



**Owuor v Atieno (Suing as legal representatives of Maurice Onyango Omondi - Deceased)
(Civil Appeal 9 of 2018) [2023] KEHC 24283 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 9 OF 2018
KW KIARIE, J
OCTOBER 25, 2023**

BETWEEN

HERMMERSON OMITI OWUOR APPELLANT

AND

**MOLLYNE ATIENO (SUING AS LEGAL REPRESENTATIVES OF MAURICE
ONYANGO OMONDI - DECEASED) RESPONDENT**

*(Being an Appeal from the judgment in Oyugis Principal Magistrate's
PMCC No. 113 of 2016 by Hon. J.P. Nandi –Senior Resident Magistrate)*

JUDGMENT

1. Hermmerson Omiti Owuor, the appellant, in this case, was the defendant in Oyugis Principal Magistrate civil case number 113 of 2016. The claim was related to a road traffic accident that involved a vehicle with registration number KAW 918T. The appellant was the insured and/or beneficial owner of the vehicle, which was registered in the names of Janemary Macharia and National Industrial Credit Bank Limited.
2. The deceased was a pedestrian along Oyugis-Kisumu road near Nyadenda. He was fatally knocked down by the said motor vehicle. The parties had recorded consent on liability where the appellant was 70% liable and the respondent was 30% liable. The learned trial magistrate delivered judgment dated 21st March 2018. He made an award of Kshs. 1,258,385 after factoring in contribution.
3. The appellant was aggrieved by the said judgment on quantum and filed this appeal. He was represented by the firm of Peter Karanja advocate. He raised the following grounds of appeal:
 - a. The quantum of general damages in respect of lost dependency is inordinately high erroneous, oppressive, and punitive and amounts to a miscarriage of justice.



- b. The learned trial ignored and/or paid lip service to the appellant's submissions and especially the precedents cited therein.
 - c. The learned trial magistrate erred in law when he held without any reference to any precedence or legal basis that the multiplier applicable was 30 years and then proceeded to award damages on the basis of that arbitrary multiplier.
 - d. The learned trial magistrate erred in law when he found a dependency ratio of 1/3 but failed to apply the same while calculating loss of dependency and/or contradictory himself in finding a correct dependency ratio and then applying a wrong dependency ratio of 2/3 and thereby made an award which was so high as to amount to an error in law in this particular case.
 - e. The learned trial magistrate erred in law and fact in applying a dependency ratio of 2/3 without considering and applying the principles enunciated in the authorities referred to him or to the evidence before him, or taking them into account thereby applying the wrong principles in the assessment of other suitable dependency ratio and thereby making an award which was so high as to amount to an error in law in this particular case.
 - f. The learned trial magistrate erred in law and in fact in reaching a multiplicand of kshs.7, 000/- without considering the evidence before him and without any reference to any precedent or legal basis thereby making an award which was so high as to amount to an error in law in this particular case.
 - g. The learned trial magistrate erred in law and fact by entering judgment for funeral expenses that were never pleaded, particularized, or proved and further by entering judgment for special damages, which special damages comprised of the funeral expenses incurred thus making awards that were unjust, oppressive and amounted to double compensation
 - h. The learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of special damages and ignoring and/or paying lip service to the appellant's submissions thereon.
4. The appeal was opposed by the respondents through the firm of Ochoki & Company Advocates. They raised the following grounds of opposition:
- a. That it was sufficiently established that the deceased was earning Kshs. 20,000/= per month from his boda-boda business;
 - b. That the court applied the correct multiplier; and
 - c. That the learned magistrate applied the correct dependency ratio.
5. As the first appellate court, it is my responsibility to carefully review all the evidence presented on record. However, I must keep in mind that I did not have the opportunity to observe the witnesses and their behavior firsthand. Therefore, I will follow the guidance provided in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123, which requires the first appellate court to thoroughly reconsider and assess the evidence presented in the trial court and reach its own independent conclusions.
6. After examining the appellant's grounds for appeal, I have identified three issues:
- a) That the amount awarded for general damages or loss of dependency was excessively high.
 - b) That the multiplier used in the calculation was incorrect.
 - c) That the ratio for dependency was also incorrect.



7. In order for an appellate court to vary an award of damages by the trial court, certain conditions must be present. These were enumerated in the case of *Butt v Khan* [1981] KLR 349 on page 356 in the following words:

...an appellate court will not disturb an award of damages unless it is so inordinately high or lower 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 a figure which was either inordinately high or low.

8. At the time of the fatal accident, the deceased herein was aged 20 years. He was a boda-boda rider. Evidence was adduced that he was making Kshs. 20,000 per month. However, no documentary documents were produced. The appellant proposed a multiplicand of Kshs. 5,844/= which was the applicable minimum wage in the rural areas. On the other hand, the respondent proposed a multiplicand of Kshs.20, 000/=.
9. The learned trial magistrate a multiplicand of Kshs.7, 000/= . This was faulted by the appellant. The court of Appeal in the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR made the following observations:

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.

10. Based on my analysis and having in mind the above-cited decision of the superior court, I have determined that although there was no documentary evidence to support the monthly earnings, the judge's decision to deviate from the minimum wage was reasonable considering the circumstances of the case. Therefore, I conclude that a multiplicand of Kshs.7, 000/= is a fair and just amount.
11. I have perused the authorities relied upon by both parties on the proposal of the appropriate multiplier for loss of dependency and I have no reason to vary the multiplier adopted by the learned trial magistrate.
12. In the trial magistrate's verdict, it was stated that the deceased was unmarried and childless, the ratio of one-third was applicable. However, there was an error in the calculation which should have been $30 \times 12 \times 7000 \times 1/3 = 840,000$ (less contribution Kshs.252, 000). As a result, the net award ought to have been Kshs.588, 000/=. Therefore, I set aside the net award of Kshs.1, 253,385/= and substitute it with a new award of Kshs.588, 000/=.
13. The appeal partially succeeds and the appellant is to have half the costs in this court.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF OCTOBER, 2023

KIARIE WAWERU KIARIE

JUDGE

