



Endege & another (Suing as the legal representatives in the Estate of John Madege Endege (Deceased)) v Benard & another (Civil Appeal 4 of 2021) [2024] KEHC 709 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 4 OF 2021
JN KAMAU, J
JANUARY 30, 2024**

BETWEEN

PATRICK LUYALI ENDEGE 1ST APPELLANT

KENNETH ONZERE LWEGADO 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES IN THE ESTATE OF JOHN
MADEGE ENDEGE (DECEASED)**

AND

NGENO BENARD 1ST RESPONDENT

PATRICK WAWERU 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. M. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court Case No 147 of 2017 on 9th July 2020)

JUDGMENT

Introduction

1. In her decision of 9th July 2020, the Trial Court, Hon R. M. Ndombi, Senior Resident Magistrate found both the 1st and 2nd Respondent herein to have been equally to blame for the accident that occurred on 30th November 2016 and entered judgment against them in favour of the Appellants herein as follows:-

Loss of Dependency Kshs 500,000/=

Loss of Expectation of life Kshs 100,000/=

Less LR Act Award (sic) Kshs 130,000/=



Pain and Suffering Kshs 30,000/=

Kshs 370,000/=

Special Damages Kshs 21,000/=

Kshs 391,000/=

Plus costs of the suit and interest on general and special damages at court rate.

2. Being aggrieved by the said decision, on 5th March 2020, the Appellants filed a Memorandum of Appeal dated 3rd August 2020. They relied on four (4) grounds of appeal.
3. Their Written Submissions were dated 30th August 2022 and filed on 28th November 2023 while those of the Respondents were dated 27th November 2023 and filed on 13th December 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the Trial Court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the Trial Court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-
 - a. Whether or not the award for general damages for loss of dependency that was awarded herein was inordinately low; and
 - b. Whether or not the award under the *Law Reform Act* ought to have been deducted from the award under *Fatal Accidents Act*.
7. All the grounds were related but were dealt with under separate and distinct heads shown hereinbelow.
 - I. Deduction Of The Award Under The *Law Reform Act* From The Award Under *Fatal Accidents Act*
8. The Appellants submitted that they were satisfied with the Trial Court's award of Kshs 100,000/= for loss of expectation of life and Kshs 30,000/= for pain and suffering but wondered if the award of Kshs 130,000/= under the *Law Reform Act* was a negative or a positive award.
9. They contended that the Trial Court gave a strange explanation for its calculation of award totaling to Kshs 391,000/= as the same was computed as follows:-
$$(500,000 + 21,000 = 521,000) - (100,000 + 30,000 = 130,000) = 391,000 \text{ (sic)}$$
10. They also questioned whether the deduction of the award under the *Law Reform Act* from the award under the *Fatal Accidents Act* was a concept of double compensation.



11. In that regard, they placed reliance on the case of *Crown Bus Services Ltd & 2 Others v Jamila Nyongesa & Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased))* [2020] eKLR where the court explained the concept of double compensation and held that duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* were the same because the claim for lost years and dependency would go to the same persons.
12. It was their case that the Trial Court never awarded them damages for lost years but only loss of dependency and that the award under the *Law Reform Act* ought not to have been deducted as the same did not amount to double compensation.
13. To buttress their point, they relied on the cases of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No. 2)* [1987] KLR 30 and the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased)) v Kiarie Shoe Stores Limited* (eKLR citation not given) where the common thread was that there was no requirement for the trial court to discount or reduce the damages under *Fatal Accidents Act* from the award recovered under the *Law Reform Act*.
14. On their part, the Respondents submitted that the beneficiaries of the deceased's estate herein under the *Law Reform Act* and dependants herein under the *Fatal Accidents Act* were the same hence the awards under the *Law Reform Act* and the Fatal Accidents would benefit the same people and hence, the Trial Court's decision on deduction should be upheld.
15. In this regard, they relied on the case of *David Kajogi M'mugaa v Francis Muthomi* Civil Appeal No 118 of 2010 (eKLR citation not given) where the court deducted the general damages awarded under the *Law Reform Act* from the total award in order to avoid duplication.
16. They also placed reliance on the cases of *Francis Wainaina Kirungu (Suing as the personal representative of the Estate of John Karanja Wainaina (Deceased)) v Elijah Oketch Adellah* [2015] eKLR and *Kemfro v (A. M. Lubia) and Olive Lubia* (1982-1988) KAR 727 where the common thread was that where it was evident that the net benefit was likely to be inherited by the same dependants under the *Law Reform Act*, the same had to be taken into account in the damages under the *Fatal Accidents Act*. They were emphatic that the loss under the *Law Reform Act* had to be offset from the gain under the *Fatal Accidents Act*.
17. The position of deduction of an award under the *Law Reform Act* was settled in the case of *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased)) v Kiarie Shoe Stores Ltd* [2015] eKLR where the Court of Appeal noted the confusion in regard to the concept of double compensation that was put across by in the case of *Kemfro Africa Limited t/a Meru Express Services & Another v Lubia & Another (No. 2) Kemfro Africa Limited* [1987] KLR 30. The Court of Appeal expressed itself as follows:-

