IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 22 OF 2014

BETWEEN

HELLEN WARUGURU WAWERU (Suing as the legal representative of

PETER WAWERU MWENJA (Deceased)……....................APPELLANT

AND

KIARIE SHOE STORES LIMITED..RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nyeri (Ongundi, J.) dated 20th February, 2010

in

H. C. C. C. No. 58 of 2010)

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JUDGMENT OF THE COURT

1. This is a second appeal from the decision of the High Court in its appellate jurisdiction. As such it lies on issues of law only under **Section 72** of the **Civil Procedure Act** which provides:

> ***"72 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely -***
>
> > ***(a) The decision being contrary to law or to some usage having the force of law;***
> >
> > ***(b) The decision having failed to determine some material issue of law or usage having the force of law;***
> >
> > ***(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.***

(2) An appeal may lie under this section from an appellate decree passed ex parte."

2. The appeal relates to a road traffic accident which occurred along the Thika/Makuyu road on 18th July 2007, when a *matatu* and another vehicle collided, instantly killing **Peter Waweru Mwenja** (the deceased), who was a fare paying passenger in the *matatu*. Liability was settled by consent at 70:30 as against the respondent herein, Kiarie Shoe Stores Ltd **(KSSL)** and the quantum was left to the Chief Magistrate to assess.

3. On the basis of the pleadings, the sole evidence of the legal representative of the deceased, Hellen Waruguru Waweru **(Hellen),** and submissions of counsel on record for the parties, the trial court made an award under the **Law Reform Act, Cap 26, Laws of Kenya (LRA)** in the sum of Sh. 10,000 for pain and suffering and Sh. 100,000 for loss of expectation of life.

4. The court also made an award under the **Fatal Accidents Act, Cap 32 (FAA),** for loss of dependency, since the deceased was survived by Hellen and several children and grand children. It found as a fact that the deceased was a teacher employed by the Teachers Service Commission earning a gross salary of Sh. 39,683 as at the time of death. He was aged 54 years when he died and therefore, under the existing law, he would have retired at age 55. The trial court then used a multiplier of 1 ½ and the conventional dependency of 2/3 on the multiplicand of the gross salary and awarded a figure of Sh. 476,196 in general damages.

5. The court further considered the evidence of further income from the deceased's farming activities which were pleaded at Sh. 40,000 per month but found that it was Sh. 200,000 per year, used a multiplier of 1 and a dependency of 2/3 to arrive at Sh. 133,333 as compensation. From the total award was deducted the agreed liability of 30% for a net award of general damages of Sh. 503,670.30.

6. KSSL was aggrieved by that award and contended before the High Court **(H. I. Ongundi J.)** that the trial court did not apply the known principles of law pertaining to assessment of damages. Hellen, through her counsel, conceded the appeal on that ground and left it to the High Court to reassess the damages afresh. Counsel, however, complained about the multiplier applied to the income on farming activities since the deceased would have continued to work on the farm even better after his retirement up to another 10 years.

7. It was KSSL's contention before the High Court that the multiplier of 1 ½ was erroneously applied since the deceased had only 1 year of service before retirement; that the multiplicand based on the gross salary of the deceased was erroneous since there were statutory deductions which did not go to the benefit of the dependants and should therefore have been discounted to the net salary of Sh. 19,373; that the annual income of Sh. 200,000 from farming activities had no evidential basis; and that the award under the LRA should have been deducted from the award under the FAA to avoid double compensation to the same dependants.

8. In its decision, the High Court confirmed the award made under LRA in the sum of Sh. 110,000 as it had not been challenged. On the awards under FAA, the Court held that the multiplicand on the salary income was the net salary and not gross salary; that there was no evidence to support the farming income of Sh. 200,000 per year which was reassessed at Sh. 30,000 per year; and that the LRA award would be deducted from the FAA award. In the end the following award was made by the High Court:-

"Pain and suffering	***10,000/-***
Loss of life expectation	***70,000/-***
Loss of dependency	***128,288/-***
Farming	***30,000/-***
Total	***238,288/-***

