IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 250 OF 2016

BETWEEN

SILVERSTONE QUARRY LIMITED.....1ST APPELLANT

MANJI HIRJI CHHABHANDIYA.....2ND APPELLANT

AND

BEATRICE MUKULU KANG'UTA & ZAKAYO MWAKA MUTHOKA

(Suing as Administrators of the Estate of PHILIP MUSYOKA MUTHOKA.....RESPONDENTS

(Being an appeal from the Judgment and Decree of the High Court of Kenya

*at Machakos (**P. Nyamweya, J**.) dated 26th of September, 2016*

in

HCCC No. 56 of 2014)

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JUDGMENT OF THE COURT

1. This is an appeal by the appellants against the judgment of the High Court (**Nyamweya, J**) in which the learned Judge awarded the respondents damages of Kshs. 1,345,679 for loss of expectation of life, pain and suffering, lost years and funeral expenses after taking into account apportionment of contributory negligence on liability at 30%.

2. **Beatrice Mukulu Kang'uta** and **Zakayo Mwaka Muthoka** (1st and 2nd respondents) who are widow and brother respectively to the late **Philip Musyoka Muthoka** (deceased) lodged a claim in the High Court as administrators of the estate of the deceased. In the plaint dated 5th December, 2014 that was filed in court on 9th December 2014, the respondents pleaded that on 9th August 2012, the deceased was crossing the road along Mombasa Road at KAPA Stage when motor vehicle registration number KAQ 413R, which was registered in the name of **Silverstone Quarry Limited** (1st appellant) and was at the material time being driven by **Manji Hirji Chhabhandiya** (2nd appellant), knocked down the deceased. As a result, the deceased who sustained fatal injuries died a few hours later.

3. The respondents alleged that the accident occurred due to the negligence, reckless and careless driving of motor vehicle KAQ 413R by the 2nd appellant, and that the 1st appellant was vicariously liable for the negligent acts of the 2nd appellant. The respondents thus sought damages against the appellants under the Law Reform Act and the Fatal Accidents Act.

4. In response to the plaint, the appellants filed a joint defence admitting the occurrence of the accident, but denying that the accident was caused by their negligence. The appellants pleaded contributory negligence on the part of the deceased maintaining that that was the sole cause of the accident.

5. During the trial the respondents called four witnesses in support of their claim. These were, the 1st respondent who testified that at the time of his death, the deceased who supported her and their five children, was working as a mason and also a pastor. **Joseph Masai** (PW2) (**Masai**) testified that he witnessed the accident which happened at 6.00 a.m. on 9th August, 2012. He was in a matatu when he heard the screeching of tyres, followed by a huge bang. He then saw the deceased flung into the air and the motor vehicle which knocked the deceased

sped off.

6. **Aaron Muthoka,** a brother to the deceased received information, acting on which he proceeded to the scene of the accident and found the deceased injured and under a lot of pain. He accompanied the deceased to Kenyatta National Hospital in a Red Cross Ambulance. The deceased remained in hospital until about 11.40 a.m. when he passed on. Later the 2nd appellant and Aaron identified the body to the Doctor who performed a post mortem examination.

7. The 2nd appellant was the one who testified for the defence. He testified that at the material time, he was an employee of the appellant and was driving the accident vehicle. He explained that he could not have avoided the accident as there was another person crossing the road, who was in the middle of the road. He stopped after the accident but decided to drive on to the police station as there were many people at the matatu stage and he feared they would cause trouble. He denied that he was driving at a speed of more than 80km per hour.

8. In her judgment, the learned trial Judge found that the accident was substantially caused by the negligence of the 2nd appellant but held that the deceased was also partially to blame. She apportioned liability at 70%:30% in favour of the respondents. The trial Judge awarded damages as follows:

> **Kshs. 350,000 - as damages under the Law Reform Act Kshs.1,536,000 - as damages under the Fatal Accidents Act Kshs. 36,370 - as special damages, Kshs. 1,922,370 - Sub total**
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> ***Less*** **- Kshs. 576,711 - 30% contributory negligence Kshs. 1,345,679 - Total awarded to respondents**

8. The appellants are aggrieved by that award and the finding on liability and have now filed this appeal anchored on five grounds. The grounds include, the learned Judge having erred in law and in fact; by holding the appellants liable for the accident whereas there was no evidence to support that finding; by disregarding the appellants' evidence and basing her finding on liability erroneously; by making an award that was highly exaggerated and excessive; by awarding damages of Kshs. 150,000 and Kshs. 200,000 under both the Law Reform Act and the Fatal Accidents Act; and by awarding the respondents excessive damages of Kshs. 200,000 as damages for pain and suffering. The respondents have also filed a cross-appeal against the apportionment of liability by the trial court and the failure of the court to take into account the earning of the deceased as a pastor in apportioning damages.

