



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 40 OF 2017**

**JECINTA RUGURU.....APPELLANT**

**VERSUS**

**BEATRICE MUTHONI MUTHIKE (*Suing as the legal***

***representative of the Estate of the late Isaac Muthike Nyaga*).....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of *Hon. S.K. Mutai* dated 18<sup>th</sup> July 2017. The impugned judgment was delivered in a suit instituted by the respondent in her capacity as the legal representative and administratrix of the estate of the late *Isaac Muthike Nyaga* who lost his life after being involved in a road accident on 14<sup>th</sup> May 2016 along Embu-Kiritiri Road.

2. According to the averments made in the plaint dated 8<sup>th</sup> September 2016, the accident was allegedly caused by the negligence of the appellant's authorized driver. The respondent prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* as well as costs of the suit and interest.

3. The record of the trial court shows that on 30<sup>th</sup> May 2017, the respondent and the appellant recorded a consent on liability following which the court entered judgment on liability in favour of the respondent against the appellant in the ratio of 70:30. Hearing thereafter proceeded for assessment of damages after which the trial court rendered its judgment on 18<sup>th</sup> July 2017 and awarded the respondent damages as follows:

Pain and suffering	-	KShs.50,000
Loss of expectation of life	-	KShs.100,000
Loss of dependency	-	KShs.1,728,000
Special damages	-	KShs.17,050

4. The appellant was aggrieved by the trial court's decision on quantum hence this appeal. In her memorandum of appeal dated 14<sup>th</sup> August 2018, the appellant advanced seven grounds of appeal which are reproduced hereunder:

*i. The learned trial magistrate erred in law and in fact in awarding KShs.1,728,000 under the heading loss of future earning/lost years.*

*ii. The learned trial magistrate erred in law and in fact in stating that the deceased would be in employment up to 65 years.*

*iii. The learned trial magistrate erred in law and in fact in awarding KShs.200,000/- under the heading loss of expectation of life.*

*iv. The learned trial magistrate erred in law and in fact in awarding KShs.50,000 under the heading of pain and suffering.*

*v. The learned trial magistrate erred in law and fact in failing to consider the appellant's submissions.*

**vi. The learned trial magistrate erred in law and in fact in awarding sums of money without considering recent judicial decisions on the same.**

**vii. The learned trial magistrate erred in law by failing to give concise statement of the case, a concise statement of evidence adduced by parties, the points of determination, the decisions thereon and reasons of her judgment pronounced on 18<sup>th</sup> July 2017.**

5. By consent of the parties, the appeal was prosecuted by way of written submissions.

6. This is a first appeal to the High Court. I am well aware of my duty as the first appellate court which is to subject the evidence and all the material presented before the trial court to a fresh and exhaustive re-evaluation to draw my own independent conclusions regarding the soundness or otherwise of the trial court's decision. See: **Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123; Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR.**

7. This being an appeal on quantum only, it is important to consider the principles that guide an appellate court in deciding whether or not to disturb an award of damages made by the trial court.

8. As a general rule, the award of damages is at the discretion of the trial court but like all other judicial discretions, that discretion must be exercised judiciously in accordance with the law and established legal principles and not capriciously or whimsically.

9. The principles that guide an appellate court in determining whether or not to interfere with a trial court's decision on quantum are now well settled. They have been developed by the courts in a long line of authorities. The golden thread that runs through those authorities is that an appellate court should be slow to interfere with an award made by the trial court unless it is satisfied that in assessing the damages, the trial court misapprehended the evidence or considered irrelevant factors or failed to consider relevant ones or applied the wrong legal principles. The award can also be disturbed if the appellate court was of the view that the amount awarded was so inordinately low or high as to give rise to an inference that it represented a wholly erroneous estimate of the damage suffered but the court should avoid the temptation of substituting its own discretion with that of the trial court. See: **Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30; Mariqa V Musila, [1984] KLR 251; Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1.**

10. I have carefully considered the grounds of appeal, the evidence adduced before the trial court and the parties' rival written submissions as well as the authorities cited. I have also read the judgment of the trial court.

11. Having done so, I find that besides contesting the damages awarded by the learned trial magistrate under both the *Law Reform Act* and the *Fatal Accidents Act*, the appellant has faulted the trial court's decision on grounds that the judgment did not contain a concise statement of the respondent's claim, the evidence adduced by the parties, points for determination, the decision and the reasons thereof.

12. My reading of the trial court's judgment reveals that the learned trial magistrate gave a detailed account of the respondent's claim as pleaded in the plaint and a summary of the respondent's oral testimony. She also clearly indicated the amounts awarded to the respondents under the various heads of damages allowed under the two legal regimes on which her claim was anchored and the reasons for her decision. I am satisfied that though the learned trial magistrate did not specify the issues arising for her determination, her judgment sufficiently complied with the requirements of the law as set out in *Order 21 Rule 4* of the *Civil Procedure Rules*. Nothing therefore turns on that ground of appeal.

13. That said, the only other issue left for my determination is whether the learned trial magistrate erred when assessing the damages awarded under both the *Law Reform Act* and the *Fatal Accidents Act*.