“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 v Lubia & Another (No. 2)* and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:

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. 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 damage.... there is no compulsion in law to make the deduction.”

18. In *Peres Wambui Kinuthia & Another v S.S Mehta & Sons Limited* [2015] eKLR the court interpreted the holding in *Kemfro Africa v Meru Express Services & Another v Lubia & Another* (*Supra*) thus:-

“Accordingly, what is required in order to avoid double compensation is for the court to have in mind and therefore take into account the award under the *Law Reform Act* when making an award under the *Fatal Accidents Act*.”

19. In this court’s view, this was the better way of construing Section 4 (2) of the *Fatal Accidents Act* and Section 2(5) of the *Law Reform Act*. This is because there would be no need of having to bring the suit under both statutes only for the award to be deducted from the award made in the other.

20. Going further, this court was of the considered opinion that the award under the *Law Reform Act* was a benefit springing from the estate of the deceased and surviving him or her after death which his or her beneficiaries would be entitled to benefit from. The award was different from that under the *Fatal Accidents Act* which was what the beneficiaries had lost due to the shortening of the life of the deceased by the negligent acts of a respondent.

21. Notably, the award for lost years was made under the *Law Reform Act* while the award for loss of dependency was made under the *Fatal Accidents Act*. It was the award of lost years that could not be awarded if that of loss of dependency was awarded as both awards would be going to the same beneficiaries.

22. Mureithi J also arrived at a similar conclusion in the case of *Nyota Tissue Products v Benjamin Obonyo Mukati & 4 others* [2020] eKLR where the deceased was eighteen (18) years of age. He stated as follows:-

“...for the case herein of an eighteen old un-employed student, the general method for assessment of damages under *Fatal Accidents Act* for damages for what she called lost years [properly recoverable under *Law Reform Act*], I think it is convenient to discuss the correct position as regards award of damages for lost years and related loss of dependency. Lost years refers to damages for loss of prospective earnings recoverable by a person who is injured in such a way as to shorten his earning capacity, recoverable by the person during his shortened life and, upon his death, by the Estate under the *Law Reform Act* as damages for lost years. Damages for loss of dependency is a right under the *Fatal Accidents Act* for benefit of the dependants of the deceased injured person. ... “The rights conferred by Section 2 (5) of the *Law Reform Act* (Cap 26, Laws of Kenya) for the benefit of the estates of deceased persons are stated to 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 does not mean that damages can be recovered twice over but that if damages recovered under the *Law Reform Act* devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the *Fatal Accidents Act*...””

23. This court was therefore persuaded to find and hold that the Trial Court erred in both law and fact in having deducted the award for loss and expectation of life and pain and suffering under the *Law Reform Act* from the award of *Fatal Accidents Act* as the awards were distinct and separate. The award was not under lost years which would have been taken into account when the Trial Court awarded the award for loss of dependency under the *Fatal Accidents Act*.