9. **Mr. Shah** represented the appellants while **Mr. Kanjama** appeared for the respondents at the hearing of the appeal. **Mr. Shah** submitted that the respondents did not produce evidence from an eye witness who actually saw the accident happen; that the evidence of Masai did not explain how the accident occurred or who was responsible for the accident; that the 2nd appellant clearly explained how the accident happened; that while crossing the road, the deceased jumped abruptly onto the 2nd appellant's lane; that the accident could not be avoided due to the short distance; that the deceased was to blame for causing the accident by attempting to cross the road before ensuring that there were no oncoming vehicles; and that the learned Judge erred in finding that the 2nd appellant ought to take the larger blame for the accident in failing to see the deceased and/or failing to apply his brakes in time. Mr. Shah argued that pedestrians also owe a duty of care to motorists. In this regard, counsel relied on **Livingstone Otundo v Naima Mahood [1990] eKLR. (Nairobi Civil Appeal No 110 of 1986)**. Counsel for the appellant urged this Court to find the appellants not liable for the accident or in the alternative, to find that the appellants were only contributorily negligent to the extent of 30%.

10. On the issue of damages, Mr. Shah submitted that the learned Judge erred: in finding that the deceased was working as a mason, earning a sum of Kshs. 800 per day, when no evidence was adduced in support of that income; in adopting a monthly wage of Kshs. 19,200 instead of the minimum monthly wage for a mason of Kshs. 11,831.20; in adopting a multiplier of 10 years when a multiplier of 8 years would have been appropriate, given the deceased age of 48 years; in awarding damages for loss of expectation of life and for pain and suffering which was a duplication of awards under the Law Reform Act and the Fatal Accidents Act; and that the award of Kshs. 200,000 for pain and suffering was excessive as the deceased died a few hours after the accident.

11. In highlighting his written submissions, **Mr. Kanjama** stated that the appellants were fully liable for causing the accident; that the 2nd appellant admitted to knocking down the deceased; that the 2nd appellant failed to produce any evidence which showed that the deceased was to be blamed for the accident. **Mr. Kanjama** asserted that the 2nd appellant's negligent driving caused the accident that occasioned fatal injuries to the deceased, and thus the appellants were fully liable for the accident. In support of his submissions, **Mr. Kanjama** relied on **Joyce Mumbi Ngugi v The Co-operative Bank of Kenya Limited & Others, Civil Appeal No 214 of 2004**.

12. On the issue of damages, counsel cited **Butt vs Khan [1981] KLR 345**, for the proposition that an appellate court should be slow to disturb an award of damages, unless it is so inordinately high or low to represent an erroneous estimate. He pointed out that the deceased's wife testified that the deceased was earning a sum of Kshs. 800 per day, and worked for six days; that the trial court was right in adopting the figure of Kshs. 19,200 as no evidence was produced by the appellants to disprove the evidence regarding the income of the deceased; that the multiplier of 10 years adopted by the trial court was too low as the deceased could have worked for more than 60 years, and that a multiplier of 15 years should have been adopted.

13. Further, counsel faulted the learned Judge for failing to find that the deceased was also a pastor earning a monthly sum of Kshs. 10,000. He submitted that proof of income is not subjective to production of pay slips. In this regard, counsel relied on the Court of Appeal decision in **Jacob Ayiga Maruja & Another vs Simeon Obayo, [2005] eKLR** where the Court while addressing the question on failure to adduce proof of income stated as follows;

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

14. On the issue of duplication of awards under the two Acts, counsel submitted that the awards did not amount to double compensation as the estate of the deceased was entitled to sue under both Acts. In this regard, counsel relied on the case of **Richard Omeyo Omino vs Christine A Onyango, [2009] eKLR** where **Justice J.R. Karanja, J** discussed the provisions of Section 2(5) of the Law Reform Act and stated as follows:-

> **"The Law Reform Act Section 2(5) provides that the rights conferred by or under the benefit of the estates of deceased's 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."**

[**15**] This being a first appeal, the duty of this Court is as set out in **Selle & Anor vs Associated Motor Boat Company LTD. [1968] EA 123 at 126** in which **Sir Clement De Lestang VP** stated as follows:

> ***"An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

16. From the record of appeal, and the submissions made by the parties, it is not disputed that an accident involving the 1st appellant's motor vehicle took place, and that the deceased suffered fatal injuries as a result of that accident. It is also not disputed that the motor vehicle was being driven by the 2nd appellant who is an employee of the 1st appellant. The appellants are aggrieved by the finding of the court in regard to liability and also by the quantum of damages awarded. Likewise, the respondents are aggrieved by the apportionment of liability. Therefore, what is in issue in this appeal is whether the accident was caused by the negligence of the 2nd appellant, or the deceased, or whether both contributed to the accident. The second issue is whether the learned Judge properly addressed and applied the law in awarding damages to the respondents.

