



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**HIGH COURT CIVIL APPEAL NO. 5 OF 2018**

**SOUTH SIOUX FARMS LTD.....1<sup>ST</sup> APPELLANT**

**AMRIK SING.....2<sup>ND</sup> APPELLANT**

**PETER NJUGUNGA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**SELINA ROBI MWITA (suing as legal representative of the**

**estate of the late JULIUS BONARE CHACHA.....RESPONDENT**

*(An appeal from the judgment of the Chief Magistrate's court at Nakuru dated 8<sup>th</sup> day of December 2017 in Nakuru Cmcc No. 141 of 2010)*

**JUDGMENT**

1. The appeal before this court for determination emanates from a suit filed in the lower court by the respondent herein seeking general and special damages for the death of the late **Julius Bonare Chacha** who was knocked by the appellant's motor vehicle registration No. KAU 476/ D/ZC on 30<sup>th</sup> January 2018 while walking along Nakuru/Nairobi road at state house area.

2. After trial, the trial court delivered judgment on 22<sup>nd</sup> January 2018 apportioning liability in the ratio of 50: 50 and awarded damages as follows:

Loss of dependency.....	Kshs. 1,916, 740.80/=
Pain & suffering.....	Kshs. 150, 000.00/=
Loss of expectations.....	Kshs.150, 000.00/=
Special damages.....	Kshs. 25,000.00/=
Total .....	Kshs. 2,410,740.80/=
Less 50% .....	Kshs. 1,120,870.,40/=

3. The appellant aggrieved by the trial magistrate's court decision on the quantum of damages appealed vide the memorandum of appeal filed on 16<sup>th</sup> December 2019, on the following grounds:

*a) The learned trial magistrate erred in law and fact in awarding damages which are speculative, excessive, unrealistic and unreasonable and not supported by evidence and documents on record and in particular:*

*b) The learned magistrate disregarded the fact that the respondent had failed to adduce conclusive evidence to prove that the deceased was in fact a watchman.*

*c) The learned trial magistrate disregarded that there was no conclusive evidence to prove the income of the deceased and to establish the deceased earnings,*

d) The learned magistrate erred in law and fact on holding that the deceased's wage was Kshs.8,873.80 without taking into account that any earning would be subject to statutory deductions.

e) The learned magistrate erred in law and fact in awarding damages for dependency under the fatal Accidents Act and also for pain and suffering and loss of expectation of life under the Law Reform Act without deductions.

f) The learned magistrate erred in law and fact in awarding damages using a multiplier of 27 years which was unreasonable, excessive, and unrealistic.

4. That the deceased left behind a wife and four children who were dependant on him. The respondent avers that the deceased died on the 9<sup>th</sup> day after the accident and that he was earning a basic salary of 20,000/= where the deceased set aside kshs.10,000/= for family use. In her evidence, she produced the death certificate marked as PEXB 1, a police abstract PEXB 2, post mortem report PEXB 3, the birth certificates as PEXB 5. The evidence of the respondent was corroborated by that of PW2 who confirmed the occurrence of the accident and he indicated that a Good Samaritan stopped his vehicle and took the deceased to hospital.

5. The Respondent avered that the deceased was 28 years of age when he died and urged the court to award fair damages as follows: loss of expectations of life Kshs. 2,261,555.20/=, pain and suffering Kshs, 100,000/=, loss of expectations of life Kshs. 100,000/= and special damages of Kshs, 25,000.

6. The appellants in their defense denied liability, and further denied that indeed the respondent spent Kshs. 25,000/= in obtaining the grant of letters of administration *ad litem*. The appellants further denied being vicariously liable and avered that the deceased was crossing the road at a 4 lane highway where he was not supposed to cross. During the trial, the turn boy avered that the driver was driving at a speed of 30km/hr. The defence did not file any written submissions.

7. Parties herein agreed to proceed by way of written submissions.

#### **APPELLANT'S SUBMISSIONS**

8. The appellants' through submissions filed on 21<sup>st</sup> October, 2020 submitted that the award of damages was speculative, excessive, unrealistic, and unreasonable having not been supported by any evidence. Appellants urged this court to interfere with award of damage and cited the case of **Kemfro Africe Ltd t/a Meru Express Service, Gathogo Karimi vs A.M. Lubia 7 others (1982-88) I KAR 727, Bashir Ahmed Butt Vs. Uwais Ahmed Khan (1982- 88) KAR and Loice Wanjiku Kagunda Vs Julius Gachau Mwangi CA 142/2003.**

9. Appellants submitted that the trial court adopted a wage figure for the deceased on a fact that remains to be proved as no employment contract or payment slip was ever produced as evidence. Further that the deceased's wife was not aware of the income earned by the husband as she was only gave 10,000/= ; that the mere award of Kshs. 8,873.80 by the trial court which was not proved remains as hearsay and speculations.

