



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO E045 OF 2021

MELBRIMO INVESTMENT COMPANY LIMITED.....APPELLANT

VERSUS

**DINAH KEMUNTO & FRANCIS SESE (Suing as personal representative of the
estate of Stephen Sinange Alias Reuben Sinange (Deceased).....RESPONDENTS**

**(Being an appeal from the Judgment and decree of Hon W.C. Waswa (RM) delivered at Nyamira in CMCC No E009 of 2020 on 17th
May 2021)**

JUDGMENT

INTRODUCTION

1. In his decision of 17th May 2021, the Learned Trial Magistrate, Hon W.C. Waswa, Resident Magistrate, entered Judgment in favour of the Respondents against the Appellant in the following terms:-

Loss of expectation of life	Kshs 100,000/=
Pain and suffering	Kshs 50,000/=
Loss of dependency	Kshs 1,920,000/=
Special damages	<u>Kshs 110,550/=</u>
	Kshs 2,180,550/=
Less 30% contribution	<u>Kshs 654,165/=</u>
	<u>Kshs 1,526,385/=</u>

2. Being aggrieved by the said decision, on 10th June 2021, the Appellant filed a Memorandum of Appeal dated 9th June, 2021. It relied on six (6) grounds of appeal on the issue of quantum only.

3. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

LEGAL ANALYSIS

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein stated that the jurisdiction to review the evidence should be exercised with caution

and it was not enough that the appellate court might have come to a different conclusion because it was the trial court that had had the advantage of seeing and hearing the witnesses.

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 as follows:-

1. Whether or not the Learned Trial Magistrate erred in the apportionment of liability warranting interference by this court.

2. Whether or not the Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded under the Fatal Accidents Act Cap 32 (Laws of Kenya) and the Law Reform Act Cap 26(Laws of Kenya) warranting interference by this court.

7. The court addressed the issues under the separate and distinct heads shown hereunder.

I. LIABILITY

8. In Ground of Appeal No (6) of its Memorandum of Appeal, the Appellant had appealed against the apportionment of liability at 70%-30% in favour of the Respondents herein. On their part, the Respondents argued that the Appellant had in fact proposed that they bear thirty (30%) per cent liability which is what the Trial Court adopted.

9. As the Appellant did not submit on the issue of the apportionment of liability and it was not clear whether it had abandoned the said ground of appeal, this court was therefore not persuaded that it should disturb the apportionment of liability at 70%-30% in favour of the Respondents herein.

II. DAMAGES UNDER THE LAW REFORM ACT

A. PAIN AND SUFFERING

10. The Appellant submitted that the Trial Court's award of Kshs 50,000/= for pain and suffering was excessive and proposed that an award of Kshs10,000/= would suffice under this head. In this regard, it relied on the case of **Moses Koome Mithika & Another vs Doreen Gatwiri & Another (Suing as the Legal Representative and Administrator of the Estate of Phineas Murithi(deceased) [2020] eKLR** where the High Court upheld the trial court's award of Kshs10,000/= where the deceased therein died on the spot.

11. On their part, the Respondents urged this court to uphold the Trial Court's award under this head. They relied on the case of **Acceler Global Logistics vs Gladys Nasambu Waswa & Another [2020] eKLR** where the court awarded a sum of Kshs 50,000/= for pain and suffering where a deceased who died immediately after the accident.

12. The Trial Court had relied on the case of **Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR** where it had been held an award for pain and suffering range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering before death had been prolonged.

13. **This court perused** the Post Mortem Report which indicated that the deceased herein died on the spot after the accident. Having said so, this court is enjoined to consider passage of time and the inflationary trends when considering an award under this head when a deceased had died on the spot. As the sum of Kshs 10,000/= proposed by the Appellant was awarded in the 1980s and the 1990s, the same did not reflect the current awards. In this respect, this court found and held that an award of Kshs 50,000/= for pain and suffering was not only fair but the same was reasonable. The award under that head is therefore hereby upheld.

B. LOSS OF EXPECTATION OF LIFE

14. The Appellant submitted that the Trial Court erred for having awarded a sum of Kshs100,000/= for loss of expectation of life. It prayed that the sum be reviewed downwards to Kshs 80, 000/=. It relied on the case of **Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and Personal Representatives of the estate of Josephine Weyanga Tsuma-Deceased) [2019] eKLR** where the court therein awarded a sum of Kshs 80,000/= for loss of expectation of life.

15. On the other hand, the Respondents urged this court to maintain the Trial Court's finding on loss of expectation of life. They placed reliance on the case of **Jackson Kariuki Ndegwa (Suing as the administrator of the estate of Fabius Munga Kariuki) vs Peter Kungu Mwangi [2016] eKLR** where the court awarded Kshs150,000/= for loss of expectation of life.

16. In the case of **Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and Personal Representatives of the estate of Josephine Weyanga Tsuma-Deceased)** (Supra), the court therein held that a sum of Kshs 100,000/= was the conventional figure for damages for loss of expectation of life.

17. It was this court's considered view that a sum of Kshs 80,000/= was low considering the inflationary trends and the low value of the Kenya Shilling. Bearing in mind that courts have awarded higher sums than Kshs 100,000/= under this head, this court was not persuaded that it should interfere with the award of Kshs 100, 000/= that was awarded by the Trial Court as the same was fair, just and reasonable in the circumstances.

