



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.E005 OF 2020**

**BETWEEN**

**JEMIMAH KERUBOH NYARANGO.....APPELLANT**

**AND**

**CHRISTINE ANYANGO OWALLA & DAVID OMONDI OWALLA**

[Suing as the legal administrators of the estate of Evance Ochieng Owalla-deceased].....**RESPONDENTS**

*(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's*

*CMCC No. 65 of 2019 by Hon. T.M. Olando–Senior Resident Magistrate).*

**JUDGMENT**

1. Jemimah Keruboh Nyarango, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No. 65 of 2019. This was a claim that arose from a road traffic accident on 2<sup>nd</sup> June, 2019. The accident involved motor vehicle KCR 196J and the deceased who was a pedestrian. The deceased was fatally injured. Parties agreed on liability at a ratio of 80% in favour of the respondent and the contributory negligence was agreed at 20%. The learned trial magistrate awarded Kshs.2, 132,000.00 after factoring in the contributory negligence.
2. The appellant was dissatisfied with the award and filed this appeal. He was represented by the firm of Okongó Wandago & Company Advocates. Six grounds of appeal were raised as follows:
  - a) That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
  - b) The learned trial magistrate erred in law and in fact when he used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the fact that no evidence was led before him on the basis of which such an award could be found.
  - c) That the learned trial magistrate erred in law and fact in awarding the respondents kshs.2, 400,000.00 for loss of dependency which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable.
  - d) The learned trial magistrate applied the wrong and inaccurate multiplier and dependency ratio and failed to consider the correct factors and or applied or considered erroneous, irrelevant and or extraneous factors in determining the loss of dependency and he erred by failing to consider or by dismissing out of hand the issues and or submissions raised by the appellants.
  - e) The learned trial magistrate erred by awarding special damages which had not been strictly proved and were unjustified and unmerited and his awards were unfair and indefensible and have resulted in a miscarriage of justice.
  - f) The learned trial magistrate erred in law and fact in making duplicate award under Law Reform Act and Fatal Accidents Act without taking the awards against each other.
3. The respondents were represented by the firm of Everlyne Kuke & Company Advocates. The appeal was opposed and it was contended that it lacked merits.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

**...an 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 a figure which was either inordinately high or low.**

6. Special damages must be pleaded and strictly proved before they are awarded. The respondents pleaded special damages of Kshs. 250,000.00. They were awarded Kshs. 145,000.00. Christine Anyango Ochieng (PW1) during cross examination said that she could not remember what the taxi service was for, for which she paid Kshs.15, 000.00. This amount ought not to have been awarded. The respondents proved special damages of Kshs. 130,000.00. I therefore set aside the award of Kshs. 145,000.00 and substitute it with an award of Kshs. 130,000.00 special damages.

7. It is trite law that where an award has been made under the Law Reform Act and Fatal Accidents Act and beneficiaries are the same, the loss suffered under the latter Act must be offset by the gain from the estate under the former Act. The Court of Appeal in the case of **Kemfro vs. A. M. Lubia & Another [1982-1988] KAR 727** as follows:

**The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.**

8. In the instant case the learned trial magistrate did not appreciate this legal position. He ought to have discounted the same.

9. At the time of his death the deceased was aged 25 years. It was testified that he was married and had four children. He used a dependency ratio of 2/3 and a multiplier of 30 years. The appellant argued that this was wrong. There is no scientific approach to a multiplier but this being discretionary, courts are urged to exercise it judiciously. In the case **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another (2014) eKLR** it was held that:

**The choice of a multiplier is a matter of court's discretion which discretion has to be exercised judiciously with reason.**

In **Bash Hauliers v Dama Kalume Karisa & another [2020] eKLR** the court stated:

**Having referred to the above authorities in considering if the multiplier of 20 years adopted in this case was reasonable, this Court has no basis to interfere with the discretion exercised by the Hon. Magistrate in adopting a multiplier of 20 years for the deceased who was 32 years old. I uphold the decision of the Hon. Magistrate in that regard.**

I equally do not find the multiplier of 30 years for the deceased who was aged 25 years unreasonable. I will not therefore interfere with it. The dependent ratio of 2/3rds cannot be said to be unsupported for he had a family that depended on him.

10. There was no proof that the deceased was earning Kshs.30, 000/= a month as pleaded. The learned trial magistrate a multiplicand of Kshs.10, 000/=per month. He however did not give his reasons for adopting the same. In the case of **Mwanzia Ngalali Mutua vs. Kenya Bus Services (Msa) Ltd & Another** (unreported) where Ringera J (as then was) expressed himself 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.**

In the instant case, this is the approach that the learned magistrate ought to have used. The appellant has proposed that the same be reassessed at Kshs.2, 500,000.00. The respondent on the other hand contended that the Kshs. 2, 400,000.00 awarded by the trial court was correct. In spite of using a multiplier approach, I have no basis to interfere with the said award.

11. I therefore set aside the award by the trial court and substitute it as follows:

a) Special damages	Kshs. 130,000.00
b) Loss of dependency	Kshs. 2,400,000.00
c) Pain and suffering	Kshs. 20,000.00
d) Loss of expectation of life	Kshs.100,000.00

Less	<u>(Kshs.120, 000.00)</u>
Subtotal	<b>Kshs. 2,530,000.00</b>
Less 20% contributory	<u>Kshs. (506, 000.00)</u>
Net balance	<b>Kshs. 2,024,000.00</b>

12. Since the appeal has succeeded to some extent, the appellant will be entitled to 1/3 costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF JANUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**