10. The appellants further submitted that the award of loss of expectation of life be deducted from the award for loss of dependency noting that the widow and children are under the both Law Reform Act and Fatal Accidents Act as it amounted to double compensation.

11. Further that the multiplier of 22 years was sufficient and urged the court to find that the expectancy of life age to be 60.

12. Appellant submitted that an award of Kshs. 50,000/= for pain and suffering was fair compensation and under the head loss of expectations of life, it was submitted that an amount of Kshs. 1000,000/= would be sufficient.

#### **RESPONDENT'S SUBMISSIONS**

13. The respondent supported the trial court's judgment and submitted that the evidence of PW1 and PW2 was sufficient evidence to prove that the deceased was employed as a watchman and production of documents is not the only way to proving a persons occupation. Respondents cited the case of **Elizabeth Njeri Mwangi vs Catholic Diocese of Embu (2007) eKLR, Jacob Ayiga Maruja & Another Vs Simeon Abayo Civil Appeal No. 167 of 2002.**

14. Respondent submitted that the award of Kshs 8,837 was sufficient as the deceased worked as a shopkeeper by day and as a watchman by night and the multiplier of 30 years was sufficient and reasonable.

15. Respondent cited the case of **Paul Ouma Vs Rosemary Atieno Onyango & Another suing as the legal representative of the deceased Joseph Onyango Amollo (2018) eKLR** where the court found that the deceased died at 29 years of age and in Kenya, there was no retirement age of a watchman and thus a watchman at 55 years would still feel energetic to continue working at 75 years of age.

16. Respondent submitted that damages awarded are not inordinately so high or low to warrant interference by this court.

#### **ANALYSIS AND DETERMINATION**

17. This being a first appellate court, my role is to evaluate, re-assess and re-analyze the evidence before the trial court and draw my own conclusion as per the case in **Kenya Ports Authority vs. Kuston (Kenya) Ltd. [2009] 2 EA 212** where this court held as follows:-

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”**

18. In view of the above, I have perused and considered evidence adduced before the trial court. I have also considered submissions filed herein. I note that the appellants are dissatisfied with assessment of damages and I will proceed to determine each limb on the basis of evidence adduced before the trial court.

19. In respect to the deceased’s earnings, the appellants argument is that there was no prove of the deceased’s earnings by his wife. I note from record that the wife said he worked as a shop keeper during the day and PW2 who worked with him as security guard said he worked at night as security guard. The wife said he was earning kshs 20,000 per month. The court did not apply kshs 20,000 per month as there was no proof and he applied minimum wage which was kshs8,834.20 at the time he died. Appellants argued that the court did not consider statutory deductions; however the amount is lower than the wife alleged he earned and an employer is not bound to pay the minimum wage but is at liberty to pay higher than the minimum as long the earnings do not go below the minimum. I will not therefore interfere with multiplicand applied.

20. In respect to multiplier, I note that the deceased died at the age of 28years, the court applied a multiplier of 30 years taking into account that he had 32 years to attain age of 60 which is the statutory retirement age. Whereas I agree that the deceased’s nature of work would allow him to work beyond 60 years, it is important to consider the fact there are risks involved in the work of security guard besides other vulgarities of life which include illness and there are chances that a person may die before attaining the age of 60 or may be alive but unable to engage in active employment. In my view award of 30 years as multiplier is on the higher side and I am inclined to reduce to 22 years.

21. Dependency ratio of 2/3 is reasonable bearing in mind the fact that the deceased had a wife and 4 children.

22. I find award of kshs 80,000 under pain and suffering reasonable noting the fact that the deceased died after being in a coma for 8 days. I will not also interfere with award under loss of expectation of life; award of kshs 100,000 is reasonable.

23. As to whether there was double award under **Law Reform Act** and **Fatal Accidents Act**, I refer to the case of **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) Vs Kiarie Shoe Stores Limited [2015] eKLR** where the Court of Appeal explained on the issue of double compensation under the **Law Reform Act** and the **Fatal Accident Act** as follows:-

*“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.”*

*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 issues of duplication does not arise.*

*The words ‘to be taken account’ and ‘to 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.”*

24. From the above therefore there is no legal requirement for the court to deduct the amount awarded under the **Law Reform Act** from the award made under the **Fatal Accidents Act**. The argument by the advocates for the appellant on the issue therefore does not stand.

25. From the foregoing this appeal partly succeed. The multiplier under loss of dependency is reduced to 27 years.

## 26. FINAL ORDERS

1. Appeal partly succeed.
2. Multiplier under general damages for loss of dependency is reduced to 27 years.
3. The other award to remain as assessed by the trial court.
4. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru this 25<sup>th</sup> day of February 2021

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Mr.Mwenda counsel for appellant

Ms.Makori holding brief for Gekonga counsel for respondent