REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E083 OF 2023

MASHLINE AGENCIES K LTD ……

APPELLANT

-VERSUS-

LINET JEVOLI LIHAMBI &

(Suing as the Administrators of the Estate of

BROWN INGABO OTUYA ……

RESPONDENT

(An appeal against the Judgment and Decree by Honorable D Karani (SRM) dated 28th July 2023 in the Chief Magistrate's Court at Makindu Civil Case No. 70 of 2018)

JUDGMENT

1. This appeal arises from the judgment and decree of the Principal Magistrate's Court at **Makindu in SRMC No. 70 of 2018**, delivered on 26th July, 2023. The suit in the lower Court was commenced by the Plaintiff, suing as the

wife and administrator of the estate of the late Brown Ingabo Otuya, following a road traffic accident that occurred on 29th March, 2015 along the Nairobi–Mombasa Road.

2. It was pleaded that at the material time, the deceased was lawfully travelling aboard motor vehicle registration number GKB 770F when a trailer and container, motor vehicle registration number KBJ 830Z/ZD 2624, owned by the Defendant, was so negligently driven that it lost control, veered onto the lane of the deceased's motor vehicle, and caused the container to roll over onto it. As a consequence of the accident, the deceased sustained severe injuries from which he later succumbed.

3. The Defendant entered appearance and filed a statement of defence denying liability. However, prior to the determination of the suit, the parties recorded a consent on liability on 9th February, 2023, apportioning liability at the ratio of 80:20 in favour of the Plaintiff as against the Defendant. Liability having thus been settled, the trial Court was left to determine the issue of quantum only.

4. In its judgment, the trial Court awarded damages under various heads. For pain and suffering, the court awarded Kshs.100,000/=. For loss of expectation of life, a further Kshs.100,000/= was awarded. Under the **Fatal Accidents Act**, the Court assessed loss of dependency at Kshs.5,326,516.80/=, applying a multiplier of three years and a dependency ratio which the court stated to be one half.

5. After applying the agreed apportionment on liability and adding special damages in the sum of Kshs.1,013,430/=, the total award stood at Kshs.5,434,643.44/= , together with costs and interest.

6. The Appellant, being dissatisfied with the judgment and decree of the trial court, raised the following grounds of appeal:

> ***a. That the learned magistrate erred and misdirected himself in law, principle and fact by misapprehending and misunderstanding the applicable principles in the assessment of quantum, thereby arriving at an award that was so manifestly and inordinately high as to***

amount to an entirely erroneous estimate of damages in the circumstances of the case.

b. That the learned magistrate erred in fact and in law in awarding the Respondent damages in the sum of Kes 5,424,643.44 under the Fatal Accidents Act, which award was excessive in the circumstances.

c. That the learned magistrate erred in law and in fact by relying on the maximum number of productive working years and failing to adequately consider the vicissitudes of life when awarding damages under the Fatal Accidents Act.

d. That the learned magistrate erred in law by failing to deduct the damages awarded under the Law Reform Act from the total award.

e. That the learned magistrate erred in law and in fact by failing to accord due regard to the Appellant's submissions and the authorities cited on quantum and the applicable principles for assessment of damages.

Submissions:

7. The Appellant submits that the learned trial magistrate fell into error in the assessment of damages, and particularly in the award made under the **Fatal Accidents Act.** While it is accepted that the assessment of damages is a matter within the discretion of the trial Court, it is settled that such discretion must be exercised judiciously and in accordance with established principles.

8. An appellate Court is entitled to interfere where it is demonstrated that the trial Court acted on wrong principles, misapprehended the evidence, or arrived at an award that is so inordinately high as to represent an erroneous estimate. Reliance is placed on ***Butt v Khan [1981] KLR 349 and Kemfro Africa Ltd t/a Meru Express Service v A.M. Lubia & Another (No. 2) [1987] KLR 30.***

9. On the award for pain and suffering, the Appellant submits that the sum of Kshs.100,000/= awarded by the trial court was excessive in the circumstances of this case. It is contended that although the deceased passed away approximately one year after the accident, the evidence on record did not demonstrate prolonged

conscious pain attributable directly to the injuries sustained, as opposed to complications arising from medical intervention.

10. The Appellant urges that a lower conventional award was appropriate. In this regard, reliance is placed on ***West Kenya Sugar Co. Ltd v Philip Sumba Julaya (Suing as the administrator of the estate of James Julaya Sumba) [2017] eKLR***, where the court reiterated that nominal damages are awarded where death follows shortly after the accident, and higher awards are justified only where prolonged suffering is proved. Further reliance is placed on ***Sukari Industries Ltd v Clyde Machimbo Juma [2016] eKLR and Mercy Muriuki & Another v Samuel Mwangi Nduati & Another [2019] eKLR***, where the Courts underscored that awards for pain and suffering must correlate to the duration and degree of suffering endured.