14. I will start with the damages awarded under the *Law Reform Act*. In her submissions, the appellant argued that the award of KShs.50,000 for pain and suffering was excessive considering that the deceased died moments after the accident; that the conventional sum of KShs.10,000 ought to have been awarded. As expected, the respondent supported the trial court's award contending that it was reasonable.

15. The law is that damages for pain and suffering in fatal accident claims are designed to compensate the deceased's estate for the pain and suffering the deceased endured before death. That is why courts as a matter of practice award a conventional sum of KShs.10,000 in cases where the deceased died either on the spot or moments after the accident.

16. In this case, from the respondent's evidence, it is apparent that the deceased did not die on the spot but he died on the same date of the accident. This is confirmed by the death certificate which was not included in the record of appeal but is contained in the trial court's original record. Since it is not clear whether the deceased died soon after the accident or long thereafter, it is impossible to establish how long the deceased endured pain and suffering before succumbing to his injuries. Since there is a possibility that the deceased died several hours after the accident, I am not persuaded that the award of KShs.50,000 was unreasonable or inordinately high. The award is hereby upheld.

17. Regarding the award for loss of expectation of life, the deceased's estate was awarded KShs.100,000 as proposed by the appellant in her submissions and not KShs.200,000 as indicated in the grounds of appeal. The award of KShs.100,000 is thus confirmed.

18. Turning now to the award of KShs.1,728,000 for loss of dependency, the appellant has asserted that the award was erroneous in that the income used as the multiplicand was not proved; that instead of applying KShs.27,000 as the deceased's income, the trial court should have applied the minimum wage provided by the law. The appellant did not however disclose which minimum wage was applicable to the deceased who according to the respondent worked in a school and was also a farmer.

19. The appellant also contended that the trial court erred in adopting a multiplier of eight years when the deceased was 57 years old at the time of his demise and had only three years to go before attaining the mandatory retirement age of 60 years. According to the appellant, a multiplier of 3 years was the most appropriate in this case and ought to have been adopted by the trial court.

20. The respondent in her submissions urged me to uphold the award arguing that though the deceased died at the age of 57 years, he was in very good health and there was no indication that he would not have lived to be 65 years; that a multiplier of 8 years was reasonable and had been adopted in Joseph Katuga Gathii V World Vision Kenya & Others, [2010] eKLR and Florence Gatheo Miano V Mary Boniface & Jackson Wambua & Another, [2017] eKLR where the deceased persons were 57 years at the time of their death.

21. I have given due consideration to the parties' rival submissions on this point. I agree with the appellant that the income used by the trial court as the multiplicand was neither pleaded nor proved. The respondent only pleaded the age of the deceased prior to his death and the fact that he used to be a farmer. His income as a farmer was not disclosed. Though she claimed in her evidence that the deceased also used to work in a school and earned a monthly salary of KShs.12,000 and KShs.15,000 as a farmer, she did not adduce any evidence to substantiate this claim. She however pleaded that the deceased was survived by herself and three children aged between 17 and 9 years who entirely depended on him for their livelihood. This claim was not contested by the appellant.

22. Though the deceased's income was not proved, I am prepared to find that the deceased must have been earning some reasonable income which enabled him to financially support a family of four but I concur with the appellant that the trial court erred in adopting a multiplicand of KShs.27,000 when the same was neither pleaded nor proved.

23. In my view, this case was not suitable for use of the multiplier approach in the assessment of damages for loss of dependency. As I have held previously in other decisions, the multiplier approach is not the only method of calculating damages for loss of dependency. Where the deceased's income is not ascertainable and other facts in the case do not facilitate its application, the trial court should abandon it and use instead the lump sum principle or the global award approach.

24. I fully agree and associate myself with the holding of *Ngaah, J* in Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR when he stated thus:

***“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.”***

25. In this case, it is not disputed that the deceased was 57 years at the time of his death and that he had four dependants who included three minors aged 9, 13 and 17 years respectively. It is also not disputed that the deceased was not working as a public servant and therefore the mandatory retirement age of 60 years may not have been applicable to him.

26. Taking into account all relevant factors particularly the deceased's age at the time of his demise and the length of his children's expected dependency, it is my finding that a sum of KShs.1,300,000 would have been sufficient to compensate the respondent and her children for their loss of dependency.

In the premises, I set aside the award of KShs.1,728,000 made by the trial court and substitute it with an award of KShs.1,300,000.

27. In the end, I find merit in this appeal and it is hereby allowed. The trial court's judgment is hereby set aside and is substituted with a judgment of this court awarding the respondent damages as hereunder:

Pain and suffering	-	KShs.50,000
Loss of expectation of life	-	KShs.100,000
Loss of dependency	-	KShs.1,300,000
Special damages	-	KShs.17,050
Less 30% contribution	-	KShs.435,525
<u>Total</u>		<u>KShs.1,902,575</u>

28. The award shall attract interest at court rates from date of the trial court's judgment until payment in full.

29. Costs follow the event and are at the discretion of the court. Since the appeal has partially succeeded, the respondent is awarded costs of the suit in the lower court but each party shall bear his/her own costs of the appeal.

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2021.**

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.**

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

No appearance for the appellant

Mr. Njage for the Respondent

Esterina: Court Assistant