17. On the issue of liability, the appellants maintain that the deceased should be held fully liable for attempting to cross the busy Mombasa Road when the road was not clear. The respondents on the other hand maintained that the 2nd appellant admitted to causing the accident as he was the one who knocked down the deceased, and he should thus be found wholly liable for the accident. In addition, the respondents maintained that the evidence by **Masai** who was at the scene of the accident, showed that it is the 2nd appellant's negligence and reckless driving that caused the accident.

18. The learned Judge found that the 2nd appellant was driving at a speed of more than 60 kph, hence his inability to avoid knocking the deceased, and for this reason, the appellants should shoulder more liability. The Judge therefore apportioned liability against the 2nd appellant at 70% and held the deceased 30% contributorily negligent, as the deceased contributed to the occurrence of the accident by crossing the road when there was oncoming traffic.

19. Our re-evaluation of the evidence reveals that **Masai** who was a passenger in a matatu, explained that he heard screeching of tyres, followed by a loud bang, and then saw the deceased flung in the air before he fell down and a car sped off. It is evident that contrary to the evidence of the 2nd appellant that he was driving at a speed of 60 kph, and could not avoid hitting the deceased as the deceased jumped suddenly on to his path, the impact as explained by **Masai** shows that the 2nd appellant was speeding.

20. The learned Judge who saw the two witnesses testify believed and accepted the evidence of **Masai.** Obviously, there was some element of negligence on the part of the deceased, but the greater burden was upon the 2nd appellant who had in his control a motor vehicle that required careful handling. We agree with the trial Judge that if indeed the 2nd appellant was not driving at a fast speed, and exercising due care and attention, he would have been able to break and stop in good time to avoid the accident. In his evidence, the 2nd appellant explained that he could not avoid the accident as there was another person crossing the road, who was in the middle of the road. This makes his responsibility to exercise due care all the more as there was already someone on the road.

21. As for the deceased, being cognizant that Mombasa Road is a busy dual carriage way, and a highway, he ought to have taken care of his safety by ensuring that there were no oncoming vehicles as he crossed the road. We are therefore in agreement with the finding of the learned Judge that both the 2nd appellant and the deceased were negligent, but that the 2nd appellant was more to blame. We find no reason to depart from the apportionment of negligence by the learned Judge and would uphold his finding on liability.

22. In regard to the assessment of damages, the principle stated by ***Kneller JA*** in **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30** at page 35 is instructive:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

23. The appellants maintain that the trial Judge misapprehended the evidence by adopting a multiplicand that was not supported by any documentary evidence, and thus arrived at an exaggerated award. The respondents on the other hand contend that during the trial, the appellants did not dispute the evidence regarding the earnings of the deceased, and therefore the court was right in accepting the evidence.

24. The evidence that was adduced by the respondents that the deceased was working as a mason was not disputed. What the applicant took issue with, was the alleged daily income of Kshs. 800. No documents were adduced nor was the court informed where the deceased was

working. In the circumstances, although the appellants were not obliged to produce documents to confirm the deceased's employment and income, it was reasonable that the court applies the gazetted minimum wage for masons, as there was nothing to substantiate the allegation that the deceased was earning more than the minimum provided by law. We concur with the appellant that the minimum wage of Kshs. 11,831.20 should have been used as the multiplicand.

25. As regards the allegation that as at the time of his death the deceased was also working as a pastor, there was nothing to confirm this, nor was there any evidence in support of the alleged income regarding his pastoral activities. Taking into account that the burden was upon the respondents to establish such additional income, and that it would not have been difficult for the respondents to get such evidence from the church, the learned Judge cannot be blamed for failing to take into account the alleged additional income of the deceased, as the same was not established.