Less

Damages under Law Reform Act 80,000/-

Balance 158,288/-

Less

30% contribution 47,486/-

Balance 100,802/-"

9. Hellen is now before us to challenge that award of damages as it would mean that she should refund the money paid so far in settlement of the original decree of more than Sh. 550,000. The three main issues raised before us through learned counsel **Mr. Mugambi Njeru** are that:-

> ***(i). The deceased's salary which was applied as the multiplicand was erroneous;***
>
> ***(ii). Both the multiplier and the multiplicand applied to the farming income was erroneous;***
>
> ***(iii). The deduction of the amount awarded under the LRA from the award under the FAA was erroneous.***

Those are issues of law and therefore we have the jurisdiction to consider them.

10. As a general principle, assessment of damages lies in the discretion of the trial court and a*n appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.* The Court must be satisfied that either 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 damages. See ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727, *Peter M. Kariuki v Attorney General* CA Civil Appeal No. 79 of 2012 [2014] eKLR** and ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5.**

11. On the first and second issues, it becomes necessary to examine the evidence supporting both the multiplier and the multiplicand. In doing so, we know we must extend some measure of deference to the findings of fact made by the two courts below, especially if they are concurrent. The logic of that is simple. The trial court would have heard and seen the witnesses as they testified and formed a clear opinion on their credibility, while the first appellate court would have re-evaluated and re-assessed the entire evidence in the manner of a retrial. Unless therefore the findings of fact are not based on any discernible evidence on record or they are based on a perversion of the evidence on record, the findings of fact will remain undisturbed on a second appeal.

12. In this case, there was no complicated record of evidence to evaluate. Only Hellen testified and produced documentary evidence. On the issue of the salary, the deceased's last pay-slip was produced and it showed clearly his gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error.

13. In the case of ***Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957]**

EA 748, 749, the Court of Appeal stated the law on assessment of damages under the Fatal Accidents Act which we cite in part as follows:

> "***The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.*** *(Emphasis added)*

14. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. In this case, Hellen testified, and it is apparent from the pay-slip, that the net salary after statutory deductions was Sh. 19,373, and indeed counsel for KSSL accepted that figure in his submissions. There is no reason why the High Court should have interfered with that figure.

15. On the issue of farming income, there was also no concurrent finding and it is thus open to us to reconsider the evidence on record. Hellen pleaded that the deceased had income from farming activities estimated at Sh. 40,000 per month. She went ahead and testified that he was involved in coffee farming, horticultural farming, and keeping cows. She produced various documents to support those assertions, including proof that in one season in 2002, he earned Sh. 200,000 from horticulture. She also produced expenditure receipts for fees paid towards education of some of the children. The figure accepted by the trial court and used as the multiplicand was Sh. 200,000 per year, or an average of Sh. 16,000 per month, but was overruled by the High Court which held that there was no evidence to prove the farming income. Despite so finding, the High Court plucked out of the air a figure of Sh. 30,000 per year, or 2,500 per month, which it applied as the multiplicand.

16. This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of ***Jacob Ayiga Maruja & Another v Simeone Obayo*** **CA Civil Appeal No. 167 of 2002 [2005] eKLR** the Court observed:-

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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".***

17. It is our view that Hellen submitted sufficient evidence, on a balance of probability, to support the assertion that the deceased at least earned half the pleaded sum of Sh. 40,000 per month. That would be Sh. 20,000 per month and we so find.

18. Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.

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.

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.

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 **Kenfro 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."***

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. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

23. The consequence of our intervention in the various awards boils down to the following final assessment of damages:-

Pain and suffering	10,000/-
Loss of life expectation	100,000/-
Loss of dependency (19,373 x 12 x 1 x 2/3)	154,984/-
Farming (20,000 x 12 x 5 x 2/3)	800,000/-
Total	1,064,984/-
Less	
30% contribution	319,495/-

Balance	745,489/-

In our view, the low amounts awarded under the LRA sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate.

24. The appeal is thus allowed in the manner stated above and an order shall issue accordingly. The appellant shall have the costs of the appeal.

Dated and delivered at Nyeri this 14th day of October, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

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