11. With respect to loss of dependency, the Appellant submits that the learned magistrate erred both in principle and in computation. It is not disputed that the deceased was aged 57 years at the time of death and was in salaried employment, with a statutory retirement age

of 60 years. However, the Appellant contends that the trial Court failed to adequately account for the uncertainties and vicissitudes of life, which must invariably temper the choice of multiplier.

12. It is submitted that the adoption of a multiplier of three years did not sufficiently reflect those contingencies, and that a lower multiplier, and in particular one year, would have been more appropriate in the circumstances. Reliance is placed on the decision in ***Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457,*** where the Court of Appeal emphasised that an award for loss of dependency must fall within the limits of the deceased's realistic working expectancy and life uncertainties.

13. The Appellant further submits that the trial Court misdirected itself in the application of the dependency ratio. While the court stated that it was applying a ratio of one half, the actual computation adopted a factor inconsistent with that ratio, thereby inflating the award.

14. It is contended that such an inconsistency demonstrates a misapprehension of principle warranting appellate interference. The Appellant relies on ***Kemfro***

Africa Ltd t/a Meru Express Service v A.M. Lubia & Another (No. 2) [1987] KLR 30, where the Court of Appeal held that an appellate Court may interfere where the trial court misapplies the method of assessment, even if the underlying figures are not disputed.

15. On the issue of deduction of damages awarded under the **Law Reform Act,** the Appellant submits that the trial court erred by failing to deduct the sums awarded for pain and suffering and loss of expectation of life from the total award. It is contended that failure to do so resulted in duplication of awards to the estate and the dependants. Reliance is placed on the principle enunciated in ***Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601***, as applied in Kenyan jurisprudence, to the effect that Courts must guard against double compensation arising from overlapping heads of damage.

16. Finally, the Appellant submits that the learned magistrate failed to accord due regard to the Appellant's submissions and the authorities cited on quantum. It is contended that the judgment does not meaningfully engage with the Appellant's arguments on multiplier,

dependency ratio, and applicable comparative awards, thereby occasioning a miscarriage in the exercise of discretion.

17. The Appellant urges this Court to re-evaluate the award and substitute it with a figure that accords with principle, the evidence on record, and comparable decided cases.

18. In opposing the appeal, the Respondent submits that the learned trial magistrate properly exercised judicial discretion in the assessment of damages and that no basis has been laid for appellate interference. It is contended that the Appellant has not demonstrated that the trial court acted on wrong principles, misapprehended the evidence, or arrived at an award that was so inordinately high as to amount to an erroneous estimate.

19. The Respondent reiterates the settled position that assessment of damages is a discretionary function of the trial Court, and that an appellate Court ought not to interfere merely because it would have arrived at a different figure. Reliance is placed on ***Butt v Khan [1981] KLR 349 and Kemfro Africa Ltd t/a Meru***

Express Service v A.M. Lubia & Another (No. 2) [1987] KLR 30, where the Court of Appeal underscored that interference is only justified where wrong principles are applied or where the award is manifestly excessive or low.

20. On the award for pain and suffering, the Respondent submits that the sum of Kshs.100,000/= was justified and moderate in the circumstances. It is contended that the deceased survived for approximately one year after the accident, during which period he endured pain arising from the injuries sustained. The Respondent argues that this was not a case of instantaneous death warranting a nominal award.

21. Reliance is placed on ***Sailesh M.K. Patel & Another v Sukha Singh & Others [2019] eKLR,*** where an award of Kshs.100,000/= was upheld even where the deceased survived for a much shorter period. Further reliance is placed on ***Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457***, where the Court affirmed that damages under this head depend on the duration and degree of suffering prior to death.

22. With respect to loss of expectation of life, the Respondent submits that the conventional award of Kshs.100,000/= was properly made and accords with prevailing jurisprudence. It is contended that such awards are modest and conventional, and that the age of the deceased, though relevant, does not warrant a departure from the accepted range.

23. Reliance is placed on **West (H) & Son Ltd v Shephard [1964] AC 326** and **Otieno v Ngunyi & Another (1982–88) 1 KAR 1048**, where Courts affirmed that damages under this head are compensatory and conventional in nature. The Respondent further relies on **Benedita Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR**, where an award of Kshs.100,000/= was upheld.

24. On funeral expenses, the Respondent submits that the award of **Kshs.1,013,430/=** was properly made, the same having been specifically pleaded and strictly proved by receipts produced at trial. It is contended that the Appellant did not challenge the authenticity or reasonableness of the receipts.