26. From the evidence adduced at the trial, the deceased died at the age of 48 years. In adopting a multiplier of 10 years, the trial Judge expressed herself as follows:

> ***"Lastly, on the multiplier the deceased was aged 48 years when he died. Everything being equal he would have worked to the official retirement age of 60 years. But due allowance must be given for vagaries, vicissitudes and uncertainties of life, and due regard must also be hard of the fact that the payment under this head is also being made in a lump sum. The plaintiff's advocates proposed a multiplier of 12 years, while the defendants' advocates proposed 7 years. I will award a multiplier of 10 years."***

27. The learned Judge took into account the parties' submissions and gave good reasons as to why she adopted the multiplier of 10 years. The reasons are valid and the multiplier adopted was reasonable. Evidence was adduced showing that the deceased was survived by a wife and five children, whom he used to support, hence the dependency ratio of 2/3 was also reasonable. In our view, the trial Judge properly directed herself and took into account relevant issues in regard to the multiplier and dependency ratio. However, given our finding on the multiplicand, we would apply the minimum wage of Kshs 11, 831.20 as the multiplicand in the assessment of damages for loss of dependency under the Fatal Accidents Act. The damages should therefore be Kshs.11,831.20 × 12 × 10 × 2/3 =Kshs. 946,496.

28. As regards damages under the Law Reform Act, the learned Judge awarded Kshs. 150,000 as damages for loss of expectation of life. Although the respondents sought damages of Kshs. 300,000, the amount awarded by the learned Judge of Kshs. 150,000 was reasonable and comparable with the cases that were cited to her. The appellants have not raised any serious objection to this figure, nor given any good reason as to why we should interfere with this award. We would accordingly uphold the award.

29. The appellants also took issue with the sum of Kshs 200,000 that was awarded as damages for pain and suffering. It was not disputed that following the accident the deceased was taken to hospital and that the deceased who was in a lot of pain died about five hours later, as the certificate of death lists the time of death as 11.40 a.m., whereas the accident happened at around 6.00 a.m. The general consensus in awarding damages for pain and suffering is that damages are normally assessed on the basis of the length of suffering that the deceased endured before death.

30. We note that in the submissions, the respondents prayed for Kshs. 150,000 relying on the decision of the High Court in **General Motors EA Limited vs Eunice Alila Ndeswa [2015] eKLR** where a sum of Kshs. 150,000 was awarded for pain and suffering, and **George Moraa vs Nairobi Womens Hospital [2015] eKLR** where a sum of Kshs. 100,000 was awarded. Our perusal of these authorities does not reveal how long the deceased endured his pain in the General Motors case, but in the George Moraa case, the deceased was in pain for two days before her death. The learned Judge did not give any reason for the departure from the submissions and authorities cited to her. In the circumstances, we are in agreement with the appellants that the amount of Kshs. 200,000 awarded for pain and suffering was excessive. In our view, given the submissions and the authorities that were cited to the trial Judge, and taking into account that the deceased endured pain and suffering for only five hours, a sum of Kshs. 50,000 would have been appropriate.

31. The respondents were awarded damages under both the Law Reform Act and the Fatal Accidents Act. The appellants faulted this, as double compensation. In **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited [2015] eKLR** this Court succinctly addressed this issue of double compensation as follows:

> ***"19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.***
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> ***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.***
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> **…..**
>
> ***The confusion appears to have arisen because of different reporting of the Kemfro 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 Kemfro Africa Ltd t/a Meru Express Services [1976] & Another -VS- Lubia & Another (No.2) 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.'***"**

32. We reiterate that the issue of double compensation does not arise because the two Acts independently provide for award of damages. The only obligation that the trial court has in awarding damages under the two Acts, is to take into account what has already been awarded in one Act, and this will generally affect the assessment of damages. As it is evident from the plaint and the evidence that was adduced, that the deceased's beneficiaries under the Law Reform Act and the Fatal Accidents Act were the same, i.e. the 1st respondent and her five children, the issue herein is whether in awarding the damages under the Fatal Accidents Act, the trial court took into account the damages awarded under the Law Reform Act.

33. A perusal of the judgment of the High Court reveals that in assessing the damages under the Fatal Accidents Act, the learned Judge did not make any reference to the damages awarded under the Law Reform Act. This means that the learned Judge did not take that award into account. For this reason, there is justification in interfering with the award made by the trial Judge in regard to loss of dependency. Accordingly, we would reduce the amount from Kshs. 946,496 to Kshs. 900,000.

34. The upshot of the above is that this appeal succeeds to the limited extent of reviewing the damages awarded by the trial Judge as follows:

Damages under the Law Reform Act - Kshs. 200,000

Damages under the Fatal Accidents Act - Kshs. 900,000

Special damages - Kshs. 36,370

Subtotal **=Kshs.1,136,370**

Less 30% contribution

- (Kshs. 340,911)

Total awarded = Kshs. 795,459

35. The appellants having partially succeeded, he shall have half their costs.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 21st of February, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR