REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

COUNTY COURT NAME: MACHAKOS HIGH COURT

CASE NUMBER: HCCA/E117/2023

ROBERT KINOTHYA MAKAU VS FAITH KANINI NTHENGE

JUDGMENT

(Being an appeal from the judgment of Hon P/M. WECHULI (Senior Resident Magistrate) delivered on 11th May 2023 in Kithimani Chief Magistrate's Court Civil Suit No. 100 of 2022)

JUDGMENT

1. By a plaint dated 11/05/2022 the Respondent sued the Appellant for general damages under the Law Reform Act and the Fatal Accidents Act, special damages, costs of the suit and interest and was successful. The claim arose from a motor accident allegedly involving motor vehicle KCZ 316L in which the deceased was a lawful passenger and motor vehicle KBL 423A. The accident is said to have occurred along the Thika Garissa Road on 17th July 2021. It is instructive to note that the claim under the Fatal Accidents Act is brought on behalf of the spouse of the deceased.
2. The learned magistrate in the court below found the Appellant who was the owner of motor vehicle KBL 423A wholly liable for the accident and awarded the Respondent damages as follows:

a. Loss of dependency Kshs 3,840,000
b. Pain and suffering Kshs 10,000
c. Loss of expectation of life Kshs 100,000

d. Special damages Kshs 144.110 Total Kshs 4,094,110

3. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:
    a. That the learned Magistrate erred in law and in fact in holding the Appellant wholly liable for the accident.
    b. That the learned Magistrate erred in law and in failing to hold that dependency was a matter of fact which has not been proven by the Respondents.
    c. That the learned Magistrate erred in law and in adopting a multiplier of 16 years.
    d. That the learned Magistrate erred in law and in adopting an unproven multiplicand of Kshs 30,000 for an alleged painter who was actually a casual labourer.
    e. That the learned Magistrate erred in law and in failing to discount the award under the Law Reform Act noting that the beneficiaries are the same.
4. The appeal was canvassed by way of written submissions.
5. For the Appellant it was argued that negligence was not proved against him on a balance of probabilities; that there was no eye witness and that the police abstract tendered in evidence was merely proof that an accident occurred. On the award for damages Counsel argued firstly; that given the vicissitudes of life there is no guarantee, that the deceased who was 44 years old, would have lived or worked up to 60 yearsand as such a multiplier of ten years would have been more reasonable than that of 16 years adopted by the learned magistrate. Secondly, Counsel argued that the plaintiff did not prove that she depended on the deceased and that although she claimed to have had four children with the deceased, she only produced

birth certificates for two children.

6. Counsel also argued, that as there was no proof of earnings the court should have relied on the minimum wage payable to general labourers under Legal Notice No. 2 of 2019 which was in operation at the time material to this case. Counsel submitted that the damages under the Fatal Accidents Act should be calculated as follows 7240.95 *12*10*2/3= Kshs. 579,276/=. Lastly, Counsel urged this court to

discount the award under the Law Reform Act from the final award of the court. In support of his submissions, counsel placed reliance on inter alia; the case of **Kibet Langat & Another V Miriam Wairimu Ngugi (Suing as The Administrator of The Estate of Daniel Mwiruti Ngugi [2016] EKLR**

7. For the Respondent, it was submitted that liability was proved on a balance of probabilities; that the Respondent's evidence was not rebutted. Further, that no evidence was adduced to controvert that the deceased was 44 years old, that he was earning Kshs2,000 per day as a painter and mason hence kshs60,000 per month. That nevertheless, the learned magistrate reduced the earnings to Kshs1000 per day and there was no basis for setting aside the judgment. Counsel also asserted that the issue of double compensation does not arise, as would to warrant this court, to discount the claim for loss of expectation of life from the final award; that the appeal should be dismissed with costs. To support the submissions, reliance was placed on the following cases; ***Jacob Ayiga Maruja and another vs Simeon Obayo[2005] KECA 202 eKLR, Priscilla Mwathimba v Simon Kaibuga and another [2018] e KLR, Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR).***

Analysis and determination.

8. The issues that arise for determination are:

i. Whether negligence was proved against the Appellant to the required standard.

ii. Whether the learned magistrate erred in assessing the award of damages.

9. In regard to the issue of negligence this court has, bearing in mind that an appeal is a retrial, reconsidered and evaluated the evidence in the court below so as to arrive at its own independent conclusion and made provision for it. This court has also considered the issues raised in the rival submissions and the law. See the case of **Coghlan vs. Cumberland (1898) 1 Ch. 704**, where the court stated as follows –

> "***Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...***
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> ***When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.***"

10. From the record, it is not disputed that an accident involving the Appellant's vehicle and a vehicle in which the deceased was a lawful passenger occurred along the Thika- Garissa area on 17th July 2019. The Respondent called two witnesses to prove liability. PW2 testified that he was one of the officers who investigated the accident and that he blamed the driver of the Appelant's vehicle for the accident; that following the accident, the said driver was charged with the offence of causing death by dangerous driving and was fined kshs30,000. The Respondent did not adduce any evidence in rebuttal and as there is no evidence

that the driver appealed then it is deemed that he committed the offence-**see Section 47A of the Evidence Act.** This court is not therefore persuaded that the learned magistrate erred in holding the Appellant wholly liable for the accident.

11. On the quantum of damages, it is instructive to note that it was not disputed that the deceased suffered fatal injuries. It is also instructive

that the Appellant seems to contest only the award under the Fatal Accidents Act but not under the other heads. It is trite that an appellate court can only interfere with an award where it is shown that the court below either misapprehended the evidence or failed to take into account a relevant issue or took into account an irrelevant one or short of that, that the damages were so inordinately high or low as to be an erroneous estimate of the damage.

12. As stated earlier, the only award in contention is the one for loss of dependency and the reason given is that the multiplier and multiplicand adopted by the learned magistrate. According to the Respondent there was no evidence to prove that the deceased was a painter; that the evidence available points to him as having been a general or casual laborer. Also, that as no evidence was tendered to prove his wages then the court should have adopted the minimum wage applicable to a general laborer at the time. Counsel for the Respondent also submitted that dependency was not proved. This court has carefully considered the issues raised and finds that firstly, the Fatal Accidents Act does not require proof of dependency. It suffices to show that the person for whose benefit the claim is made is a spouse, child or parent of the deceased- see **Section 4(1) of the Act**. In this case, it was not disputed that the Respondent was the wife of the deceased. On the issue of the quantum of damages under that head, I am persuaded that there was no proof on a balance of probabilities that the deceased was a painter and that he earned kshs1000 a day. I say so because in her witness statement which she adopted as her evidence in chief, she refers to her daughter who was a sales lady earning kshs2000 a month. It is not clear whether this was an error on her part as she does not seem to have been asked to correct it at the hearing. Suffice it however to state that according to her testimony the deceased was a guard cum farmer. The submissions on the other hand refer to a painter and contractor.

Nothing at all was tendered to prove that he engaged in any of those occupations and I am therefore persuaded that the best approach was to treat him as a general laborer and to adopt the minimum wage applicable at the time. In the case of VOLCAN HOLDINGS LIMITED V Mourine Nasimiyu & Alice Nasimiyu (Suing as Administrator of the Estate of Arnest Wasike Sindani (Deceased)[2021]KEHC 6763 (KLR),

the court stated and I agree;-

> ***"…In the instant appeal, this court is satisfied that despite the failure to produce documentation demonstrating the earning capacity of the deceased, the trial magistrate's recourse in the minimum wage regulations cannot be faulted. This was a proper case where the court was entitled to look elsewhere to ascertain what the deceased could have been earning….."***
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> ***inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.''***

13. The learned magistrate clearly erred in finding that the deceased was a painter when no such evidence was tendered. I am persuaded that since the learned magistrate preferred to adopt the multiplier method as opposed to the global approach then he should have applied the minimum wage for a general/ casual labourer to wit Kshs 7240.95. the deceased was 44 years and as he was not in formal employment, he could have worked even beyond 60 years. I am not therefore persuaded that the multiplicand of 16 years was unreasonable. Accordingly, I assess damages for loss of dependency as follows -7240.95 x12 x16 x 2/3= Kshs. 926,841.6/=

14 Lastly, on the issue of double compensation, I am guided by the finding of the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR)** where the court dealt with this issue conclusively and stated as follows;

> ***"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it***

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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 (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 <u>Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2)</u> and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:

"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."

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages."

15. If this decision is to go by, then the issue of double compensation does not arise. In the end, the appeal succeeds only to the extent that the award for loss of dependency of Kshs 3,840,000 is set aside and substituted with an award of Kshs. 926,841.6/=. The rest of the awards remain the same. The damages under the different heads shall attract interest at court rates from the date of the judgment in the court below. The special damages shall however attract interes at court rates from the date of filing suit.

16. On costs given that the appeal has succeeded only partially I order that each party shall bear his/her own costs.

Orders accordingly.

Judgment signed, dated and delivered virtually on this 19th March 2026.

IN PRESENCE OF;

Ms Njeri Ikubi for the Appellant. N/A for the Respondent.

Mary court assistant.

SIGNED BY/FOR:
HON. LADY JUSTICE E.N. MAINA