24. In the premises foregoing, Ground of Appeal No (3) was merited and the same be and is hereby allowed.

II. Loss Of Dependency

25. The Appellants submitted that the Trial Court's award of Kshs 500,000/= for loss of dependency was inordinately low as Trial Court awarded a global figure for loss of dependency. They argued that their claim was for damages for lost years payable to the estate of the deceased whose life was shortened by the tortious acts of the Respondents and was not for loss of dependency that the Trial Court awarded.
26. They contended that they were entitled to adequate compensation as envisioned under the Law Reform Act and that although it was the discretion of the court to find a befitting global award guided by precedence, the discretion ought not be used to award damages which are inordinately low.
27. They referred this court to the cases of Leonard Ochar Otieno v Mathews Mwanza Wanga (Suing as the Legal Administrator of the estate of Kennedy Owino Wanga (deceased)) 2020 where the court cited with approval the case of Sbeikh M. Hassan v Kamau Transporters [1982-88] KAR 946 and held that the appellate court could only increase an award of damages if it was inordinately low that it represented an entirely erroneous estimate or the judge proceeded on a wrong principle or misapprehended the evidence in some material respect.
28. In addition, they stated that claims under the Law Reform Act and the Fatal Accidents Act were distinct claims as the Fatal Accidents Act was meant to cure a deficiency in the common law where the cause of action did not provide for dependants of a deceased person and the Law Reform Act was intended to ensure that causes of action survived the death of the deceased hence the provision in Section 2 of that Act.
29. They proposed that an award of Kshs 1,200,000/= would be sufficient for loss of dependency herein and prayed for interest on damages from the date of judgment of the Trial Court until payment in full, costs of both the Trial case and this appeal and interest on costs from the date of taxation until payment in full.
30. On their part, the Respondents submitted that the Trial Court did not err in in the assessment of damages under the Fatal Accidents Act and urged the court to uphold the same. They asserted that the Trial Court awarded the global sum considering that the dependants as pleaded were siblings to the deceased, no documents were availed to prove that the deceased was a student hence the court could not tell what the deceased would be in future and that no proof was given to show whether the deceased was employed or not.
31. They contended that the approach of the global award taken by the Trial Court was indeed the best approach when determining the amount of damages to be awarded for case of dependency in respect of the estate of a deceased minor. They urged the court to be guided by the decision in the case of Kenya Breweries Ltd v Soro [1995] eKLR and Nairobi HCCC No 12012 of 1992 Kinyozi Kitungi v Simon Okoth Obor & Another (eKLR citation not given) without highlighting the holding they were relying on.
32. Notably, the Kenyan legal system is based on common law. It places the principle of stare decisis or precedent on a very high pedestal. Indeed, a court is bound by the decisions of courts above it. This is for purposes of ensuring that there is consistency in the decisions that are delivered to provide certainty in the judicial system.



33. Whereas a court has the discretion to decide the amount of damages to award, courts must derive guidance from comparable past decided cases so that the award is as close as possible to damages awarded in other comparable cases. Decisions of courts of equal and competent jurisdictions are merely persuasive and not binding on each other.
34. According to the Trial Court, a global sum award was the proper award since the multiplier method would only be speculative in the circumstances.
35. There are two (2) schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.
36. This court had due regard to the case of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* that was cited in *Albert Odawa v Gichumu Githenji*[2007]eKLR where the court therein observed as follows:-
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”
37. Similarly, in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the Personal Representative of the Estate of Mercy Nzula Maina (Deceased))* [2016] eKLR, the court therein held as follows:-
- “It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”
38. The Respondents were in support of the Trial Court award based on the global award. Based on the above decisions, this Court was convinced that the Trial Court did not err in principle to apply the global award method instead of a multiplier approach. This was because Kevin Onzere Lwegado (hereinafter referred to as “PW 1”) the deceased was aged nineteen (19) years at the time of the accident and was still a student in Form 2 in Bungasi Secondary School. The court noted that the Plaintiff had indicated that the deceased was a student in Form 3. Be that as it may, no document was tendered in evidence to prove that indeed the deceased was a student.
39. It would be difficult to determine what he would have turned out to be in life without speculating. Indeed, it would not have been practically possible to determine whether he would have lived to the age of 60-80 years or if he would have successfully completed his education or if after successful completion of his education he would have been employed or if would have been engaged business or what position he would have held if he was employed or what profession he would have ended up in or what he would have earned as an employee or how much he would made in business.
40. As his life was cut short due to the negligence of the Respondents and/or its driver and/or agent and/or servant and under circumstances, his beneficiaries were entitled to reasonable compensation. In a



case like the instant one, a global award would have been most suitable to calculate the award for loss of dependency or loss years.