25. Reliance is placed on ***Jacob Ayiga v Simeon Obayo [2005] eKLR***, where the Court of Appeal recognised that funeral expenses are recoverable where proved, and that courts should not adopt an unduly restrictive approach. Further reliance is placed on ***Peter K. Waweru v Susan Wangari & Another [2018] eKLR,*** where a similar award for funeral expenses was upheld.

26. Regarding loss of dependency, the Respondent submits that the learned magistrate correctly applied the multiplier/multiplicand approach. It is not disputed that the deceased was aged 57 years, was in stable salaried employment, and had three children who were still in university and dependent on him.

27. The Respondent contends that the multiplier of three years was conservative, reflecting the remaining years to retirement, and that it sufficiently accounted for the vicissitudes of life. Reliance is placed on *Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457 and Nyakabu v Mbugua*, where Courts affirmed that the choice of multiplier is a matter of discretion to be exercised on the facts of each case.

28. The Respondent further submits that the dependency ratio of one half was reasonable in light of the evidence on dependency and the deceased's family circumstances. It is argued that the Appellant did not rebut the evidence of dependency at trial, and cannot now invite the appellate court to substitute its own view absent an error in principle.

29. On the issue of deduction of damages awarded under the **Law Reform Act**, the Respondent submits that there is no requirement in law for a mathematical deduction of such awards from damages awarded under the **Fatal Accidents Act**. It is contended that **Section 2(3)** of the **Law Reform Act** expressly provides that the rights conferred thereunder are in addition to, and not in derogation of, rights under the **Fatal Accidents Act.**

30. Reliance is placed on ***Kemfro Africa Ltd t/a Meru Express Service v A.M. Lubia & Another (No. 2) [1987] KLR 30***, where the Court of Appeal held that "to be taken into account" does not mean "to be deducted". Further reliance is placed on **Hassan v Nathan Mwangi Kamau Transporters & Another [1986] KLR 457,**

where the Court reiterated that awards under the two statutes serve distinct purposes.

31. Finally, the Respondent submits that the learned magistrate did not disregard the Appellant's submissions or authorities. It is contended that a Court is not obliged to reproduce or expressly cite every authority relied upon by a party, so long as the judgment demonstrates that the relevant principles were considered. Reliance is placed on **Nguruman Ltd v Shompole Group Ranch & Another [2014] eKLR and *Kenya Breweries Ltd v Saro [1991] KLR 408*,** where Courts affirmed that consideration of submissions is presumed unless the contrary is shown.

Issues:

32. A review of the appeal grounds shows that the focus is on the damages award amount, especially the damages under the **Fatal Accidents Act.** They do not contest liability, which was agreed upon and is not at issue in this appeal.

Determination:

33. The Appellants argue that the trial Court misapplied the principles governing damage assessment, used an incorrect multiplier and dependency ratio, and failed to properly consider the vicissitudes of life, resulting in an award which the appellant claims was excessive and not supported by the evidence on record.

34. Allied to this is the complaint that the trial Court failed to deduct the sums awarded under the **Law Reform Act** and did not accord due consideration to the Appellant's submissions and cited authorities.

35. In the case of **Mbogo and Another v Shah [1968] EA 93** the Court discussing the circumstances under which a Court on appeal would or ought to upset an award of the trial Court held that:

> ***"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should***

have taken into consideration and in doing so arrived at a wrong conclusion."

36. The Appellant's gripe with the award for loss of dependency is substantially premised on the idea that the learned trial magistrate failed to sufficiently account for the vicissitudes of life, given that the deceased was aged 57 years at the time of death. It is argued that the Court ought to have adopted a drastically reduced multiplier, or indeed one as low as a single year.

37. That submission is untenable in my view. The deceased was a salaried public servant with a clearly defined retirement age of 60 years. There was no evidence placed before the trial Court that he was in ill health, facing disciplinary proceedings, or otherwise at risk of premature cessation of employment. In the absence of such evidence, the Court was entitled to proceed on the basis of the ordinary course of human affairs.

38. The principles governing the selection of a multiplier are settled. The principles governing appellate interference with awards of damages, and the assessment of loss of dependency in particular, are well settled. An

appellate Court will only interfere where it is demonstrated that the trial Court acted on wrong principles, misapprehended the evidence, or arrived at an award that is so inordinately high or low as to amount to an erroneous estimate. This position is settled in, among others, **Butt v Khan, Kemfro Africa Ltd t/a Meru Express Service v A.M. Lubia & Another (No. 2),** and **Hassan v Nathan Mwangi Kamau Transporters & 4 Others.**

39. In applying a multiplier of three years, the learned magistrate did not speculate beyond the deceased's remaining working life. The multiplier adopted corresponded precisely with the period remaining to the deceased's statutory retirement. Far from ignoring the vicissitudes of life, the court demonstrably took them into account by declining to assume continued earnings beyond retirement.