III. DAMAGES UNDER THE FATAL ACCIDENTS ACT

18. The claim for loss of dependence constitutes the multiplicand, the dependency ratio and the multiplier. This court addressed the same under the distinct and separate headings shown hereunder.

A. MULTIPLICAND

19. The court opted to consider the aspect of multiplicand in the first instance to determine how the claim for loss of dependency ought to have been computed.

20. The Appellant submitted that the Trial Court ought to have awarded a global sum of Kshs 1, 000,000/= for the claim of loss of dependence as opposed to adopting a multiplicand. It stated that it was not clear how the minimum wage of Kshs 12, 000/= that was adopted by the Trial Court was arrived at because the evidence on record was that the deceased was a businessman earning Kshs 30, 000/= at the time of his demise.

21. It argued that since no evidence was adduced to show the income the deceased used to generate during his lifetime, it was speculative to attempt to use a multiplier. It relied on the case of **Kwanzia vs Ngali Mutua & Another** (citation not given) where it was held that the multiplier approach could be abandoned where the facts did not support its application.

22. It also placed reliance on the case of **Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina(Deceased) [2016] eKLR, Mary Khayesi Awalo & Another vs Mwilu Malungu & Another [1999] eKLR and Eston Mwirigi Ndege vs Patrick Gitonga [2018] eKLR** where the common thread was that where the earnings of a deceased person were unknown, then a global award/sum ought to be adopted.

23. On their part, the Respondents submitted that the monthly income of Kshs 12,000/= that was adopted by court was fair, reasonable and justified.

24. A perusal of the Certificate of Death showed that the deceased's occupation as at the time of his death was "businessman". His wife, Dinah Kemunto (hereinafter referred to as "PW 2") adopted her Witness Statement as her evidence-in-chief. Her testimony was that the deceased was a businessman and earned Kshs 30,000/= per month. She did not adduce any evidence to support her said averment. For all purposes and intent, the deceased's income was unknown.

25. It was this court's position that where a businessperson's wage was unknown, the trial court could consider adopting the minimum wage of a deceased person's job prevailing at the time of his death.

26. In this respect, this court was guided by the decision of the Court of Appeal in the case of **Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellena Wanjiru Rukanga [2020] eKLR** where it held that a minimum wage ought to be adopted as a multiplicand where monthly income could not be ascertained.

27. As the Respondents did not elaborate what business the deceased was engaged in, the Trial Court adopted a sum of Kshs 12,000/= as the multiplicand. The Appellant herein had proposed the adoption of the statutory minimum wage of Kshs 10,000/= per month.

28. Notably, the deceased died on 7th May 2019. The Regulation of Wages (General) (Amendment) Order 2018 that came into force on 1st May 2018 was the applicable regulation herein. The monthly minimum wage for general labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, messenger was Kshs 13,572.90.

29. Accordingly, in the absence of proof of the deceased's income, this court was persuaded by the Respondent's submissions that the award of Kshs 12,000/= that was awarded by the Trial Court as the monthly income was not unreasonable as it was in fact below the monthly minimum wage. It was also Kshs 2,000/= more than what the Appellant had proposed as the multiplicand in the lower court.

B. MULTIPLIER

30. The Appellant did not submit on the issue of the multiplier. This may have been because it had proposed that the Respondents be awarded a global figure for loss of dependency.

31. On the other hand, the Respondents submitted that the Appellant had in the lower court proposed a multiplier of twenty (20) years and had relied on the case of **Nicholas Nyagwenchi, Miyogo Joseph vs Joseph Nyakundi Nyamari & 2 Others [2019] eKLR**.

32. According to the Certificate of Death, the deceased died at the age of thirty five (35) years. There is no retirement age for business people or general labourers. If he had remained in good health, it would have been expected that he could have worked for another thirty (30) years or more.

33. The Respondents had proposed a multiplier of twenty five (25) years. After taking into account the vagaries of life, the Trial Court applied a multiplier of twenty (20) years as had been proposed by the Appellant herein.. It was the view of this court that a multiplier of twenty (20) years was reasonable in the circumstances of the case herein and therefore left the same undisturbed.

C. DEPENDENCY RATIO

34. The Trial Court observed that the deceased left behind his wife and three (3) children and therefore adopted a multiplier of 2/3. This court found and held that a multiplier of 2/3 was appropriate in the circumstances of the case herein as the deceased must have used 2/3 of his

income on his family and 1/3 on himself and thus left the determination of the dependency ratio of 2/3 undisturbed.

CONCLUSION

35. After carefully reviewing the evidence that was adduced during trial and the parties' Written Submissions, this court came to the firm conclusion that the Trial Court did not err and applied itself correctly in apportioning liability between the Appellant and the deceased and in awarding damages both under the Law Reform Act Cap 26 (Laws of Kenya) and the Fatal Accidents Act Cap 32 (Laws of Kenya).

36. In the premises foregoing, Grounds of Appeal Nos (1) – (6) were not merited and the same be and are hereby dismissed.

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th June 2021 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondents costs of this Appeal.

38. It is so ordered.

DATED and DELIVERED at NYAMIRA this 4th day of April 2022

J. KAMAU

JUDGE