41. The same would have to be justifiable and based on some sort of rationale that can be followed and understood by all and sundry. Indeed, all court decisions must be reasoned in line with Order 21 Rule 4 of the [Civil Procedure Rules](#), 2010. The same provides as follows:-

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision (emphasis court).”

42. Although the Trial Court proceeded on the correct premise by awarding a global sum for a deceased who was nineteen (19) years of age and in Form 2 at the material time of the accident, it erred therefore for not having given its reasoning of how it arrived at the global sum of Kshs 500,000/=.

43. The above notwithstanding, this court noted that the claim for loss of dependency under the [Fatal Accident's Act](#) Cap 32 (Laws of Kenya) was brought on behalf of the 1st Appellant and his sister.

44. Section 4(1) of the [Fatal Accidents Act](#) provides as follows:-

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused (emphasis court), and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

45. The Appellants could not approbate and reprobate at the same time. In other words, they could not contend that the award for loss of dependency was actually meant to be lost years envisioned under the [Law Reform Act](#) but claim it under the [Fatal Accidents Act](#) as could be seen in Paragraph 7 of their Plaint dated 11th December 2017 and filed on 14th December 2017.

46. It was therefore clear that the Trial Court also erred in having awarded damages under the [Fatal Accidents Act](#) as the 1st Appellant and his sister were outside the purview of the beneficiaries envisaged in Section 4(1) of the [Fatal Accidents Act](#).

47. The award under the [Fatal Accidents Act](#) could not therefore be allowed to stand and this court could disturb the same irrespective of the fact that the Respondents had asked this court not to interfere with the same. An appellate court takes the place of an original court and ought not to turn a blind eye to illegalities that had been perpetrated and/or advanced during trial and conceded to by the opposing party.

48. Going further, this court found and held that the computation of the award by the Trial Court was erroneous and was difficult to follow. This was ably alluded to by the Appellants herein. The claim had been computed as follows:-

Loss of Dependency Kshs 500,000/=



Loss of Expectation of life Kshs 100,000/=

Less LR Act Award Kshs 130,000/=

Pain and Suffering Kshs 30,000/=

Kshs 370,000/=

Special Damages Kshs 21,000/=

Kshs 391,000/=

49. Ordinarily, the computation ought to have been as shown hereunder:-

Loss of Dependency Kshs 500,000/=

Loss of Expectation of life Kshs 100,000/=

Pain and Suffering Kshs 30,000/=

Kshs 630,000/=

Less Law Reform Act Award Kshs 130,000/=

Kshs 500,000/=

Special Damages Kshs 21,000/=

Kshs 521,000/=

50. However, the computation of the final award was rendered irrelevant for the reason that this court found and held that the Trial Court ought not to have deducted the award of the loss of expectation of life and pain and suffering that was made under Law Reform Act from the award that was made under the Fatal Accidents Act and further because the Appellants were not entitled to the award under the Fatal Accidents Act.

Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal that was lodged on 5th August 2020 was partially merited and the same be and is hereby allowed in part.

52. The effect of this decision was that the Judgment of Kshs 391,000/= (sic) that was entered by the Trial Court in Vihiga in SPMCC No 147 of 2017 on 9th July 2020 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment be and is hereby entered in favour of the Appellants herein against the Respondents for the sum of Kshs 151,000/= made up as follows:-

Pain & Suffering Kshs 30,000/=

Loss of Expectation of Life Kshs 100,000/=

Special Damages Kshs 21,000/=

Kshs 151,000/=

Plus costs and interest thereon. For the avoidance of doubt, interest on damages under the Law Reform Act Cap 26 (Laws of Kenya) will accrue at court rates from the date of judgment of the Trial Court until payment in full. Interest on special damages will accrue from the date of filing suit until payment in full.



53. As the Appellants were only partially successful in their Appeal herein, each party will bear its own costs of this Appeal.

54. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JANUARY 2024

J. KAMAU

JUDGE