40. The Appellant's submission appears to proceed from the assumption that attainment of the age of 57 years justifies an expectation of imminent cessation of work or death. That approach is neither supported by evidence

nor grounded in law. The vicissitudes of life are a moderating consideration; they are not a basis for conjecture or pessimistic assumptions in the absence of supporting evidence.

41. Accordingly, the learned magistrate cannot be faulted for failing to consider the vicissitudes of life. The Appellant has not demonstrated that the Court applied a wrong principle or that the multiplier adopted was outside the range of reasonable judicial discretion.

42. This approach accords with the principles enunciated of Ringera J. in the case **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR)** 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. <u>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.</u>"

43. Indeed, it cannot be said to be unreasonable that the deceased would have continued in employment up to the point of his mandatory retirement, whether to his last year, month, or indeed his final day of service. The Appellant's invitation to discount even the remaining three years to retirement would require this court to proceed on conjecture rather than evidence, and to substitute a reasoned judicial estimate with pessimistic speculation.

44. So much so, that if the courts were to accede to the Appellant's argument, we would be inviting a level of mathematical exactitude in the assessment of damages that the law has expressly disavowed. The multiplier is not a product of scientific calculation but of judicial

estimation, informed by experience, evidence, and principle.

45. Comparable awards serve as guides, not as binding tariffs, and the fact that another court might have adopted a different multiplier does not demonstrate error. The law does not sanction such an approach. The multiplier of three years adopted by the learned magistrate cannot, under any banner, be said to be unreasonable or excessive in the circumstances of this case.

46. What the Appellant effectively asks this Court to do is to re-exercise discretion merely because it would have arrived at a different figure. That is not the role of an appellate court. Interference is not justified unless there is at least a demonstration that the trial Court based its decision on incorrect principles, misunderstood the evidence, or reached an excessively high and clearly mistaken outcome.

47. In the circumstances of this case, the multiplier adopted fell well within the acceptable range of judicial

discretion and was firmly anchored on the evidence and the applicable principles. That ground therefore fails.

48. Finally, the Appellant contends that the learned magistrate fell into error by failing to deduct the damages awarded under the **Law Reform Act** from the damages awarded under the **Fatal Accidents Act**, thereby occasioning what is described as double compensation. The Respondent disputed that contention and submits that the law does not require such deduction.

49. The relationship between claims under the **Law Reform Act** and those under the **Fatal Accidents Act** is expressly addressed in statute and has been the subject of repeated pronouncement by the Court of Appeal.

50. **Section 2(3)** of the **Law Reform Act** provides as follows in that regard:

> ***"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 or any other written law."***

51. The plain wording of the statute leaves no room for doubt. Claims brought for the benefit of the estate of a deceased person under the **Law Reform Act** are intended to coexist with, and not to diminish, claims brought by dependants under the **Fatal Accidents Act**. The two causes of action are distinct in character, accrue to different beneficiaries, and compensate for different forms of loss.

52. In **Kemfro Africa Ltd t/a Meru Express Service & Another v A.M. Lubia & Another (No. 2) [1987] KLR 30**, the Court stated that the requirement under **Section 4 (2)** of the **Fatal Accidents Act** that certain benefits be "taken into account" does not mean that they must be mathematically deducted. The Court in **James Muthomi Njeru [suing in his capacity as the legal representative of the Estate of the late Agnes Tirindi Njeru-Deceased] v Joseph Erasmus Mugo [2021] KEHC 8355 (KLR)** citing the *Kefro* decision reaffirmed that:

> ***"The Court of Appeal in Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30 while***

interpreting Section 4 (2) of the Fatal Accidents Act emphasized that the words used in the section namely "take into account" referred to matters which ought to be taken into account when assessing damages under the Act and not necessarily what should be deducted. The court reiterated that whereas there was need to award conventional sums to avoid over compensating the same persons, there was no requirement in law for the trial court to engage in mathematical deductions."

53. The Court of Appeal (Waki, Nambuye and Kiage JJA) in the case of **Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR** similarly stated that:

"…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 are the same, and

consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise… 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". This 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."

54. A cursory perusal of the Judgment of the trial Court shows the Court awarded damages under the **Law**

Reform Act for pain and suffering and loss of expectation of life, and separately assessed loss of dependency under the Fatal Accidents Act. The judgment considered his dependent children. There is nothing on the record to suggest that the learned magistrate conflated the two heads of claim or compensated the same loss twice.

55. Accordingly, this ground of appeal must fail.

Disposition:

56. The appeal is dismissed. The costs of this appeal are awarded to the Respondent.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **17TH** day of **DECEMBER, 2025.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl Anindo

No attendance by Parties