Accident Act** hence I cannot intervene in the award as proposed by the appellant.

13. Finally, when the court makes an award under the **Fatal Accidents Act** it must, in accordance with **section 4(1)** thereof, apportion the amount awarded to each dependant. As children are beneficiaries, the court must also approve a scheme of investment. I therefore direct that the respondents to file the necessary application for consideration before the subordinate court in due course before the decretal sum is released.

14. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 6th day of October 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed L. G. Menezes & Company Advocates for the appellant.

Mr Omollo instructed by Ken Omollo and Company Advocates for the respondent.